

VIEW FROM THE CHEAP SEATS



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Just Sue It

Two ad-related lawsuits you need to know about

Two major lawsuits concerning the ad industry were in the news this past week. Interestingly, both cases were appealed many times, and one was settled out of court—so there's no clear-cut conclusions one can draw from these cases. But you'll no doubt be affected by them.

(I'm not a lawyer, I don't play one on TV, either—so if I don't have all the facts exactly right, well, don't get your panties in a wad—remember, in the ad business, perception is reality, and here's the way I perceive them)

#1: Lasky vs. Nike

The basic plot: In recent years, Nike has been accused of labor abuses in overseas factories. An activist (Lasky) sued Nike, claiming that Nike's press releases, ads, and responses to defend itself against the allegations were untrue. The question is whether such corporate PR efforts are commercial speech; if proven untrue, those efforts would be considered "false advertising" and therefore not protected speech. If PR is found to be similar to editorial content, it is free speech and protected by the 1st Amendment. California courts agreed with Lasky's argument, the Supreme Court refused to hear the case. Nike settled the case out of court.

What scares me about this case is it seems, on the surface, as an attempt to prevent Nike from saying anything, good or bad, about how it makes its shoes or treats its workers. Which means, in effect, a watchdog organization can make all sorts of wild claims about Nike's sweatshop practices, take out ads against Nike in protest, and the company could not publicly respond without fear of being sued.

I'm not defending the right of slimy corporations to defend themselves with more slime, but I do think companies have a right to be heard. I've dealt with many clients who were dishonest marketers, if not outright liars. They look upon advertising as a way to lie or perversely twist the truth, not promote a brand. And they should be challenged in the court of public opinion, not a court of law, so consumers get to be judge and jury. Plus, in an age of Enron, WorldCom and the rest, companies need the opportunity to be as forthright and public as possible, without fear of idiotic lawsuits like this. If they're lying about their practices, they'll be exposed. Let the companies hang themselves with their own rope.

And, it's good business for corporations to be open about their values. Ben and Jerry's, REI, Whole Foods—they enjoy a large amount of consumer goodwill and loyalty because of the causes they publicly champion. I suppose this lawsuit could mean consumers wouldn't know what positive values a company stood for. After all, those kinds of PR efforts could also be deemed "false advertising."

#2: The Taco Bell Chihuahua Case

Two marketing executives sued Taco Bell, saying they originally presented an idea to the company which featured a Chihuahua as a spokesman...er, dog. After several rounds of negotiations with Taco Bell, the idea was scrapped. Two years later, along came Chiat/Day and the "Yo Quiero Taco Bell" campaign, which I'm sure you all remember.

Taco Bell defended the suit by maintaining the guys at Chiat who did the campaign came up with the concept entirely on their own, which is most definitely plausible. It's not so ingenious a concept (Mexican food=Mexican dog) that two parties couldn't have independently thought of it.

The difference is: the Chiat guys sold it, produced it, got the credit, the glory, and the money.

Until last week, that is, when a jury awarded the two men \$30 million, saying that Taco Bell did indeed steal the Chihuahua character. That's a buttload of burritos and gorditas.

(As I write this, the story is still being played out. Now Taco Bell is even suing to get Chiat/Day, no longer their agency, to pay the \$30 million. Talk about passing the buck.)

Man, if there's a precedent being set here, I'm on the wrong end of the ad business.

I've had a number of ads in my book that bore more than a passing resemblance to ads that were produced years later by other agencies. I've sent copies of my book to dozens of people at dozens of agencies, so I have no clue if anyone saw an idea of mine that influenced them to produce similar ads at some point. I'm somewhat of a conspiracy theorist, so I wouldn't be surprised if it happened. But I'm not suing anyone.

Copycat ads are everywhere—no idea is truly original anymore. The difference is that some people just execute them better, produce them slicker, or with bigger budgets, get in Adweek and Creativity with PR more often, or win more awards with the campaign.

In advertising, ideas are floated constantly. What sounds like a great idea one day sounds horrible the next, and vice versa. Timing and luck play a key role in selling creative. There's just not much a person can do to protect his/her ideas from being pilfered.

It's no wonder agencies run on fear. When it comes to great ideas, the legal department may become more valuable than the creative department.