

NAD and ERSP Seek to Establish Standards for "Buzz Marketing"

Contributed by:

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As the omnipotence of the traditional 30-second television commercial wanes, advertisers are increasingly using alternative forms of marketing to promote their products and services to consumers, including but not limited to "Word of Mouth" (WOM) marketing. WOM marketing encompasses "a broad range of activities in which a marketer induces and facilitates communication between and among consumers about the marketer's products."¹ WOM marketing comprises a number of subcategories, including buzz, blog, viral, and social media marketing.² Some estimates have placed annual expenditures on such advertising approaches at \$40 million to \$60 million.³

To date, there has been very little new legal precedent developed regarding the substantiation and disclosure requirements applicable to WOM marketing, and specifically to buzz marketing.⁴ In late 2005, Commercial Alert, a nonprofit organization whose self-described mission is "to keep the commercial culture within its proper sphere"⁵ requested the Federal Trade Commission to investigate certain allegedly deceptive buzz marketing practices, also known as "guerrilla" or "stealth" marketing.⁶ According to Commercial Alert, one tactic "[d]irectly targets consumers and does not openly appear as a marketing drive"⁷ by "enlisting people to promote products under the guise of doing something else."⁸ In its letter, Commercial Alert specifically singled out the marketing practices of Sony Ericsson and Procter & Gamble, which had allegedly assembled large sales forces to covertly promote certain of their products to the public.⁹ Commercial Alert argued that where buzz marketers did not disclose that they were paid promoters, or identify the principal, such marketers were omitting material information in violation of Section 5 of the Federal Trade Commission Act.¹⁰

In its December 7, 2006 response, the FTC acknowledged that it could bring an action under Section 5 where an advertiser makes a deceptive claim about its product through an agent such as a sponsored consumer.¹¹ However, the FTC declined to issue guidelines at that time with respect to WOM marketing, opting to continue to proceed on a case-by-case basis.¹²

The National Advertising Division of the Council of Better Business Bureaus, Inc. (NAD), as well as its affiliate, the Electronic Retailing Self-Regulation Program (ERSP), industry-sponsored monitors of advertising practices, have recently endeavored to "step into the void" and develop standards for WOM marketing, and in particular viral or buzz marketing. In 2007, for instance, NAD considered a comparative product demonstration depicted in a video appearing online on www.youtube.com (YouTube).¹³ There, NAD defined YouTube as "a video-sharing website that provides a non-traditional medium which may be utilized by advertisers as a means of 'viral' or 'buzz' marketing."¹⁴ Because the video consisted of a comparative product demonstration, NAD considered it to be advertising which was subject to the legal requirement of being truthful and accurate (i.e., required substantiation).¹⁵

Similarly, in a March 2008 decision in an inquiry instigated by ERSP, that group determined that videos posted on YouTube, primarily consisting of consumer testimonials, were within the purview of that self-regulatory forum.¹⁶ There, although the majority of the claims at issue were on the advertiser's website and MySpace page, and thus clearly traceable to the advertiser, ERSP considered several YouTube videos (primarily video consumer testimonials) as well. Although the Case Report did not describe the precise relationship between the advertiser and YouTube, ERSP did note that links to the advertiser's website could be found in the subject videos and referred to YouTube as a "third party advertiser."¹⁷ In its decision, ERSP acknowledged that the marketer may not be responsible for the dissemination of inaccurate claims made *without its knowledge* by third parties such as YouTube. However, since ERSP had identified and informed the marketer of certain inaccurate claims made on YouTube, "it is expected that the marketer will

exercise the same due diligence previously used to alert third parties that they are disseminating either inaccurate claims for Proactol or that certain claims need to be carefully qualified [sic]. . . ."¹⁸ The marketer, in response, accepted the obligation to proactively use its "best efforts" to deal with such unsupported claims.¹⁹

Most recently, the NAD, as part of its routine monitoring program, reviewed a video clip disseminated by a manufacturer of wireless Bluetooth technology as part of a viral marketing campaign.²⁰ That video, which appeared on YouTube, depicted individuals using their cell phones to pop nearby popcorn kernels, while making no reference to the marketer or to any products or services it sold. The advertiser stated that the purpose of the video was to "create a buzz" about a video depicting something absurd, and to subsequently post another video explaining the spoof nature of the first and identifying the marketer.²¹ Indeed, the marketer did subsequently post a video to YouTube explaining the first video and inviting consumers to visit its website and learn more about its products.

In its decision, NAD recognized that the purpose of the "buzz" generated by the video was to generate "hits" and thus create an online audience which can then be reached with specific messaging about products.²² NAD further acknowledged that while this is an "exciting" new type of marketing, it also poses challenges to maintain truth and accuracy in advertising. With respect to the particular YouTube video at issue, NAD noted that it had previously considered YouTube clips to be national advertising under its purview, and held that the absence of any mention of a company or product name "does not remove a marketing or advertising message from NAD's jurisdiction or absolve an advertiser from the obligation to possess adequate substantiation for any objectively provable claims that are communicated to consumers."²³ Because the video had already been discontinued, however, NAD decided that it did not have the jurisdiction to review any claims made in the video and thus did not reach the merits of the popcorn-popping simulation.

One can predict with confidence that NAD and ERSP will continue to try to develop standards for WOM marketing. All three inquiries noted herein appear to have been self-initiated by these groups, perhaps hoping to encourage competitors to file challenges with them. With respect to the substance of the decisions, applying traditional principles of substantiation to WOM-disseminated claims that are traceable to the marketer seems non-controversial. We question, however, in light of First Amendment non-commercial speech interests, whether federal courts or the FTC would impose an affirmative obligation on marketers to, in effect, police the Internet and make good faith efforts to protest inappropriate claims made by truly independent parties, particularly consumers.²⁴

One can also predict with little risk that WOM marketing will increase, and with that increase will come more regulatory scrutiny as respects protecting consumers from deceptive advertising.

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¹ See Letter from Mary K. Engle, Associate Director of Advertising Practices, FTC, to Gary Ruskin, Executive Director, Commercial Alert (December 7, 2006), at 1.

² See <http://en.wikipedia.org/wiki/Word-of-mouth> (last visited Apr. 10, 2009).

³ See Letter from Gary Ruskin, Executive Director, Commercial Alert, to Donald Clark, Secretary, FTC (October 18, 2005), at 6 (citing Matthew Creamer, "Is Buzz Marketing Illegal? Lawyers Warn of Advertising Law Disclosure Requirements," *Advertising Age*, October 3, 2005).

⁴ The Word of Mouth Marketing Association ("WOMMA") in this connection issued an Ethics Code in 2005 which, *inter alia*, encouraged disclosure of sponsored consumer relationships with the marketers and required consumers to give their honest opinions about the products. See <http://womma.org/ethicscode/code> (last visited Apr. 10, 2009).

⁵ Commercial Alert Home Page, <http://www.commercialalert.org> (last visited Apr. 10, 2009).

⁶ See Press Release, "Commercial Alert Asks FTC to Investigate Buzz Marketers for Deception," (October 18, 2005), available at <http://www.commercialalert.org/news/news-releases/2005/10/commercial-alert-asks-ftc-to-investigate-buzz-marketers-for-deception>.

⁷ See Letter from Gary Ruskin to Donald Clark, at 1, *supra* note 3.

⁸ See *id.* at 1.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4-5.

¹¹ Letter from Mary K. Engle to Gary Ruskin, *supra* note 1, at 2 n.5.

¹² *Id.* at 1, 5.

¹³ *Dyson, Inc.* (Upright Vacuum Cleaners), Case Report # 4619, *NAD Case Reports* (1/12/2007).

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Proactol, Ltd.* (Proactol Fat Binder), Case Report # 178, *ERSP Case Reports* (3/11/2008), at 6.

¹⁷ See, e.g., *id.* at 12-13.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

²⁰ *Cardo Systems* (Wireless Bluetooth Headsets), Case Report # 4934, *NAD Case Reports* (11/14/2008).

²¹ *Cardo Systems*, at 1.

²² *Id.* at 1.

²³ *Id.* at 2.

²⁴ See, e.g., *Doctor's Associates, Inc. v. QIP Holders, LLC*, No. 3:06-cv-1710 (JCH), 2007 BL 24908 (D. Conn. Apr. 19, 2007).