



Introduction to Advertising Law

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Agenda

- Overview of Selected Topics in Advertising Law
- Case Studies

The Lanham Act

- The Lanham Act (15 U.S.C. 1125) prohibits false and misleading advertising.
- Elements of a prima facie claim:
 - False statement (or truthful but misleading statement)
 - Statement deceives or has capacity to deceive
 - Deception is material, i.e., likely to influence a consumer's purchasing decision
 - Product is in interstate commerce
 - Plaintiff has been injured as a result of the statement at issue
- Courts have consistently rejected consumer standing under the Lanham Act, however separate state laws also regulate advertising claims and give consumers standing to raise the same claims.

Lanham Act Remedies

- Preliminary injunctive relief
- Permanent injunction
- Damages (treble damages if violation is willful)
- Attorneys' Fees
- Corrective Advertising

Alternatives to Litigation

- Cease and Desist Letter
- Network challenge for TV ads
- FTC/State AG
 - FTC powers:
 - Cease and desist orders
 - Can order consumer refunds
 - Civil penalties
 - Corrective advertising
 - Compelled disclosures (e.g., tobacco warnings)

Alternatives to Litigation

- Challenge through National Advertising Division (NAD) of the Council of BBB
- A NAD Challenge is a voluntary ADR process for ad industry to investigate substantiation concerns

Alternatives to Litigation

- NAD Challenge (cont.)
- Advantages to litigation:
 - Cheaper
 - Quick result (60 days +/-)
 - Only issue is whether advertiser adequately substantiated claims
 - Confidential process until decision is rendered
 - No discovery
 - Sophisticated review
- Disadvantages:
 - Not as fast as a preliminary injunction
 - No enforcement authority, but can attempt to refer matters to government agency
 - No subpoena power

Implied vs. Express Claims

- Express claim: direct message likely to influence consumers' purchasing decisions.
 - E.g., "Listerine prevents colds."
- Implied claim: an indirect claim about a product or its performance.
 - Visual material in an ad
 - True statement may imply a false claim, e.g., "Listerine kills germs that cause colds" implies that it helps prevent colds.

Implied Claims

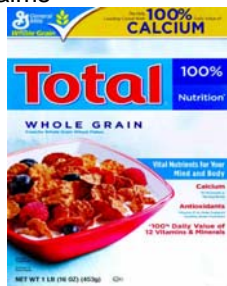
- Nutella’s manufacturer settled a class action lawsuit alleging that it falsely implied that it was a healthy food.
- Ferraro will issue up to \$3 million in refunds to consumers who purchased Nutella.

Key Issue—Fact vs. Puffery

- What is a statement of fact?
 - Objective statement that can proven true or false
 - Comparative claims against a competing product
 - Objective claims require substantiation, or adequate factual proof of the claim’s truth

Statements of Fact

- Examples of Factual Claims

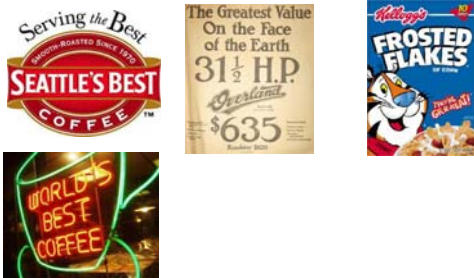


Puffery

- What is “puffery”?
 - A claim that is not capable of objective proof, or that are so vague, hyperbolic, or humorous that consumers would not take it seriously
 - Substantiation is not possible because there is no factual claim

Puffery

- Examples of Puffery



Puffery vs. Objective Claims

- Puffery and objective claims:



“Better” claims



- Claims that a product is “better” are a gray area and can be either a statement of fact or puffery.
 - When standing alone, statements that a product is “better” are generally puffery.
 - However, when used in comparative advertising, or in clear reference to another product, such statements are generally claims that require substantiation.

“Better” claims





“Better” Claims







- Pizza Hut vs. Papa John's
 - In 1997, president of Pizza Hut “dared” anyone to make a better pizza
 - In response, Papa John’s launched its “Better Ingredients, Better Pizza” tagline and a comparative ad campaign against Pizza Hut
 - Papa John’s ran commercials stating that:
 - its “vine-ripened tomatoes” were superior ingredients to Pizza Hut’s “remanufactured tomato sauce.”
 - It made fresh dough with filtered water, compared to Pizza Hut’s frozen, premade dough
 - These fresher ingredients resulted in better tasting pizza



- Pizza Hut sued under the Lanham Act, alleging that Papa John’s statements about its ingredients that were false and misleading because tests showed that the freshness of Papa John’s ingredients made no difference in the pizza’s taste.



- Papa John’s defense was that its “better ingredient” claims were puffery.
- Jury found that Papa John’s ads were deceptive and entered a verdict for Pizza Hut.



- Fifth Circuit found that the statement "Better Ingredients. Better Pizza", standing alone, is puffery
- But, when used in the context of a direct comparison, as Papa John's had done in its crust and sauce ads, the statement became a factual claim that requires substantiation
- Fifth Circuit overturned jury verdict because Pizza Hut failed to produce evidence showing that the ads actually induced people to purchase Papa John's pizza
- Supreme Court declined to hear the case



- Be careful when using puffery as a defense, as it can backfire

Use of the word "Free"



Use of the word "Free"

- Regulated by the FTC
- Suggests a special offer in which a consumer is given an item at no cost over the regular price
- Restrictions on frequency of "free" offers
 - Not more than 6 months of a 12 month period
 - 30 days should elapse between "Free" offers
 - No more than three of the same "free" offers should be made per year
- Any conditions or limitations must be clearly and conspicuously disclosed "in close conjunction with the word 'Free'"
- State law may regulate font size, content requirements.

Use of word "Free"

- Notice of a "Free" offer on the main panel of a package or ad is not precluded if:
 - The notice does not identify the free item
 - The notice informs consumer of the location on the package or ad where conditions may be found
 - No purchase is required to discover the terms of the offer



Sheraton Saigon Free Night Offer

Book a minimum four (4) night stay and enjoy the following benefits:

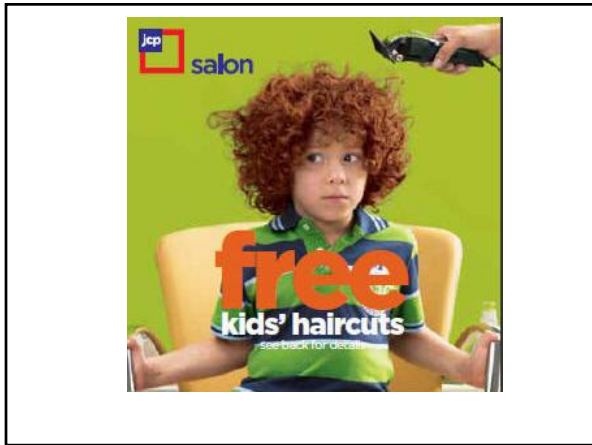
- Stay three (3) consecutive nights and enjoy the fourth night free
- 10% discount off daily meeting percentage
- Extra double Champagne offer at the end of the event
- Book a group dinner for a minimum of 50 guests and enjoy a complimentary Deluxe decoration in a private function room.

TERMS AND CONDITIONS

- MINIMUM BOOKING OF 30 NIGHTS
- THIS OFFER CANNOT BE USED IN CONJUNCTION WITH ANY OTHER CURRENT PROMOTION OR PREFERRED RATE
- VALID THROUGH 31.12.12
- SUBJECT TO AVAILABILITY

Book us at saigon@sheron.com
Tel: (84) 91 9127 2000 Fax: (84) 91 3827 2100







SPECIAL MAIL-IN OFFER
FREE BOBA FETT™
 With Purchase of five select Star Wars® figures.
 Limited-time offer!

SHOP ACTION FIGURES




Here's how it works:

1. **Collect and save the UPS codes of any five figures** from the Star Wars® Build a Droid (87535 Asst.), Saga Legends (87993 or 21115 Asst.), Star Wars® The Clone Wars™ (87638 or 94736 Asst.), or the Vintage (87568 Asst.) collections.
2. **Print out the offer form** and print your information clearly in the spaces provided.
3. **Mail the completed form in a stamped envelope**, including all five UPC codes and a check or money order for \$6.99 for shipping, made out to Figure Redemption Inc.

PRINT OFFER FORM

Look for this sticker!

Endorsements

- FTC regulates endorsements
 - Must reflect honest opinions or experience of endorser
 - Cannot contain representations that could not be substantiated if made by the advertiser
 - Consumer endorsements must not be paid, unless that fact is disclosed
 - Celebrity endorsers can be paid, but must actually use the product if represented to be a user
 - Endorser's experience must be typical of average consumer, or that fact must be disclosed (e.g., fitness videos "results not typical")

Currency

- US Currency can be used in advertisements if:
 - More than 150% or less than 75% of actual size
 - Can be normal size, if black and white and one-sided
 - Texas and California require inclusion of "SPECIMEN-NON NEGOTIABLE" in 18 pt font when using simulated currency to promote a sweepstakes


Other Regulated Areas

- Environmentally-friendly/Green claims
- Health and Nutrition Claims
- Credit
- Made in the USA
- Gambling
- Alcohol/Tobacco/Prescription Drugs
- Insurance

Health Claims

- Jointly regulated by FDA and FTC
- Complex regulations govern nutrient content and health claims
 - Examples of regulated claims:
 - “Reduced fat”
 - “0 g trans fat”

Health Claims



Health Claims

- General Mills claimed that Cheerios can "lower your cholesterol 4% in 6 weeks" and "Cheerios is clinically proven to lower cholesterol"
- 4% is within margin of error for cholesterol test
- In a letter, FDA accused General Mills of violating the FDA Act:
 - "Based on claims made on your product's label, we have determined that your Cheerios Toasted Whole Grain Oat Cereal is promoted for conditions that cause it to be a drug."
- FDA threatened to seize the offending products
- General Mills could not legally market Cheerios unless:
 - it applied for approval as a new drug or
 - changed the way it labels the cereal and presents the cholesterol-lowering information

Health Claims

- In response, Cheerios dramatically softened the claims on the web and the box.
- In a Q/A section on the Cheerios website, the question "Does Cheerios lower cholesterol?" is answered as follows:
 - "Cheerios . . . have soluble fiber from whole grain oats, which can help lower cholesterol.*"
 - "3 grams of soluble fiber daily from whole grain oat foods, like Cheerios and Honey Nut Cheerios, in a diet low in saturated fat and cholesterol, may reduce the risk of heart disease. Cheerios has 1 gram per serving; Honey Nut Cheerios has 0.75 gram per serving."



“Natural” Claims

- FDA has not defined “natural”:
 - FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.
 - <http://www.fda.gov/AboutFDA/Transparency/Basic/s/ucm214868.htm>

“Natural” claims

- Vermont Congressman sent letter to FDA commissioner complaining about Log Cabin “All Natural” syrup
- Claimed that use of the term “natural” is misleading to consumers, especially when considered in context of packaging
- Class action lawsuit filed against maker of Log Cabin syrup

“Natural” claims

- Ingredients:
 - 100% maple syrup
- Price \$12.99



“Natural” claims

- 4% maple syrup
- Other Ingredients:
 - Brown rice syrup
 - Sugar
 - xanthan gum
 - caramel color
 - citric acid
- Price: \$5.99



“Natural” claims

- Xanthan gum is derived from corn using a bacterial fermentation process.
- Caramel color is derived from caramelizing sugar
- Appears to be no consensus whether either ingredient is “natural”

Reebok
THE SPORT OF FITNESS HAS ARRIVED.



Toning Shoes

- Both Reebok and Sketchers have entered into consent decrees with the FTC concerning false claims promoting their toning shoes.
- Reebok agreed to pay \$25 million in consumer refunds
- Sketchers agreed to pay \$40 million

Toning Shoes

- Reebok claimed that walking in its EasyTone shoes had been proven to lead to 28% more strength and tone in buttock muscles, 11% more in the hamstrings, and 11% more in the calf muscles, than regular walking shoes.
- Reebok could not substantiate these claims


Toning Shoes

- **Reebok's current claims:**
 - The EasyTone collection features built-in balance pods with Moving Air Technology, which transfer air in response to your stride and create micro-instability with every step.
 - Mesh/synthetic upper for added comfort, support, breathability and durability
 - SmoothFit seamless design helps minimize rub and irritation
 - Specially designed Women's Specific Last technology ensures optimal fit and function for a woman's foot
 - Midfoot shank and overlay for stability and support
 - Antimicrobial PU sockliner provides cushioning and moisture management

Toning Shoes

- The FTC challenged Sketchers' toning shoes ads on several grounds:
 - Failing to substantiate claims that Shape-ups would provide more weight loss, and more muscle toning and strengthening than regular fitness shoes in an ad telling consumers to "Shape Up While You Walk," and "Get in Shape without Setting Foot in a Gym."
 - Failing to disclose that a chiropractor who endorsed the shoes and conducted an "independent" clinical study was married to a Skechers marketing executive, and that Skechers paid him to conduct the study.
 - An ad that claims consumers wearing the shoes will increase "muscle activation" by up to 85 percent for posture-related muscles, 71 percent for one of the muscles in the buttocks, and 68 percent for calf muscles, compared to wearing regular shoes.



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