

## When Ad Campaigns Explode

February 6, 2007

Turner Broadcasting's now infamous Boston cartoon campaign for *Aqua Teen Hunger Force* highlights the risks of new media promotions. When "guerrilla" marketing firm Interference, Inc. placed "sinister looking" boxes on bridges and depots in Beantown to promote the cartoon, what was supposed to be a playful surprise to passers-by turned into near panic over a possible terrorist threat. Turner had to apologize publicly, and it has been reported that Turner and Interference will pay the City \$2 million in settlement. The incident is a wake-up call to marketers and the brands they serve to be vigilant: "Under-the-radar" advertising efforts have the potential to explode.

"Word-of-mouth" (WOM) advertising is not new. With the advent of new online "mini-celebrities" on MySpace and other public forums, many advertisers have embraced WOM campaigns hoping to capitalize on "real" personalities, mailing lists, and home pages of popular individuals for peer-to-peer promotions. For a period of time, the FTC took a "wait-and-see" approach in deciding whether such WOM advertising required a "paid endorsement" disclaimer. Significantly, last December, to little fanfare, the FTC issued a staff opinion that a seller's relationship with a WOM campaign must be disclosed in some circumstances. While the FTC did not issue specific guidelines for WOM advertising, it noted that if "the consumer would not reasonably expect [the] relationship," especially if the marketing message is directed to children or teenagers, a failure to disclose the relationship could constitute a deceptive trade practice. An FTC investigation of this type could lead to a cease-and-desist letter, potentially significant fines, undesirable publicity, and a loss of credibility in the marketplace.

Viral advertising is not new either. But as advertisers create more "content" for increasingly jaded and sometimes fickle consumers, the question often becomes: Are these ads or entertainment? This distinction is important to the owners and publishers of this kind of content, because entertainment has more flexibility than advertisements to reference third-party individuals and unrelated brands and products. Marketing agencies may compare their creations to free-wheeling *Saturday Night Live* skits, but when the content in question promotes products, even indirectly, different rules typically apply. Advertisers should exercise caution.

Nonetheless, it is true that the lines between an advertising agency (creating works for brands, like jingles and characters) and a bona fide studio/production company (willing to place products or integrate ads in its creations) are thinning. For example, ad agencies more frequently claim that they are "creating stand-alone content" with a "life beyond the campaign." Not only can this lead to an advertiser funding the creation of content that it does not own or completely control, but also may result

in final content that contains unsubstantiated product claims for which the advertiser may be held responsible.

Before entering into a co-promotion, a company should make sure it knows its “date.” A brand may get “clip” rights to a TV show or movie, but there may be significant limitations on how the “stars” in that content may appear in the context of the promotion. The producer of the content may have the right to license clips to advertisers to co-promote a show or movie, but the producer likely does not have the right to give the advertiser an “endorsement” from the star(s). Also, a producer probably cannot guarantee exactly *when* a show will be broadcast or when a movie will be released. For these reasons, advertisers often think they are getting more than a producer can actually deliver.

WOM marketing, brand-sponsored content, video sharing, blogs, and mobile phone distribution are absolutely key to brand-awareness campaigns today. However, each has its own legal and business risks, all of which can be managed to avoid unexpected and undesired attention—even in Boston.

Morgan Lewis is on the cutting edge of integrated brand advertising. We have recently worked on a celebrity agreement for a highly publicized Super Bowl ad, a major motion picture co-promotion agreement, a sponsorship and integration deal for a miniseries, product placement in a diet book, sponsorship of original Web content based on a hit television series, and a brand-sponsored blog. We regularly do sponsorships, endorsements, contests, and product integrations in all media, for both existing content as well as original brand-created entertainment.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

**Washington, D.C.**

Ron N. Dreben	202.739.5213	<a href="mailto:rdreben@morganlewis.com">rdreben@morganlewis.com</a>
Karen A. Butcher	202.739.5526	<a href="mailto:kbutcher@morganlewis.com">kbutcher@morganlewis.com</a>

**San Francisco**

Rochelle D. Alpert	415.442.1326	<a href="mailto:ralpert@morganlewis.com">ralpert@morganlewis.com</a>
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**London**

Richard Barratt	+44(0)20.7710.5592	<a href="mailto:rbarratt@morganlewis.com">rbarratt@morganlewis.com</a>
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