



Podcast Transcript

AD Nauseam: Product Demonstrations: Does It Really Work That Way?

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Rubenking: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randall Rubenking, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel talk about the use of demonstrations in ads and how they've been considered by the FTC and NAD. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Kaufman: Welcome back to AD Nauseam, and we are going to kick it old school today and talk about...

Mudge: I love to kick it old school, D.

Kaufman: Kicking it old school. We are going to talk about one of those evergreen issues, and that is the use of demonstrations in advertising. From the shady before-and-after weight photos to enhanced product demos, ads showing how your products perform have always been an area of regulatory inquiry.

Mudge: You know, I love it when we talk about one of these perennial advertising issues. It just, it never gets old to kick the tires on this. It is a classic. You have a great product; you want the world to see it in all its glory. But perhaps, at times, you got to take a few editorial steps to highlight that glory, and there have been lots of interesting cases in this area.

Kaufman: But first, I want to talk about a different kind of demo. Now, I've been watching this really fun trend on TikTok, which I spend far too much time watching. But they've been showing kids with Gen X parents, asking their parents to demonstrate how they danced in the '80s. And the music being played was Bronski Beat's Smalltown Boy. It is a really fun, viral trend showing 40, 50-somethings dancing to Bronski Beat. And it got me thinking, what is the '80s song that would also get you, always get you running to the dancefloor, Amy?

Mudge: Okay. My children have not brought this TikTok phenomenon to me, because I know they would know I would embrace it with a fury. I'm going to respond to a question with a question, Daniel. The better question is, what '80s song wouldn't get me rushing to the dancefloor? Alright? If I had to pick one, I'm an alt/new wave girl. So, anything in the New Order, Depeche Mode, Erasure kind of genre. I do also love Girls Just Want to Have Fun. That got me up at the gym the other day, and so did Pump Up the Jam. So, I'll throw a couple of those out there as well. How about you?

Kaufman: So, a few key ones from me, Yaz's Situation. To this day...

Mudge: Oh yes. Yes.

Kaufman: You got Dead or Alive You Spin Me Around. Again, an amazing song. And finally, I'm going to mention two songs by the amazing artist, Shannon, who didn't get enough credit in the '80s, Let the Music Play and Give Me Tonight. Those were always some go-to songs for me in the '80s.

Mudge: Amen. Amen. And you know we both have an affinity for Madonna.

Kaufman: Oh yeah.

Mudge: Duh. That is a duh.

Kaufman: Oh my God, yeah.

Mudge: I got to refocus. All I want to do now is have a dance party right now. Alright, but let's get back to it. Let's kick off the product demo episode with the overarching theme here that is going to guide us. And that is, if you're using a product demo, it has to accurately depict how the product will actually perform. And it's got to depict actually how the product will actually perform under normal consumer use. So, it can be deceptive if the demo was altered in a material way, such that it exaggerates the product performance. Or if it was tweaked in a way that it just, it doesn't show you how consumers actually use the product.

Kaufman: Yeah. It is interesting. When we decided to do this topic, the first thing I thought of was the kid cases. A flying helicopter that only flew through the use of hidden wires and unseen people. Or the ballerina doll that was shown pirouetting on one toe unassisted in an ad. But, of course, when you got the doll home, couldn't quite do that. And the helicopter? Well, it was lots of fun, but it wasn't actually flying unassisted.

Mudge: You know what? Our dear, dear friend and colleague, Randy Shaheen, actually defended some those cases way, way back in the day. I think those cases might have happened before you and I even started at the FTC. And it is nice to know there is a couple of things that started before we were actually there. But yeah, those are oldies but goodies.

Kaufman: Yeah. I've always wondered and assumed that these cases were inspired by a lot of unhappy, crying kids and really annoyed parents. But there is a series of toy cases the FTC brought in the 20th century that focused a lot on toys and toy demos. And when we talk about kids' advertising issues, these product demo cases were a really important part of that kid advertising focus, and there are really great examples of what not to do. Now, of course, kids are a unique audience, and the demos might have a particular impact on them. But they're not always about the little ones, these cases.

Mudge: Yeah. I mean, look, the cases you mentioned, actually, also formed a prominent role in the creation of CARU, or the Children's Advertising Review Unit and their guidelines. Including things like, if you show dolls moving, you need to show the hands that shows them moving. This is an ongoing thing that toy marketers need to think about, particularly when they're showing a fantasy scene versus a product demo. But yeah, we've seen a lot of these cases as well in the grown-up product categories. Now, maybe grown-ups are not quite as naive as kids, but they still need some protection.

So, if we go back in time, 1965, there was an FTC case involving shaving, and that one made it all the way to the Supreme Court. And so, what happened there? Well, it was a shaving ad that showed sandpaper being shaved with shaving cream and a razor successfully. And according to the FTC, what we were seeing wasn't actually sandpaper, but was instead sand sprinkled on glass. Now, the Court of Appeals upheld the FTC fact finding and legal conclusions but did find that the FTC order was too broad. The Supreme Court, however, reversed on that breadth issue in a decision by Justice Warren. And the court said, look, we're not concerned in this case with the clear misrepresentations in

the commercials showing the speed with which the product could shave sandpaper since the Court of Appeals upheld the Commission's finding on that, and the respondents haven't challenged that finding here.

Kaufman: You know, it is interesting. Another interesting thing about that decision, when you read it, there is so much discussion about the deference that the court gives to the FTC's backslash.

Mudge: Huge. Huge.

Kaufman: Lots of deference. And I'm just wondering how this is going to change as it could be, by the time you're listening to this, the Supreme Court has come out with the decision already on the Chevron issue. But the court in 1965 notes, as an admin agency which deals continually with cases in this area, the Commission is often in a better position than our courts to determine when a practice is deceptive within the meaning of the Act. The courts have frequently stated that the Commission's judgment is to be given great weight by reviewing courts. Very different than how things are likely to be interpreted in 2024.

Mudge: Absolutely. I mean, we did live in a world for a long time when consumer protection enforcement wasn't particularly politicized. Of course, that is well behind us now. But you know, probably the grand Mac Daddy of all FTC demo cases was a car case. It was from one of my other favorite decades, in the '90s. It was a great ad. It showed a monster truck driving over a series of cars and only one car was left unscathed. It was a very, very powerful message. But the advertised car had been strengthened, and the other cars' support systems had been severed to make this massive demolition something that could actually happen in the demo. But likely, not in real life.

Kaufman: Yeah. It was a pretty cool ad, but the car cases have continued. In another case, this is a lot more recent, from the early 2010s. One car company was sued by the FTC after it ran a TV commercial showing a pickup truck pushing a dune buggy up a sandy beach hill. Now, the footage was apparently filmed using cables and the like. And the ad was filmed in a reality type style, with lookers-on who were just amazed at what they were seeing. But as former FTC Bureau Director, the wonderful Jessica Rich, noted in her press release, special effects and ads can be entertaining, but advertisers can't use them to misrepresent what a product can do.

Mudge: It was very interesting. I remember that case. One question that was raised was the equivalent of, can there be a puffery defense here? Are people looking at this ad, who know cars, who might be the target audience for something like a pickup truck, don't they know what these cars can do? And aren't they going to recognize that what is depicted is so over the top that no one would take that seriously? That defense might have been undercut by the fact that there was a disclaimer in the case. Albeit sort of white, small disclaimer in sand – so, there was a clear and conspicuous issue – that said, I can't remember the exact words. But it was, this is a demo, this is not real life. That maybe cut into that. But it was certainly one that the FTC was saying, no, we're just not buying that puffery

defense here. You're showing this car or pickup truck being used in a particular way. Why wouldn't people believe that?

Kaufman: Yeah. And the other thing that is really important to point out about that car case is the FTC also sued the advertising agency there.

Mudge: Well, when you think about it, given that the FTC's ad agency theory of liability – which probably is another good podcast topic, sir – is whether the ad agency knew or should have known the ad was deceptive. But well, if they're involved in the filming and the functioning of the audio in the ad, probably helping to hook up the chains that cranked it up the sandpile, you know, in this case, it is probably not shocking that they got named as well. Because chances are good, they were right on that shoot making those adjustments and knew exactly what was going on.

Kaufman: Well, and you know what? If we do an episode on ad agencies, I think we have the perfect guest to bring back, the one and only Sarah LaVoy.

Mudge: Absolutely. Couldn't do an ad agency topic without her.

Kaufman: I'll give her an e-mail right after this. But so, in the old infomercial case I worked on also had some product demo issues. It was a relatively small case from 2003 involving a hair straightening product. The FTC sued them for a range of deceptive representations as well as mail order rule violations. And one count specifically alleged that the before and after depictions and photographs in the infomercial ads implied that the system treatments caused hair, including tightly curled hair, to be substantially relaxed in a single application. So, lots of different product categories have been the focus of these demo issues. But Amy, of course this is not an FTC exclusive. What have we seen and are we seeing from NAD when it comes to demos?

Mudge: Daniel, I just, I need a moment to recover. I'm thinking about all the hair straightening products I have bought over the years in a desperate attempt to tame my unruly mane.

Kaufman: Especially in a D.C. summer, there is nothing you can do.

Mudge: I'm telling you, we live in a swamp and it is not kind to thick hair. But yes, yes, the NAD cases in this area, many more of them than we see at the FTC. And the NAD cases are probably far more instructor for large national advertisers because most of them do not involve significant cutting of corners. So, not the kinds of cases that look like a torture test. But they delve into more, I would say, the details. The important details every day that we got to look at to decide, is a demo a torture test? Is a demo consumer relevant? And a lot of times what we see, and we see this in tons of cases, does the science that we have match up to what we're showing in the demo?

I recently blogged about a very recent case at NAD involving deodorant. And that was one where the advertiser had some great science that its product produced

sweat. But the demo that they showed showed no sweat at all appearing on a gray t-shirt after a vigorous workout. And the NAD said the testing didn't match up to this. The testing looked at sweat after sitting in a hot room, or other testing looked at people who were exercising. Looked at how much sweat was on a pad that was touching the armpit, but not looking at fabric. Alright?

Kaufman: No. Again, it is like summer in D.C. This is torture.

Mudge: Summer in D.C., it is a shifty, sweaty environment. But the testing didn't look at fabric like a t-shirt. So, the key is really making sure that the testing you have does match up squarely to what you're showing in the demo. Of course, it is not exactly real life. Time is going to be compressed, things like that, but you still need to make sure that science is a good proxy for what you're showing.

And then there were some of my favorite cases involving mascara, some of them involved face creams as well, that showed a famous celebrity or a model. And the question in those cases wasn't a puffery thing like we saw in in the car case at the FTC. But it was whether a demo was being shown at all. So, whether when you see a kind of makeup, a kind of face cream, and then you see a beautiful face of the spokesmodel; is that just the face of the brand? Or is showing the spokesmodel showing a demonstration of how well the product worked on this celebrity's face? And one of the mascara cases, the model was wearing the advertised mascara, but she also had lash inserts included. And the claims in the ad were that the mascara was going to give you eight times more volume than bare lashes. And there was a disclaimer that the lashes were enhanced post-production, but at issue there was whether you could disclaim that in any way. NAD said no. NARB disagreed. But in even deciding whether something is a demo can also be an issue.

Kaufman: So, and you bring up a really good point there, Amy. And before we say farewell, because I hate saying farewell, we would be remiss if we didn't talk a little bit about AI. And how the use of AI has the potential to bring far more attention to the issue of product demos. We are, of course, seeing AI being used in a lot of commercials. But AI can certainly be used quite easily to enhance product demos in a way that is highly believable.

Mudge: Yeah, that does worry me quite a lot. I mean, it is certainly something to watch. And it is certainly something when you're working with your ad agency and putting parameters around what they can and can't do with AI. And a lot of the focus is on copyright issues and other IP issues. But to really, really take a hard look and put some parameters behind whether, I think, it is whether you can use AI at all in connection with the demonstration.

But we don't have a long list of dos and don'ts here. But to wrap up, it is pretty simple. Don't use deceptive demos. Don't assume that people are going to understand it is a puff or it is not reality. You got to come into it with the assumption that at least some reasonable consumers are going to look at what you're showing and think that that is a demonstration of how the product will, in fact, work. If you want to try to go in a way that it is not a demo, it is something

that is totally outlandish, you really have to take steps. Don't be subtle in a case like that. You've got to really make it clear this is not a demo. You've got to make sure your science matches your demo. I know we said it. I'm saying it slowly again.

And then make sure that your demo is consumer relevant. We didn't talk through examples of this, but you really do have to make sure that how those users are using your product in the demo matches how you instruct consumers to use your product. But also, how you know consumers actually do use your product, if it is different from how they're directed. And then with these AI tools being so readily available and so good, you can imagine countless scenarios where there is an interest in making the teeth whitener even whiter, or the slimming effects even more pronounced. So, this is definitely an area to remain focused on and make sure you know when and how visuals are being enhanced. As a lawyer, you've got to ask those questions. Don't assume what you're seeing in a demo is actually what happened. And if so, you got to work your way through if you can explain this to avoid a misleading takeaway.

Kaufman: Well, Amy, thank you so much. It's been another wonderful episode of Ad Nauseam.

Mudge: Let's go hit that dance floor now with some '80s oldies. You know I can't get You Spin Me Round out of my head, Daniel. We've got to do it.

Kaufman: Like a record baby, right round. Thanks for joining us, everybody.

Rubenking Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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