

China slaps a record fine on false advertising

Draft Advertising Law stimulus for tougher
stance?

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Background of the case

A toothpaste television advertisement was hit with a record fine of RMB 6.03 million (approximately US\$0.96 million) for violating the Advertising Law in China.

According to a recent report of the Shanghai Administration for Industry & Commerce ("AIC", the administrative bureau in China responsible for enforcement of the Advertising Law) published last week, the television advertisement showed a well-known Taiwanese celebrity showing off her teeth and boasting that they were visibly whiter after just one day of using the toothpaste. The AIC found that the alleged visual "whitening" effect in the advertisement was a result of computer editing, as opposed to the actual effect of using the product. The advertisement was found to constitute a false advertisement under the Advertising Law.

The AIC did not mention whether there were any aggravating factors which justified this record fine. However, this decision is certainly in line with the recently proposed changes to the Advertising Law which aim to root out false advertising in China. The existing Law was enacted in 1995. Since last year, following the enactment of the revised Consumer Rights Protection Law in March 2014, the Chinese Government has issued a series of consultation drafts on the amendments to the Advertising Law, with a view to further enhancing consumer protection.

These draft changes to the Advertising Law are now undergoing what is believed to be the final round of review by the Chinese Government and could become law shortly. The proposed amendments, if enacted, would have wide-ranging implications on all advertising activities in China and on all stakeholders (including brand owners, advertising companies, and endorsers). False advertising is not solely about legal liabilities or monetary compensation; very often it is the reputational and publicity issues which really matter. Hence, all stakeholders should familiarise themselves with the legal developments in this area and take immediate steps to review (and revise) their advertising practice.

Here is a snapshot of the major proposed changes to the Advertising Law and their likely ramifications:

Examples of proposed changes to the Advertising Law:

"False advertising" defined

The Draft clarifies the scope of "false advertising". This would include, for example, fabrication of product efficacy, or claims about a product/service which do not match the actual conditions and which have a substantive effect on the decision to purchase (the toothpaste advertisement above would likely be an example).

Product endorsement

Celebrities or other endorsers endorsing a product or service may be held jointly liable w, if he/she knows or ought to know that the advertisement amounts to false advertising. Again, the Taiwanese celebrity in the above case may fall foul of the Draft as arguably she should know that it is not quite possible to achieve the claimed whitening effect within one day.

Internet advertising

The Draft expressly applies to Internet advertisements. Furthermore, the Draft explicitly requires that such advertisements must not interfere with people's normal usage of the Internet. Interestingly, the Draft states that advertisements in the form of pop-up windows must be capable of being closed by one single "click".

Direct marketing

No advertisements may be sent to home addresses, email addresses, mobile devices, etc. without the recipient's consent or request, or in case that person has expressly chosen not to receive them.

Specific industry sectors

Under the Draft, more stringent controls would be imposed on advertisements for certain classes of products and services. For instance, advertisements for pharmaceutical products, healthcare food, medical equipment and the like must not cite recommendations or testimonials by medical or research institutions or by patients or other endorsers (e.g. celebrities).

Meanwhile, advertisements for educational services or vocational training must not guarantee the achievement of qualifications and must not suggest that their staff is involved in the setting of public examinations.

There are also specific controls on advertisements for tobacco, real estate, agricultural products and financial investment products.

Protection of minors

Under the Draft, children under the age of 10 must not be engaged as an endorser. It would be interesting to see how this provision would be construed as this may present practical difficulties for advertisers of products or services targeting this age group, e.g. baby products.

The Draft also prohibits advertisements for products like online games or cosmetics on media targeting minors.

Furthermore, advertisements targeting children under 14 must not include content which persuades their parents to purchase or content which encourages the imitation of dangerous acts.

Sanctions and consumer remedies

Sanctions under the proposed law are wide-ranging, including administrative fines, revocation of business licences, or even criminal liabilities for serious violations. Importantly, the Draft would have to be read in conjunction with the recently-reformed Consumer Rights Protection Law, which enhances consumer remedies in relation to deceitful or misleading conduct of sellers, which possibly includes false advertising. Under the Consumer Rights Protection Law, consumers are entitled to claim additional compensation for such deceitful or misleading conduct of 3 times the purchase price of the product or service concerned.

Conclusion

The Draft is yet another clear indication that the Chinese Government is tightening up its control on advertising activities and consumer protection in China. In light of the increasing exposure to consumer complaints and regulatory enforcement under these legislative developments, it is high time for businesses in China to review their advertising practice in all forms and media.

Further information

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