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ANGUS MY BUTT

By: Jim Astrachan

Ad agency creative directors sometimes have too much fun with the ads they create. I read a false advertising case the other day that caused me to imagine a bunch of creatives laughing so hard at their own product that they fell to the floor and couldn't get up. I know they must have reacted that way because I laughed so hard at this case I could hardly see.

Carl's Jr. and Hardee's, owned by the same company, operate over 3,000 fast food restaurants and sell what they call a Six Dollar Burger and a Thickburger, each made from 100 percent USDA-approved Angus beef. Angus, if you don't know, is a type of cow, prized by carnivores for its succulent, beefy taste. The source of the beef, and its exclusivity, are the points of their advertising campaigns.

Jack-in-the-Box operates about 2,000 fast food restaurants and is in direct competition with Carl's and Hardee's. Not long ago, Jack began advertising and selling a new burger made from 100 percent ground sirloin beef. Sirloin, if you don't know, refers to a cut of beef and not a breed of cow. Jack launched two TV commercials to sell its sirloin burger.

The first ad featured Jack's CEO, a clown-headed man, who presents the new sirloin burger to his employees.

"Okay. Listen up. This is big. We have launched the first 100% sirloin burger in fast food history. . . Now, for those of you who are not from Texas, that's the sirloin area (pointing on a butcher's chart to the area of the cow where the sirloin cut comes from)."

An employee says:

"Jack, our competitor (referring to Carl's and Hardee's) serves Angus burgers. Could you point to the Angus area?"

Jack looks behind him at the rear of the cow on the butcher's chart and says, "I'd rather not."

The second ad features a bunch of Jack employees raucously laughing. One employee says:

"And that completes my report of what our competitor is doing with its Angus burger."

As soon as he utters "Angus" the other employees burst out laughing. Jack says:

"Alright settle down. Settle down. I've got film of our new sirloin burger here...We're the only ones in fast food doing that. . ."

An employee interrupts and says:

"Are you saying people will find our sirloin more attractive than their Angus...es?"

More Laughter, as the actors howl at the scatological humor.

Carl's cried foul, asking the court to stop the airing of the two commercials on the grounds that the ads violated the Lanham Act's false advertising prohibition. To succeed under the Lanham Act, Carl's need not establish actual falsity. It is sufficient to establish innuendo, indirect imitations and ambiguous suggestions. Even if an ad is not literally false, relief is available under the Lanham Act if a plaintiff can establish that the ad has misled, confused or deceived the consuming public.

These ads were not literally false, so Carl's had to prove that the ads actually conveyed the implied message – that Angus beef comes from the cow's stern – and that a significant portion of the ads' listeners believed it. It was the plaintiff's burden, then, to establish that the ads tended to mislead or confuse consumers.

Carl's produced a pilot survey taken in four cities to establish sufficient evidence of deception to obtain a preliminary injunction. The survey asked respondents, based only on the two commercials they were asked to view, and not based on any independent knowledge, "does Angus beef refer to where on the cow the meat comes from, a type of cattle, neither statement is true, both statements are true, or you don't know?" Next, the respondents were asked whether they "were more or less likely, neither more or less likely, or unsure of buying a hamburger with Angus beef".

A consumer perception survey should begin with open-ended questions that permit the respondents to identify the primary message of the ad and any course of deception. The questions posed in this pilot survey, however, were both leading and suggestive questions and respondents were not allowed to state their own impressions of the ads. Worse, these questions were unfairly framed to beg the results that Carl's wanted in that respondents were given choices among responses that suggested the answers that Carl's could rely on to obtain injunctive relief.

The survey was admitted into evidence, but it was given little weight and Carl's was left without any extrinsic evidence to support its claim that Jack's ads would cause consumers to believe that Angus was, er, an undesirable body part of the cow.

In the end, the court was not convinced that Carl's had demonstrated that the balance of hardships tipped decidedly in its favor, particularly because Carl's only marginally raised serious questions as to its likelihood of success. Further, Carl's tried to rely on speculative statements of management that it would lose sales to Jack's comments to establish harm. Jack, on the other hand, credibly asserted that its marketing of its new sirloin burger would be set back by the time required to create new ads, and that doing so would be costly.

Are American burger consumers gullible enough to believe that Angus is an undesirable body part of a cow? Maybe. One thing's for sure, however, and that is that Carl's did not make a case for preliminary injunction. Having failed to convince the court that it was harmed, it sought a way out of its losing lawsuit. Carl's and Jack settled their controversy in November with the filing of an order of dismissal and I don't know the terms of settlement. I wouldn't be too surprised, though, if one of the settlement terms requires Jack to be seen in public munching an Angus burger, and a second calls a truce to ads aimed at each other's products.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.