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The following article appeared on *iMedia Connection* (www.imediaconnection.com)

Sandwich Eaters Spark UGA Debate

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If an advertiser solicits user-generated content and makes it available to consumers as part of a promotion, should the content be considered advertising? With the proliferation of such promotions, this question raises important issues for advertisers.

False advertising laws require, among other things, that claims made in an ad be substantiated, that the ad not be false or misleading, that certain disclosures be made, and that testimonials and endorsements contained in the ad comply with federal rules. Moreover, advertisers' claims about their competitors' products must be supported by the appropriate evidence and may not be unduly disparaging.

Because advertisers' use of user-generated content in advertising and promotions is so new, the issue of whether advertising laws apply to such content has not been resolved, but it is the subject of a current lawsuit involving the Subway and Quiznos restaurant chains.

Quiznos held a contest called "Quiznos v. Subway TV Ad Challenge" in which consumers were invited to submit videos comparing a Quiznos sandwich to a Subway sandwich. Quiznos posted some of the videos on a website it controlled (called <http://www.meatnomeat.com/>) and some on the website iFilm.com. At the same time, Quiznos was also engaging in an advertising campaign comparing its sandwiches to those of Subway. Subway sued for false advertising under the Lanham Act, arguing that some of the videos make claims about Quiznos' products that could

not be substantiated and that some of the videos unfairly disparaged Subway products.

Quiznos is hoping that a federal law that shields internet service providers and other online publishers from liability for material posted on the internet will protect it from Subway's claims. The court hasn't answered that question or addressed the issue of whether Quiznos is liable for claims made in videos submitted by contest entrants.

False advertising laws

There are federal, state, and local laws that govern advertising as well as advertising industry guidelines and television network standards. These laws are enforced by the Federal Trade Commission, state attorneys general, individual or class-action plaintiffs, and competitors.

These laws require advertisers to have a "reasonable basis" for advertising claims. At a minimum, an advertiser must have the level of substantiation that it says it has and must have substantiation prior to making a claim. The substantiation requirement applies to all claims – express, implied and the overall impression – in ad copy and visuals.

What constitutes a "reasonable basis" depends on the type of claim and the product or service. A claim such as "America's favorite" requires a large, geographically di-



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verse sample size. For claims relating to preference, large consumer surveys are often required. Health, drug, dietary and safety claims require a high level of substantiation and may be subject to the Food and Drug Administration's regulations as well.

Disclosures and disclaimers must be clear and conspicuous, and disclaimers must be in close proximity to the claims being modified. Testimonials must be reliable (i.e., objectively supportable), representative of consumers' experiences with the product, and unbiased (or bias must be disclosed).

User-generated content and product claims

Not all user-generated content makes claims about a product. Some content simply shows a user enjoying a product or using a product in an exotic location. Other types of content contain hyperbole or claims that can't be substantiated -- called "puffery" -- such as "this is the best stuff on earth!"

But many videos submitted by consumers do contain product claims or demonstrations, and this poses a challenge to advertisers: Should the advertiser only post content that it can substantiate? Should it include disclaimers saying that any claims are solely the author's and not the advertiser's? Should it instruct those submitting content to refrain from making any specific product claims? Should it make sure that anyone shown using the product or praising the product actually uses it in real life?

Because this issue is not settled, advertisers who want to play it safe may want to vet all videos submitted by consumers before posting them as carefully as they review their own ads. This might mean that some user-created content may have to be rejected. It might also mean that an advertiser should think about how it solicits the content: Inviting users to compare a product to a competitor's product might make it more likely that the resulting submission will be closely scrutinized by a competitor or a regulator.

Conclusion

Advertisers are always looking for new ways to engage consumers with their brands. The prevalence of user-generated content shows that consumers, apparently, enjoy that engagement, particularly if they can show off their own skills as filmmakers and marketers. However, advertisers who want to use the fruit of their consumers' creativity may find themselves in a battle with their competitors (or regulators) if the materials created by their users include claims that the advertisers themselves couldn't make.

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