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Spooky News for Advertisers: Free Offers, Curated Reviews, and Fulfillment Delays

By Bradley Cohn

Two recent enforcement actions by the Federal Trade Commission (FTC) teach important lessons to advertisers under Section 5 of the FTC Act, which prohibits “Unfair or Deceptive Acts or Practices.”

How “free” becomes costly

Promoting products or services as “free” (including variations like “Buy 1-Get 1 Free”, “2-for-1 Sale”, and “50% off with purchase of Two”) is not uncommon, or – pardon the pun – risk-free. FTC regulations govern promotional use of the word “free”, and the FTC can take enforcement action against advertisers who violate them. For example, when an advertiser offers something for “free,” any limiting terms and conditions for receiving the “free” item or service must be set forth clearly and conspicuously at the outset so that the offer is understood. *See* 16 CFR Part 251.

But there is another way that use of “free” can land an advertiser in hot water. Case in point: the FTC’s pending action against Intuit Inc.

According to the FTC’s Complaint, Intuit repeatedly claimed in advertising that consumers could file their taxes for free using Intuit’s TurboTax service. But in fact, TurboTax was allegedly free for only the relatively small segment of consumers filing simple returns. The FTC further alleged that many consumers drawn to the TurboTax website by the promise of filing their taxes for free would discover, in the course of preparing their tax returns, that they were unable to file for free. Instead, they would be notified that they would have to upgrade to a paid TurboTax product to complete their tax filing. The FTC alleged that, in this way, Intuit’s advertisements acted as a deceptive “door-opener.” Intuit denied engaging in any deceptive advertising. Intuit asserted that its TurboTax Free Edition is free

“ PROMOTING
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for millions of taxpayers and that its advertising conveyed the limitations on its free tax filing offer by noting that it applied only to “simple tax returns”.

However, on September 6, 2023, Intuit was found to have engaged in deceptive advertising in violation of the FTC Act. For initial decision, [Click Here](#).

According to the administrative law judge, under Intuit’s eligibility requirements, approximately two-thirds of taxpayers, or approximately 100 million taxpayers, were ineligible to file for free using TurboTax’s free tax filing product, TurboTax Free Edition. More importantly, the evidence included a consumer survey showing that 24.1% respondents believed they could use TurboTax for free, even though they could not.

Key takeaways from the decision include:

- Small print disclosures that are not readily visible are generally insufficient to alter the otherwise dominant impression of an advertisement.
- Intuit’s disclosure that the free offer applied only to “simple tax returns” tended to contradict the generalized “free” claim that dominated the advertisements, and thereby injected an ambiguity that served to confuse the viewer. Confusing or ambiguous qualifiers are, by definition, not “clear.”
- An advertiser has the burden to make clear any limitations in advertised offers, as “the public is not under any duty to make reasonable inquiry into the truth of advertising.” Moreover, information available on an advertiser’s website cannot be used to counter or cure a false claim contained in other advertising. *See In re ECM Biofilms, Inc.*, 160 F.T.C. 652, 2015 WL13879743, at *49 n.75 (Oct. 11, 2015) (“It is well-established that an advertiser cannot ‘cure the deception’ in one advertisement with different statements in another.”)

Intuit has appealed the administrative law judge’s initial decision. As of the date of this article, that appeal is pending.



A SELLER “CANNOT PUBLISH ONLY THE POSITIVE [REVIEWS] WHILE SUPPRESSING THE NEGATIVE ONES.



The “Dudes” and “Don’ts” of online reviews and order fulfillment

The maxim “if you don’t have anything nice to say, don’t say anything at all” does not apply in the world of online reviews. And that is where the troubles began for Hey Dude Inc.

Hey Dude advertises and sells shoes to consumers through the Internet, using its own website and by soliciting orders via social media advertising. Hey Dude invited online reviews from customers and used a third-party interface to manage the reviews. According to the FTC, from January 2020 to June 2022, Hey Dude chose to have all five-star reviews (the best rating) posted on its website. In many instances, however, it rejected and did not publish less-favorable reviews. The FTC alleged that before June 2022, Hey Dude’s written policies and procedures even instructed staff to publish certain types of online reviews only if they were positive.

The FTC also alleged that Hey Dude violated the FTC’s Mail Order Rule in multiple ways, including: 1) failing to issue shipping delay notices when it could not timely fulfill customers’ orders; 2) not canceling customers’ orders and issuing prompt refunds, which it should have done after sending the shipping delay notices; and 3) issuing gift cards to consumers instead of promptly refunding the original payment for merchandise ordered but not shipped, as required by the Rule.

The FTC filed a complaint against Hey Dude in federal court in Nevada, alleging it violated the FTC Act by suppressing negative consumer reviews, and violated its Mail Order Rule by failing to issue timely notices and proper refunds for shipping delays.

In a consent agreement submitted to the court in September 2023, Hey Dude did not generally admit or deny the FTC’s allegations, but agreed to a permanent injunction and a court order requiring it to pay a \$1.95 million fine. For press release, [Click Here](#).

The important takeaways from this case include:

- If an online seller is going to solicit consumer reviews, it cannot publish only the positive ones while suppressing the negative ones.
- Online sellers need to fulfill their customers’ orders promptly.
- If an online seller cannot timely ship an ordered product, the customer should be promptly notified, and if necessary, promptly be given a proper refund.

These FTC actions do not address every possible “unfair or deceptive act or practice” in online advertising and sales, as such issues are fluid and evolving. Nevertheless, the cases discussed above signal enforcement trends that are important for advertisers to know. ■

WELCOME BACK



We are pleased to welcome Celestine Moody back to the Firm. Celestine received her J.D. from the University of Illinois Chicago School of Law, and her B.S. degree in Marketing from the Kelley School of Business at Indiana University – Bloomington. Celestine will focus on trademark prosecution, enforcement, litigation, and infringement work.

During law school, Celestine worked as a Superior Court Judicial Extern. She also served as President of the Corporate Law Society; Treasurer of the Black Law Students Association; Student Ambassador for the UIC Law Center for Intellectual Property; and Student Member for the UIC Law Faculty Recruitment Committee. She was a member of the Trial Advocacy & Dispute Resolution Council, competed in trial advocacy competitions across the country, and was also a Mock Trial Coach for the 1L Trial Advocacy Competition. Celestine was awarded the UIC Law Outstanding Leadership Award in 2022.

APPOINTMENTS

■ Seth Appel

Seth has been appointed to the Copyright Society Membership Committee.



■ Phillip Barengolts

Phil has been appointed to the INTA Emerging Issues Committee.

■ Thad Chaloehtiarana

Thad has been appointed a Trustee of the Foundation for the Advancement of Diversity in IP Law.

■ Bradley Cohn

Brad has been appointed to the INTA Building Bridges Committee.

■ Jonathan Jennings

Jonathan has been appointed to the INTA Trade Secrets Committee.

■ Brett Manchel

Brett has been appointed to the INTA Data Protection Committee.

■ Jeffrey Tsai

Jeffrey has been appointed to the Leadership Team of the Japanese American Bar Association.

PRESENTATIONS

■ Ashly Boesche

Ashly was a panelist at an Intellectual Property Law Association of Chicago (IPLAC) virtual event “Introduction to IP Careers” on October 20. Ashly was also a panelist at the Chicago-Kent College of Law/ Loyola School of Law alumni panel entitled “No STEM Degree? No Problem,” on September 26.

■ Thad Chaloehtiarana

Thad was featured in an American Bar Association [video](#) that was recently presented to the ABA House of Delegates at the ABA Annual Meeting in Denver. The video highlights the ABA’s impact in promoting the enactment of The Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020. The CASE Act established a streamlined small claims court-type tribunal, known as the Copyright Claims Board, for copyright owners seeking damages under \$30,000 for infringement and related claims. Thad now serves as Immediate Past Chair of the ABA Section of Intellectual Property Law.

■ Jonathan Jennings

Jonathan spoke on the Strafford Live Webinar panel entitled “UDRP, URS, ACPA, and Beyond: Domain Name Enforcement, Brand Protection Strategies, Recent Decisions,” on September 19.

Jonathan provided an update on right of publicity law at the IPLAC Annual IP Symposium, on October 26.

■ Novaira Paul



Novaira presented on a panel on August 29 for the South Asian Bar Association entitled, “Pathways to Success: IP Innovations” in which she discussed the copyright and trademark cases that the U.S. Supreme Court decided in its 2022-23 term.

PUBLICATIONS

■ Seth Appel



Seth’s case note, “Use of Andy Warhol’s ‘Orange Prince’ on Vanity Fair Cover Infringes Underlying Photograph; Supreme Court Rejects Fair Use Defense,” was published in the August *AIPPI Newsletter*.