

## FACEBOOK ADVERTISING PRACTICES SHAMED AS FAKE ERECTILE DYSFUNCTION ADS GET A RISE OUT OF EDDIE MCGUIRE

By Leanne Jezercic, Senior Associate

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In news this week, sports and media identity Eddie McGuire is threatening to sue Facebook over an ad campaign Facebook carried for TryVexan, an erectile dysfunction treatment which used McGuire's name and image to falsely claim he had a connection to the product and had suffered erectile dysfunction.

While defamation, passing off and misleading and deceptive conduct actions against TryVexan would ordinarily be the obvious course, it is Facebook that McGuire is set on challenging for its role in "promulgating bogus ads", as he claims. McGuire wants Facebook more accountable for what is published on its network. And he's not the only one.

Facebook is also being sued in the UK for defamation by consumer advice personality Martin Lewis, whose face and name were repeatedly used on fake adverts for cryptocurrency scams distributed on the social media giant's platform. Other famous identities like Sir Richard Branson and the late Professor Stephen Hawking have also been the subject of fake ads.

Does Eddie have a chance? And how does Facebook seem to get away with this sort of thing? We try to answer both of these questions below.

### Facebook's position and response to McGuire

Facebook has a system to review ads before publishing them to ensure they meet the Facebook Advertising Policies, which relevantly state that ads should not infringe on third party rights or be misleading or deceptive. But with cases like McGuire, Lewis and others, this system seems to be failing. It's clearly arguable that Facebook has not been doing enough to enforce their own policies or to generally ensure ads are legally compliant. In other words, they are saying one thing and seem to be doing another.

Facebook has stated that it does not allow ads which are misleading and false and once reported, such ads that they may have missed will be removed. Essentially, due to the gaps in their systems, Facebook advertising appears to operate on a 'publish first and remove later' system, with Facebook profiting from the resulting ad revenue in the meantime.

Herein lies a systemic issue with Facebook advertising: why should the onus be on an individual to police these fake ads on a case-by-case basis while Facebook profits from placing them on its platform?

In the case of Martin Lewis, Facebook admitted there were thousands of fake ads bearing his image. Given the scale of the deceit and coupled with the fact that some ads (known as 'dark ads') are only targeted at set individuals means that individually reporting fake ads is both impossible and unreasonable to expect.

Sir Richard Branson has stated that responsibility for stopping fake and misleading content being posted "should not fall solely on the shoulders of those high profile individuals being targeted". McGuire goes a step further and insists that if Facebook want to head down the news highway and offer advertising and news stories on its platform, they should be playing by the same rules as everyone else, such as the Nine Network for which he works. Essentially, a newspaper or television station could not get away with publishing fake ads, and neither should Facebook.

### **The legal hurdle: is Facebook a 'mere conduit'?**

If McGuire is to emerge from his battle victorious, he's going to have to swim against the generally accepted legal tides that have existed for years.

Therefore, one step in winning a case against Facebook is proving that Facebook is an active party to the misleading and deceptive conduct – that is, that Facebook is doing more than merely passing on ads created by the advertiser but is primarily involved in the conduct of publishing misleading statements. If this is held to be the case then Facebook could be seen as aiding and abetting the conduct of its advertisers, or in other words that Facebook is a party to misleading and deceptive advertising and therefore just as liable as the dodgy advertisers it allows to publish ads via its platform.

The current law in Australia generally says Internet platforms like Facebook and Google are not liable for false or misleading representations of advertisers where they simply operate as ignorant and innocent 'conduit pipes' – that is, where they are just passing on content and making it available to their audience. There is one catch – if they are made aware that content provided via their services is misleading or defamatory and they fail to remove it, they are then liable for that content. In the case of McGuire, Facebook have blocked the ads and have thereby complied with the current law and could avoid responsibility on this basis.

If this dispute ends up before the Courts this will be a case to watch, and potentially one that could significantly change the legal landscape if Facebook is found to be primarily involved in the misleading statements of its advertisers by redistributing their content. If so, the financial effect on Facebook will be huge, and systems will need to be developed for it to more thoroughly check and review ads and pre-vet them before they are published. This could mean more work for advertisers also, as they may need to provide assurances or evidence to Facebook in respect of claims made (similar to CAD-style requirements for television ads).

We will keep you updated as this story develops.

### **Contact us**

If you would like more information about the rules around Facebook advertising, please get in touch with either of our team below.

**Leanne Jezercic**  
+61 2 8935 8805  
[leanne@anisimoff.com.au](mailto:leanne@anisimoff.com.au)

**Tony Anisimoff**  
+61 2 9460 6611  
[tony@anisimoff.com.au](mailto:tony@anisimoff.com.au)



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