H&R Block's Challenge to Intuit's Comparative Ads

Thomas G. Field, Jr.

Professor Field finds that it may be easier to discredit surveys than to create them.

Since mid-January, Untuit has aired two TV commercials promoting TurboTax's advantages over services offered by "major tax stores," including H&R Block (HRB). HRB's attempt to halt them has so far been unsuccessful. *See* Order in 13-0072-CV-W-FJG (W.D. Mo. Mar. 11, 2013) (HRB). Citations are to the court's pagination in a PDF slip opinion.

The complaint has three counts, false advertising under the Lanham Act, trademark infringement, and unfair competition under Missouri law. Of the four requirements for preliminary injunctions, the court stresses likely success on the merits. *Id*. at 5. Referencing HRB's failure to argue the counts separately, it addresses only the first claim.

In comparative advertising, where both parties are identified (as in *HRB*), it makes no difference, but the identify of the party falsely depicted once had jurisdictional significance. Prior to November 1988, § 43(a) "was actually construed by the courts as not proscribing misleading or disparaging statements about another's products." Raybestos Products Co. v. Younger, 54 F.3d 1234, 1237 (7th Cir. 1995) (citation omitted). Since then, "Any person who… in commercial advertising or promotion, misrepresents… his or her or *another person's* goods, services, or commercial activities, shall be liable in a civil action by any person who… is or likely to be damaged." Lanham Act § 43(a)(1)(B).

Identified plaintiffs may nevertheless have less need to show damage. *See, e.g.,* B. Sanfield Inc. v. Finlay Fine Jewelry Corp., 258 F.3d 578, 580 (7th Cir. 2001) ("If the FTC… were to bring an action against Finlay, the court would issue an injunction in a

trice. But… plaintiff… is not a public prosecutor. It is… one of Finlay's rivals… and to prevail it must show injury.")

To succeed, HRB must show that at least one of Intuit's advertised claims is false, either literally or as it is perceived by viewers. *HRB* at 5. HRB alleged that six are. With regard to an alleged representation that Intuit's experts are better qualified, the court, after crediting evidence of its experts' experience, seems to regard the claim as true. *Id*. at 9-10.

Two statements alleged to be literally false are: (1) "At TurboTax, you only get answers from CPAs, EAs, or tax attorneys – all real tax experts." and (2) "More Americans trusted their federal taxes to TurboTax last year than H&R Block stores and all other major tax stores combined." The first is found to be true despite that software related "questions might be answered by those who are not experts in tax preparation." *Id*. at 11. The court does not find the second to imply that Intuit has tax stores. *Id*. at 12-13.

Thus, representations that can be read as literally false may be true in context, matching the converse proposition in Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144, 148 (2d Cir 2007) (literally true statements may "necessarily and unambiguously imply a false message.") (TWC).

Claims must also be material. For HRB to halt the second representation quoted above, it would seem necessary to show why potential customers would care whether Intuit has tax stores.

The situation addressed in *TWC* aside, false implied claims pose more difficult issues. To show that ads in issue have induced or may induce potential consumers to draw false conclusions from literally true statements, HRB needed competent survey evidence.

Under the best of circumstances, as Judge Posner pointed out in a brief critique, a fundamental problem with surveys is “that people are more careful when they are laying out their money than when they are answering questions. “ Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, 34 F.3d 410, 416 (7th Cir. 1994).

HRB’s expert, Dr. Scott, collected survey evidence and presented conclusions drawn from it. Dr. Nowlis who apparently did no survey of his own critiqued both. The court finds the latter more credible and agrees that flaws in Scott’s survey included the use of “closed-ended questions which all portray defendant in a positive light and plaintiffs in a negative light.” *HRB* at 8. It also agrees “that these sorts of questions are leading and/or create an improper demand effect.” *Id*.

Also notable is the court’s brief discussion of “noise,” described by Nowlis as including “pre-existing beliefs, all sorts of other things. If you think about it in terms of medical terminology, it’s sort of like a placebo. It captures things that aren’t due to the stimulus itself.” *Id*. at 8 n.4. Given the need to control for it, it seems remarkable that “noise” is mentioned in only two appellate opinions over the past thirty years. *See Indianapolis Colts,* 34 F.3d at 415, and Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578, 591 n.7 (3d Cir. 2002). In any event, the court apparently adopts Nowlis’ criticism that Scott’s control commercial was faulty for making no reference to HRB. For such reasons, it found her unable to support the conclusion that “approximately 21% of consumers are likely to be deceived into believing that H&R Bloc tax preparers are not skilled in tax preparation.” *HRB* at 7-8.

Identical or similar criticism is repeated with regard to each allegedly implied claim, making one wonder whether, had Nowlis conducted a survey, his efforts would have been as open to question. He did not need to do so, however, because HRB had the burden.

With regard to one item, the court finds, “At best, the survey demonstrates that the survey respondents were confused and misunderstood [Intuit’s] advertisements. ‘[T]he Lanham Act protects against misleading and false statements of fact, not misunderstood statements.’” *Id*. at 14 (citations omitted).

At bottom, it seems that, if actions are worth bringing, three things might be kept in mind. First, a single material misrepresentation justifies a court’s halting an ad. Second, resources seem better focused on one alleged misrepresentation instead of being scattered over a half-dozen. Last, inability to discredit criticism may lend it credence.