

Client Alert

A report
for clients
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of the Firm May 2007

Court Allows DIRECTV Television Commercial to Continue to Air

On April 16, 2007, a judge in the Southern District of New York decided a second preliminary injunction motion by Time Warner Cable seeking to halt a television commercial currently being aired by its competitor, DIRECTV, Inc. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, No. 06 Civ. 14245, 2007 WL 1138879 (S.D.N.Y. Apr. 16, 2007) (Hon. Laura Taylor Swain, J.) Although Time Warner had obtained a preliminary injunction barring the dissemination of a previous DIRECTV commercial (No. 06 Civ. 14245 (LTS), 2007 WL 412498 (S.D.N.Y. Feb. 5, 2007)), this time the Court sided with DIRECTV.

The commercial at issue in the second case features the familiar, neurotic character Doc Brown from the movie “Back to the Future.” In a scene readily recognizable from one of the Back to the Future movies, Brown is shown panicked at the realization that he forgot to tell Marty McFly to get DIRECTV when he returns to the future because “they already have all the best channels, and soon they’ll have three times more capacity than cable!” Brown’s exclamation is followed by a narrator claiming, “for a future of 150 HD channels, get DIRECTV.” Appearing on the screen during the narration and at the end of the ad, a graphic reads, “Starting at \$29.99/mo. Everyday price.” Small print at the conclusion of the commercial explains that the ad’s claims were based on a “Bank of America Equity Research Report [dated] May 2006” and states that HD programming carries an additional fee above the quoted \$29.99 price.

Time Warner alleged that three claims in the Back to the Future commercial were literally false: that 1) DIRECTV will soon have more than three times the HD capacity of cable television (the “capacity claim”); 2) DIRECTV already has “all of the best [HD] channels” (the “quality claim”); and 3) DIRECTV’s HD services are available to subscribers starting at \$29.99 a month (the “pricing claim”).

Judge Swain found that none of the commercial’s claims was literally false, and thus denied Time Warner’s motion, it appearing that Time Warner did not make any implied falsity claim at the preliminary injunction stage. As for the capacity claim, the Court held that Time Warner failed to demonstrate that DIRECTV would not “soon” have available three times the HD channels as cable. The Research Report stated, and DIRECTV’s evidence showed, that DIRECTV’s claimed capacity would be achieved by the end of 2007, a time frame the Court found “is well within any reasonable concept of ‘soon’.” The Court found Time Warner’s evidence of its own planned increase of HD channels to be “at best, a series of assumptions and predictions.” Moreover, the Court found the Report’s assessment (with which Time Warner agreed) that cable television would not likely reach DIRECTV’s anticipated level of HD channels for three to five years confirmed DIRECTV’s capacity claim.

The Court found DIRECTV’s quality claim — “all the best channels” — to be non-actionable puffery. Time Warner argued that because DIRECTV does not provide a signal for certain network programming in certain markets, it could not be considered to carry “all of the best channels” (emphasis added). The Court, however, refused to weigh the parties’ arguments as to the merits of the quality claim, holding that “the question of what channels are ‘best’ is inherently subjective.” Thus, “an assessment of the relative quality of channels... would be futile.” The Court rejected Time Warner’s argument that a claim of “all the best channels,” rather than just “the best channels,” would transform the claim from puffery to one of measurable superiority.

The Court also did not find DIRECTV’s pricing claim to be false. Time Warner argued that the inclusion of HD channels would cause the cost of a subscription to DIRECTV to exceed the advertised \$29.99 per month price, thus the quoted price was literally false. The Court disagreed, noting that the text of the commercial told viewers that prices “start” at \$29.99 and a disclaimer appeared at the bottom of the screen indicating that HD channels carried an “additional fee” beyond the ordinary subscription price. Judge Swain concluded that while

certain cases have held that inconspicuous disclaimers cannot remedy a misleading claim, here “a disclaimer of some sorts is clearly visible at the bottom of the screen,” thus not “inconspicuously located” and, though the disclaimer left “some clarity to be desired,” viewers “will not tend to overlook it.”

While this case does not break from precedent, it does underscore the sometimes fine line between non-actionable puffery and quantifiable advertising claims capable of being proven false. It would have been interesting to see what would have happened if Time Warner had run a survey to determine if consumers deemed the network channels not offered by DIRECTV to be among “the best” channels, thereby showing that that DIRECTV did not offer “all” of the best channels, which might have buttressed Time Warner’s argument. Whether such a survey could have altered the Court’s thinking is at best guesswork, although the decision suggests that this would not have mattered. This case reminds us that the more subjective a claim is, particularly when the word “best” is the adjective used and the advertisement does not make an explicit preference claim, the less likely the Court will find the challenged claim false, rather than non-actionable puffery.

Similarly, the adequacy of a disclaimer is plainly a question of fact, and thus the fact that Judge Swain found that the disclaimer sufficiently informed viewers that the “Starting at \$29.99” price did not apply to the HD channels neither changes the law nor makes new law. Yet, the commercial is all about HD channels, and thus the Court’s conclusion that the commercial clearly communicated that the “starting at” price quoted in the commercial did not apply to HD channels may raise some eyebrows. Whether the decision will lead to future court fights over the adequacy of disclaimers remains to be seen.

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