



Sample Answer to Final Exercise
Advertising and Marketing Law
Spring 2015
Professor Eric Goldman

This was a pretty easy exercise overall, and most of you got most of the main points. Only a few of you invested substantial energy on the non-deception/“other aspects” portion, even though we spent the second half of the semester preparing for that. Almost all of you did the extra credit exercise. Thank you for the honest and thoughtful reflections.

Claims Analysis

Express statement: “built for even the toughest kids”

Express statement: “kid-proof case”

Implied statement: the Kids Edition is indestructible

Implied statement: the Kids Edition can withstand more physical abuse than similar/competitive devices

Standing alone, “built for the toughest kids” and “kid-proof” are puffery. However, in the context of the ad, the statements at minimum communicate the two implied statements. The implied claim of indestructibility is also puffery. Although not many kids have access to large caliber guns, I doubt the Fire Kids Edition would survive a direct hit. Compare how Nokia cellphones, reputed to be the most durable cellphones ever, have fared when fired upon.

<https://www.youtube.com/watch?v=m5seBNQb0M4> and

<https://www.youtube.com/watch?v=wNSFRUzTxlo>.

This leaves us with the implied superiority statement, and I think this is a factual claim that needs substantiation. The question is: exactly what is being compared? Amazon might take the position that the “kid-proof” case is the only differentiator, so all it has to show is that its kid-proof case is more rugged than other standard cases from other manufacturers. (Amazon could also be comparing the Kids Edition to its other Fire editions; the substantiation would be the same). This could be as simple as comparing product specifications, but actual tests designed to simulate field conditions, such as the effects of dropping the device, would be more credible. If Amazon is making the claim for the device in total, not just the case, then it would need to substantiate the claim across a range of different abuses suffered by kids’ devices (food and water exposure, heat and cold, etc.).

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Express statement: “It’s a Real Tablet”

Express statement: It’s “Not a Toy”

Implied statement: Users can use the Kids Edition to do “real” work

Implied statement: The device’s functions and performance are comparable to industry-standard tablets

The express statements are probably puffery. We don't have rigorous definitions for what constitutes a "tablet," and how they differ from laptops, cellphones, phablets and everything else. Similarly, everyone knows the Kids Edition can be used to play games, so it is in fact "a toy" in the sense of being playable. Nevertheless, the two express statements, combined together, are designed to boost the consumer's perception of the device's functionality. This sets up the two implied statements: that the device clears some undefined minimum threshold of capability, and that the device compares favorably to other tablets in the market. I think these implied statements are fact claims. Substantiation could be as simple as comparing the Kids Edition's product specifications and functionality with the specs and functionality of a suitably representative basket of other tablets.

Express statement: "Kids love tablets, but you want peace of mind."

Implied statement: your kids are always begging you to use your electronic device, and they will satisfy them as an acceptable substitute for your devices

Implied statement: you can give the Kids Edition to your kids without fearing they will destroy an expensive item or getting exposed to inappropriate content

The express statement is puffery. Love is too subjective to measure, and so is "peace of mind." The first implied statement may not be recognized by everyone, but as a parent constantly battling my kids over their incessant desire for iPad time, I totally got that message. I think that's more an opinion than fact, however. Perhaps it could be substantiated by satisfaction surveys of kid users? The second implied statement correlates with other messages in the ad. We've discussed the indestructibility piece above, and I discuss the inappropriate content below.

Express statement: "New"/"All new" edition

The "new" can be substantiated by verifying that the release date isn't more than 6 months earlier. I'm less sure what the "all" piece does. The device probably isn't truly "all" new, in the sense that every aspect of it is less than 6 months old. Perhaps the "all" just becomes rhetorical emphasis that lots of things have changed compared to prior editions. If it's a fact claim, it's probably unsubstantiable unless it is literally *all* new.

Express statement: "HD"

I assume HD is short for "high definition." We would need to know if there are legal or industry minimum specifications for qualifying a device as "HD." If so, I would take the position that it's a fact claim, and we would need to compare the product specifications to those minimums to substantiate.

Express statement: "Kids Edition"

Implied statement: There are Fire editions that aren't the Kids Edition

The implied statement is a fact claim and easily substantiated by confirming the offering of other Fire editions.

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Express statement: “parental controls”

Express statement: “age-appropriate” content

Express statement: apps are “educational”

Express statement: access to “over 5,000” items of books, movies, TV shows, apps and games

Express statement: “kids love” the content items

Implied statement: the content featured on the depicted device will be readily available to users

Implied statement: kids can’t easily bypass the content restrictions and get inappropriate content

Implied statement: parents can trust that the content kids will obtain via the device is appropriate/“safe” for them

Implied statement: kids will enjoy the content they can get despite the device’s parental controls

Implied statement: the content can be accessed for free

Implied statement: the content can be accessed without an Internet connection

Implied statement: there is a sufficient quantity of age-appropriate content in each of the content types

Implied statement: parents are benefiting (or at least, not hurting) their children—either physiologically or psychologically—by letting them use the Kids Edition

There’s a lot going on in this sentence!

Parental controls. I think it’s a fact claim that the device has parental controls, but I don’t know what functionality consumers will assume are part of a parental control scheme. Is it a blocklist, a whitelist, a dirty word filter, a log of visited destinations, or something else? There has to be at least one of these functions, but I could see where different consumers will have different expectations about that functionality, making it a risky claim for Amazon.

The related implied statements are also risky. Kids regularly can bypass parental controls, even well-designed ones. Will the inevitable failure of the parental controls lead to legal exposure?

I don’t have a good fix for this claim, but it might be advisable to describe the parental controls in more detail. A conservative approach would also put an additional disclosure in the ad to reflect the inevitable limitations of any parental control.

Age-Appropriate Content. “Age-appropriate” is a fact claim, but like “parental controls,” we’re not sure of the claim’s scope. I imagine there is some content that no one really thinks is appropriate for kids (such as, in the US, pornography), so Amazon is representing that kids won’t be getting that. We can verify the claim by investigating how the content was selected. There may be external ratings that might expedite the review, such as the MPAA ratings or TV parental guidelines.

Otherwise, the claim’s ambiguity may create some problems for Amazon. Kids have wide ranging tastes—compare the needs of a 2 year old to a 17 year old—and it’s not clear if the device further controls the content to keep 2-year-olds from seeing content meant for 17-year-

olds. Furthermore, what's viewed as appropriate for teens will vary a lot by social and geographic norms.

I don't know if the "age-appropriate" claim adds much to the puffery statement that kids will love or enjoy the content, so I wonder if it could be deleted.

Educational Content. I'll characterize this statement as puffery. Even a shoot-em-up videogame is educational in a way. If there weren't a sufficient number of content items that were clearly identifiable as "educational" in a more traditional way, I'd nevertheless recommend deleting the statement.

Content Quantity. The 5,000 claim is easily verified by confirming the quantity available. The implied statement of a sufficient quantity of each content is harder to verify. I'd ask for the numbers by each content type and then flag the issue if a number looked uncomfortably low.

Content Availability. The ad copy is confusing about how users can access the promised content. Do they need a live Internet connection? The device photo shows what appears to be a wi-fi connection, so I'm assuming the device has wi-fi capability, but I don't know what content can be enjoyed when the device isn't Internet-connected. If an Internet connection is mandatory to enjoy the content, I think that ought to be disclosed.

Also, do users need a subscription to "Freetime," whatever that is, to access the content? The ad promises 1 year of access to Freetime, presumably at no extra cost, but will the device brick at the end of the year if the Freetime subscription isn't extended?

Suitability for Kids. The implied statement is that the device is suitable for kids. If this is a fact claim, then it runs directly into the murky science about whether kids' usage of electronic devices is advisable or not. There are some concerns about screentime on kids' cognitive development and eyesight. I imagine the scientific literature is conflicting enough that we can find ample research supporting the appropriateness of giving electronic devices to kids. However, I would want to canvass the literature; and in particular, I would want to see if there are any guidelines (say, e.g., kids under 3 should limit screentime to no more than X minutes/hours a day) that should be added as disclosures.

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Express statement: 2 year "guarantee"

Express statement: "worry-free" guarantee

Express statement: If anything happens, return the device and we'll replace it, no questions asked

Implied statement: Any replacement device will be at least as good as the original

Implied statement: There will not be any hidden costs associated with getting the replacement device

Overall, it's unclear if these statements are disclosures that modify the "toughest" statement or if they supplement it. If they limit the "toughest" statement, then they eliminate a lot of potential risk associated with that statement.

As a standalone claim, however, the guarantee raises a few questions. If Amazon's guarantee is as simple as described—tender a Fire HD Kids Edition for any reason and receive a free equivalent (or superior) replacement—then the statements are probably OK. I think “no questions asked” is rhetorical hyperbole; I interpret it to mean that there is no substantive basis on which Amazon will deny a replacement.

If Amazon in fact doesn't mean this, then the claims needs modification to be more accurate. For example, if Amazon intends to exclude deliberate destruction, it should tone down the statements. Also, if consumers have to pay any cost for getting the replacement, such as shipping in either direction, that should be disclosed. The ad doesn't make clear what happens if the device can't be returned for replacement. Presumably this means Amazon won't replace a lost device under any circumstance. It does leave open what happens if the device is pulverized into dust like the Nokia after the anti-aircraft bullet.

Express claim: 1 year of unlimited “Freetime”

The ad doesn't define Freetime, and I was OK if you didn't research it further. The name itself, including the word “free,” is confusing. Does it mean that usage is free, or is it a play on words about leisure time, i.e., “free time”? The FTC regulates the word “free,” and I'm not sure Amazon's use is consistent with it. There are no good ways to fix a claim that's baked into the service's name, so if Amazon has overclaimed with calling it “free,” the service may need a rebrand.

The word “unlimited” is always risky because there are usually limits somewhere. Data carriers have found this out as they have promised unlimited calls or unlimited data, but there in fact have been limits. See, e.g., <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data> and <https://www.fcc.gov/document/att-mobility-faces-100m-fine-misleading-consumers-0>. So long as unlimited means *unlimited*, this claim is fine. I'd need to check with the engineering/product folks to find out any hidden assumptions or limits they may have added.

As with the device generally, I am not clear if Freetime requires a live Internet connection to enjoy it. If so, this may need to be disclosed.

Express claim: the device depiction

The photo of the device communicates several potential claims, such as:

- The device size. Because the photo doesn't communicate scale, it's hard to estimate the device's size from the photo.
- The screen resolution. Is that an actual depiction of the screen, or is it simulated? I believe disclosure is required if the screen is simulated.
- Feature set. The screen shot shows a bunch of features: the wi-fi signal, the carousel presentation of content options and the menu bar of search/books/videos/apps/characters.

I'd confirm that those features are freely available on the base model. If not, I'd ask for a different photo or, at minimum, make disclosures that indicate that some features aren't available in all models.

- Product color. Will consumers be able to get the blue cover?

Most of this can be substantiated by the product specifications.

Potential Omissions

Some of the things I would want to investigate for potential disclosures beyond the existing ad copy:

- DRM. Is the device DRMed, and does that need to be disclosed? Are there reasons why the device might brick because of Amazon's retained control?
- Do users need to have an Amazon account to enjoy the device?
- As discussed a few times, do users need a live Internet connection to enjoy the device, or certain content, or the Freetime service?
- Are there any lurking privacy issues? For example, will Amazon be tracking device usage even if consumers haven't asked them to do so? Privacy issues are a paramount consideration when dealing with kids.
- Are there any unexpected limits on battery life?
- Are kids potentially able to rack up big purchases without further parental supervision?

Even if the answer were yes to any of these, I'm not sure they would need to be disclosed. That would depend on the answer!

Other Issues

Character Trademarks

The Disney name and logo is prominently displayed. The Nickelodeon name and logo is partially shown (reminded me of the Newport Cigarettes situation). The depicted characters may qualify for trademark protection: Dora, Nemo, Elmo, Lego Batman and Daniel Tiger. (Like you, I had no idea who Daniel Tiger is. He's a spinoff of Mr. Roger's Neighborhood started in 2012. One interesting point about him: the target audience is preschool kids, thus signaling that Amazon views preschool kids as part of the target users for the device, and all other representations in the ad should apply to such a young audience).

Consent may be needed from all trademark owners, including whoever has the trademark interests in Lego Batman. It would depend on two factors. First, does Amazon qualify for trademark exhaustion if it has the legal right to redistribute the content and is merely advertising that content's availability in its store? Second, even if there's no exhaustion, does the depiction create any actionable likelihood of consumer confusion? It's possible consumers will assume that the trademark owners are sponsoring/endorsing the device because of the prominent depiction of their trademarks. At the same time, Amazon may have a nominative use argument to reference

the trademark owners, although that would be more likely to protect the word mark than the character depictions.

Even if consent is required, it's possible that Amazon has obtained the necessary permissions in its content licenses with the trademark owners.

Character Copyrights

The same trademark owners discussed above may have infringement claims for possibly copyrightable depictions of their characters. I doubt 17 USC 113(c) will help because the depictions aren't of "useful articles." Fair use might help, especially because the ad doesn't depict the full characters (they are all truncated) except for Nemo. However, as we saw in class, advertisers have a tough time winning fair use arguments, especially when it's not a parody. As with trademarks, it's possible Amazon got the necessary copyright consents in its content licenses.

Publicity Rights

In the upper left of the depicted device, it's labeled "Sam's Fire." Who is Sam, and how was the name "Sam" chosen for the ad? Sam is a good generic name that isn't obviously associated with any one celebrity, but that also means there are potentially millions of "Sams" in the world who might assert that it's referring to them. Recall the "Lindsey" reference in the ETrade milk-a-holic ad. So long as we verify that Sam wasn't intended to reference anyone in particular, this should be OK.

Color Trademarks

I was intrigued by the distinctive shades of blue used for the case and orange used as the ad background. I'd inquire more about those colors. Are there competitors who are using similar colors that we might be encroaching upon? Are we potentially seeking trademark protection for either color? I'm not sure we'd do anything differently even if we were seeking trademark protection for the color, but it would be good to identify that goal so the right steps can be taken.

Copyright Clearances

We want to verify sufficient copyright permissions for:

- The device photo (the product shot)
- The ad text
- The three logos at the bottom
- The overall ad composition/layout