





**Legal Pitfalls
of the
Advertising Business**

January 24, 2008
 Douglas J. Wood



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Truth in Advertising



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Who is Watching?

- NAD – National Advertising Division
- CARU – Children's Advertising Review Unit
- ERSF- Electronic Retailing Self Regulation Program
- FDA – Food and Drug Administration
- FTC- Federal Trade Commission
- Private litigation/class actions
- ESRB – Entertainment Standards Review Board
- NAAG- State Attorneys General
- CFA- Consumer Federation of America
- CSPI- Center for Science in the Public Interest
- WHO-World Health Organization
- ATF – Bureau of Alcohol, Tobacco and Firearms



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Federal Trade Commission Act

Section 5

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.



Deceptive Act or Practice means a representation, omission, act or practice that:

- Is likely to mislead (in light of the totality of circumstances and the target audience);
- Would be deceptive to a reasonable consumer; and
- Is material (i.e., involves information that the consumer would likely consider important as part of the decision making process)
 - Can be either an express statement that is untrue or misleading or an omission of material information that has the effect of misleading the customer



When reviewing advertising materials for deceptiveness, what do regulators consider?

- How clear is the disclosure?
- How conspicuous is any qualifying information?
- If information was omitted, how important is that information?
- Will the average consumer understand the product or service as disclosed?



An unfair act or practice

- Is an act or practice that causes harm to consumers by:
 - Causing substantial consumer injury (substantial injury can be found through minor economic injury - such as a fee - if suffered by a large enough number of consumers);
 - The consumer's injury is not otherwise outweighed by benefits to the consumer; and
 - The injury is one that the consumer could not reasonably have avoided.



But is there a claim?

- EXPRESS CLAIM - statement of fact...“Fat Free”
- IMPLIED CLAIM - claim is made through impressions (not expressly), “A picture is worth a thousand words”
- PUFFERY - no reasonable person would believe it is supportable...

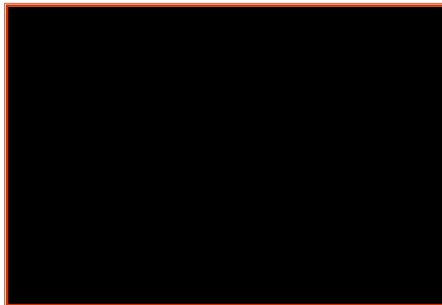
What is the
Net Impression?

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Express Claim

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Implied Claim

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What is Puffery?

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Puffery:

opinions, exaggerations,
hyperbole or similar claims
that:

- cannot be proven or disproved or
 - that no reasonable person would believe or would consider material
- do not need substantiation.

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The advertiser's right
to lie his head off
because no one is going
to believe them
anyway.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

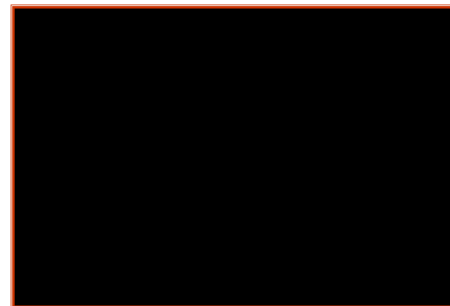
No. 03-2065

American Instant Pasta Company, *
Appellee, *
v. *
New World Pasta Company, *
Appellant. *

Submitted November 17, 2003
Filed June 7, 2004

Before RILEY, RICHARD S. ARNOLD, and MELLOV, Circuit Judges.
RILEY, Circuit Judge.

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Puffery?

- “America’s favorite pasta.”
- “The best beer in the world.”
- “Better ingredients. Better pizza.”

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Puffery?

- “America’s favorite tax software.”
- “The best analgesic in the world.”
- “Better attorneys. Better results.”

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Unsolicited Ideas



Unsolicited Ideas

Do not accept unsolicited ideas from third parties because of the potential that the party may claim misappropriation of the idea. If a third party attempts to offer an idea (e.g., in an unsolicited letter), the letter should not be discarded but instead should be forwarded to the Legal or other appropriate Department to draft an appropriate response.



Unsolicited Ideas

\$40,000,000 Mistake

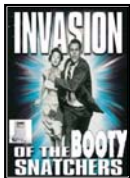
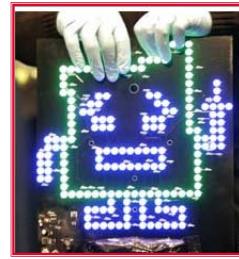


New Media Word of Mouth, Buzz, and Product Placement



Disclosure issue in word-of-mouth marketing, buzz, product placement. Should it be regulated? Are there rules already in place?

Terrorist Alert



Product placement disclaimers will soon fill the screen as products appear in paid placement.

BUZZ

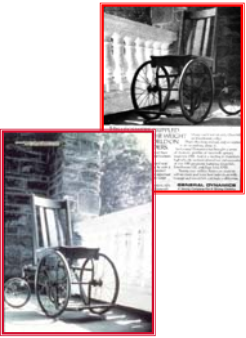




Copyright Infringement

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- ## Copyrights
- Idea vs. Expression
 - Registration and Notice
 - Access
 - Substantial Similarity
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- Comp was used in client presentation
- Too “expensive” to license
- Court awarded \$140,000

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Copyright Infringement?



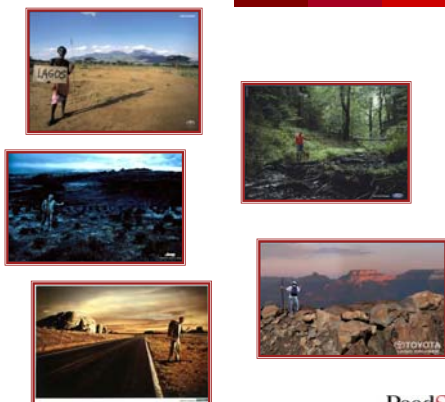
Original Work Infringing Work?

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Idea
vs.
Original Expression

You Decide...

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2007 Atlas. Finally a family sports car.

The new Atlas SUV.

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ASK FOR MORE

New! Coca-Cola Light Lemon

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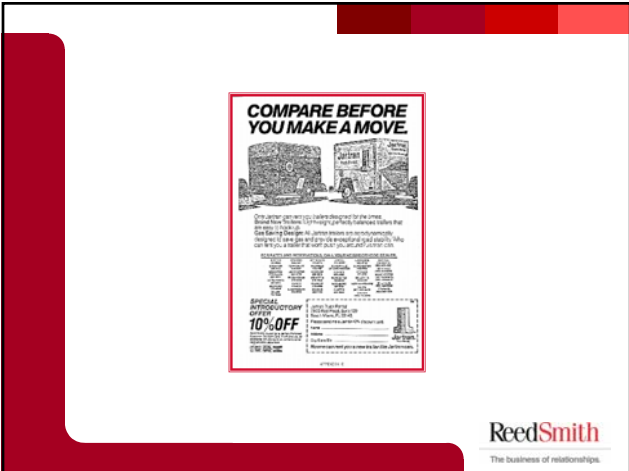
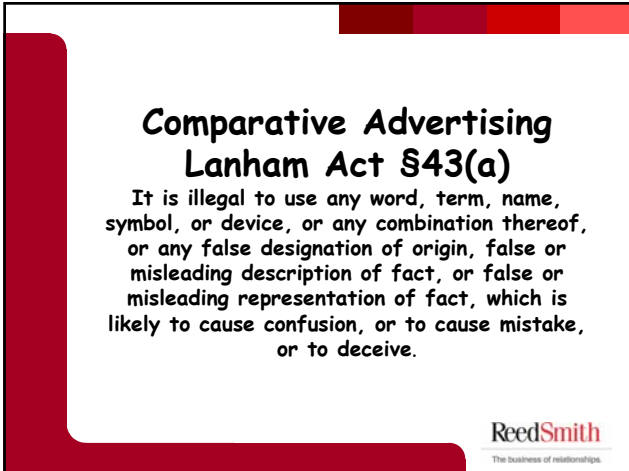
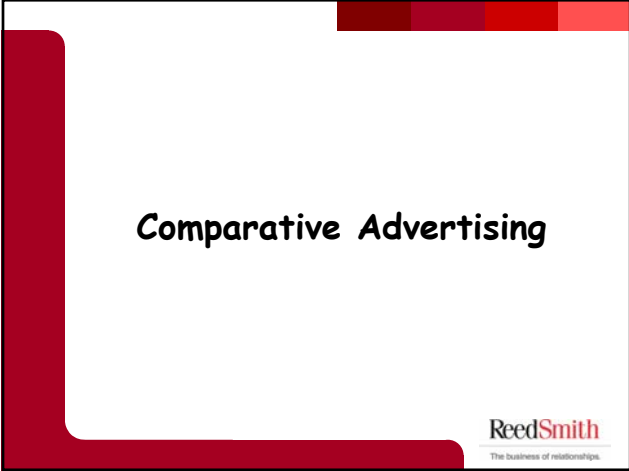
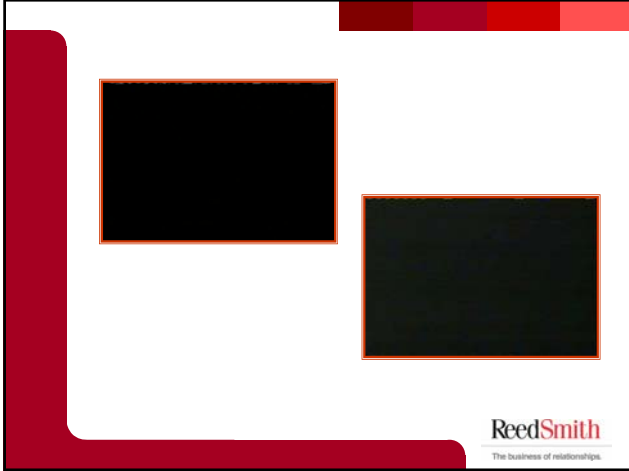
vogue.com

www.reedsmith.com

www.playboy.com.br

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Gillette in the cross hairs: Consumer suit M3P ads

Submitted by [admin](#) on Wed, 2005-06-08 10:01.
BostonHerald.com - Business: Gillette in the cross hairs: Consumer suit M3P ads

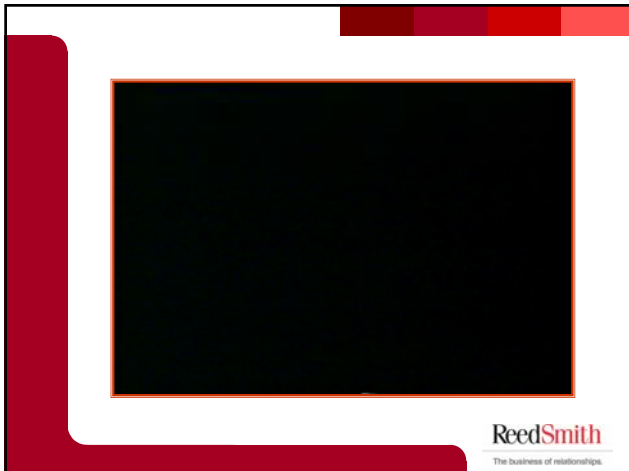
The two filed a class-action lawsuit against the company following a court ruling that Gillette used "unsubstantiated and inaccurate" advertising.

U.S. District Judge Janet C. Hall barred the company from showing a graphic of the M3Power razor lifting hair up and away from skin. The injunction is binding pending a trial.

In a class-action suit filed yesterday, Mark Dearman of Florida and Anthony DeBiseglia of New York allege the company intentionally misrepresented its product.

They're looking for a refund of at least part of what they paid for the razors.

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**You know, the thing is not with that card.
That's the problem.**

**Looking for cash without MasterCard could
lead you nowhere.**

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You know, the thing is not with that card.
That's the problem.

You know, the thing is with that card, I
don't know where. That's the problem.

Looking for cash without MasterCard could
lead you nowhere.

Looking for cash without MasterCard isn't
exactly easy.

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Taste
&
Decency

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Australia - Lee Jeans

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United States - General Motors



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United States - Volkswagon



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And some things even we can't
make up...

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Questions

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Douglas J. Wood
Reed Smith LLP
599 Lexington Avenue
New York, NY 10022
T: +1 212.549.0377
F: +1 212.521.5450
C: +1 201.745.7843
E: dwood@reedsmith.com
W: www.reedsmith.com

