

Fighting Competitors' Smear Campaigns With False Ad Laws

By **Christopher Cole** (April 13, 2022, 5:40 PM EDT)

On March 30, the Washington Post published an investigative report in which it claimed that Meta Platforms Inc, parent company of Facebook, had hired a prominent Republican consulting firm to malign one of its most significant commercial competitors, ByteDance Ltd., the owner of TikTok.[1]

According to the Post's reporting, the GOP firm placed "op-eds and letters to the editor in major regional news outlets, promoting dubious stories about alleged TikTok trends that actually originated on Facebook, and pushing to draw political reporters and local politicians into helping take down its biggest competitor."

As the Post's article states, this kind of tactic is not new, but it appears to have grown in use. More often these days, sophisticated companies are engaging members of a growing cottage industry of political public relations consultants to design and implement communications campaigns that convey messages that the company would never dare say in consumer-facing campaigns.

Capitalizing on consumer psychologies that facilitate viral social media, savvy companies place information into the social media stream, where it may amplify and spread. These companies know that tracing the origins of such information can be enormously difficult.

On behalf of many clients subject to such activities, we have given considerable thought regarding how to rein in bad competitive behavior.

A Powerful Remedy for False Commercial Speech by Competitors

Bad acts from competitors can give rise to more than mere defamation claims. Section 43(a) of the federal Lanham Act provides a powerful remedy against false advertising.

It affords injured commercial entities a means to obtain an injunction and possible monetary remedies against companies that promulgate false or misleading claims in advertisements. The scope of the law is limited to "advertising," a term that generally pertains to any concerted effort to influence consumers to buy or not buy a product or service.

Speech that is legitimately intended to influence government action is afforded the highest level of protection under the First Amendment, even if that speech turns out to be false. The Noerr-Pennington



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doctrine was designed to permit candid, and even factually incorrect, arguments to be made to courts, executive agencies and legislators if they are intended to influence government decision making.

However, there is an exception from Noerr-Pennington protection relating to so-called sham petitioning, including intentional falsehoods in other media.

There is a well-developed body of case law addressing the distinction between so-called commercial speech and political speech. The former enjoys a lower degree of protection, and under various federal and state laws may be subject to prior restraint if the decision maker — such as a court or an agency — is convinced that restricting the speech is narrowly tailored to the goals of preventing consumer harm, such as in the case of enjoining false advertising.

The Lanham Act works in exactly this way. If a plaintiff can demonstrate that a competitor is making false or misleading statements in commercial advertising, and those false statements are likely to cause commercial injury, it may be able to obtain an injunction — and also, in certain cases, monetary redress, such as disgorgement of profits, lost sales and even the costs of corrective advertising. While rare, courts can even treble damages.

Also available are a panoply of state "unfair and deceptive acts and practices" laws, most of which mirror the remedies and elements of proof under the Lanham Act. Such laws may even be additive, in the sense that they make available potential punitive damages.

Finally, state common laws typically include torts of commercial disparagement and defamation. These are also powerful remedies, but can generally be harder to prove, given the wide latitude with which courts often afford speakers on matters of public concern. Also, the showing of harm must typically be quite rigorous, which can be difficult in the case of advertising injury.

The whole point of a speedy remedy under the Lanham Act is to prevent such harm from occurring in the first place. The act even includes the concept of presumed harm with respect to literally false statements.

Nevertheless, the defamation and disparagement causes of action may provide a remedy even as to statements that are not characterized as advertisements.

Implications for Companies Being Targeted by Underground Smear Campaigns

It is becoming more common for competitors to engage political consultants to coordinate social media and whisper campaigns against their competitors' interests. Often, this is done to influence an agency or legislative decision in favor of the agitator.

That kind of activity, if it stops there, can be very hard to prevent, as it falls within the Noerr-Pennington rubric. However, the communications can, if widespread and false, rise to the level of actionable advertising, or even defamation.

Gathering evidence can be as simple as screen-capturing social media posts. However, forensic analysis may also be required to chase disinformation to its source. Additionally, there are emerging techniques to measure the reach and influence of such campaigns.

Evidence collection can also include investigation of op-eds and other written materials in support of the

smear campaign, but can even include the collection of "leave behinds" and interviews of persons who were approached by the competitor's consultants.

Further, as the ad-tech, programmatic ecosystem has grown, the ability of malign actors to spread misinformation organically has grown with it. Chasing down the source of any misinformation may require sophisticated information techniques.

If subject to such activities, your company should be aware that there are potentially powerful remedies. Even if not ultimately successful in court, a lawsuit can play a powerful deterrent role, chilling the competitor from continuing the underground bare-knuckles campaign.

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[1] See <https://www.washingtonpost.com/technology/2022/03/30/facebook-tiktok-targeted-victory/>. We take no position regarding the accuracy of the Post's reporting, but merely cite it as an example of possible conduct that is certainly prevalent in the marketplace.