Santa Clara University

Advertising and Marketing Law
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Final Exam Sample Answer
Spring 2011

Overview

I tried to make this a pretty easy exam, and you had a very generous time limit. As a result, most of you did well on this exam.

Nevertheless, reading the exam answers was an eye-opener! Many of you focused on different aspects of the issues, and some of you saw details that few or none of your peers caught. This is a reminder how important it is that you run ad copy by multiple and diverse reviewers. People see very different things in the same ad!

Question 1

"Wheel of Fortune" references. After the Vanna White case, I can't believe any advertisers would invoke Wheel of Fortune without permission!

The ad copy invokes Wheel of Fortune in three ways. First, the letterboard looks very similar to the Wheel of Fortune letterboard; it even has the same outline. Because this graphic is prominently displayed in the ad and is such a strong pop culture icon, its presence alone effectively invokes the show. Second, the male looks like a game show host, especially standing next to the letterboard. I assume he's supposed to look a little "cheesy" as part of the gag. Personally, I thought he looked a lot like a young Chuck Woolery, the show host from 1975-81. A number of you thought he looked like Pat Sajak, the current host. Third, in the lower left, the "what's your cheese factor?" multi-color graphic looks vaguely like the wheel itself.

The invocation of Wheel of Fortune isn't complete. First, the word "Fl_vor" is incomplete even though the board shows other "A"s. Second, the colors of the unturned letters are yellow, but typically on the show they are green. Third, the game show host and cheese factor graphic are at best only reminiscent of the originals. Still, it's an effective invocation.

Legal implications of the invocation:

- copyright. In theory, the letterboard could be copyrighted. This seems like a stretch to me.
- trademark. The letterboard might be protected under trademark law. Notice, though, that the ad doesn't use the word mark ("Wheel of Fortune"), and it's not 100% clear that the letterboard is independently trademarkable. Further, despite the invocation, perhaps consumers would not assume that Wheel of Fortune sponsored or endorsed this ad because of its overall generic riff on game shows.

- publicity rights. One or more of the Wheel of Fortune hosts could assert that the male is intended to be him. (There have been several hosts over the years). Note that because there have been several hosts, it reduces the odds that the ad invokes any one of them—in contrast to Vanna White, who has held the letter turner role by herself for decades. Note also that the "C'mon Down" phrase (discussed below) and the "neon lights" graphic may make the male appear to be a generic game show host, not one associated only with Wheel of Fortune.

In light of all this, I would ask the marketing folks:

- do we have permission from the Wheel of Fortune producers?
- do we have permission from one or more Wheel of Fortune hosts?
- if the answer to both is no, I would want to discuss the value of disclaimers or making the invocations either more over-the-top or less identical.

The "Price is Right" References. The headline of "C'mon Down" is a well-known catchphrase from the Price is Right game show. Some of you thought the model could be Bob Barker or Drew Carey, the hosts of the Price is Right. (For some, the headline invokes the memory of longtime announcer Johnny Olsen, who actually said the words on the show). In the case of Bob Barker, he is well-known for his animal rights activism.

Assuming the "C'mon Down" phrase is trademarkable, then invoking it here raises a risk both of infringement (sponsorship confusion) and possibly dilution by blurring. On the other hand, "C'mon Down" could qualify as a descriptive fair use given that it's a common expression for a person moving from point A to point B.

As I indicate above, the combination of Wheel of Fortune and Price is Right references, plus the "everyone's a winner" phrase, could reduce the legal risk from each. They create an overall impression that the ad is riffing on game shows generally and therefore each element shouldn't look like the sponsorship/endorsement of any specific game show.

"Cheese"/"Cheesier." The ad is clearly trying to dance around the product's status as imitation cheese. It can't call itself "cheese," but it's trying to advertise itself as a cheese substitute. In addition to the "melt" claims (discussed below), the ad advances several cheese-related claims:

- "Great Cheese Fl_vor" (in the letterboard)
- "Cheesy? Without a doubt"
- "New Cheesier Taste"
- "You have the freedom to be cheesy…find your perfect cheesy match"
- The references to "cheddar" and "mozzarella"
- The "What's Your Cheese Factor?" graphic
- The domain name "Cheesechooser.com"

Most of this is puffery, as "great," "cheesiness" and "cheese taste" are so subjective that they can't be measured—although, if the product truly tasted nothing like any cheese, than perhaps the claim is literally false.

However, two claims stand out. First, the "new" cheesier taste suggests there was an "old" taste. We should verify when the change occurred and if calling it "new" is accurate. Second, the domain name "cheesechooser" seems to communicate that consumers can, in fact, choose *cheese*—exactly what consumers can't do.

"Melt." As it turns out, making an imitation cheese that melts like real cheese is hard. (It's a like the challenge of making marshmallows without gelatin as we discussed in class). Clearly, this ad is trying to communicate that the products "melt" like cheese, which would be a good competitive differentiator if true. The ad advances the "melt" claim in numerous places:

- "Made to melt!" (both in the graphic and the text), plus the implication of "turn up the heat"
- "Better melt" on the mozzarella packaging
- The quesadilla shot, which acts as a claim that the product will melt like the depiction.

Arguably, "made to melt" is not an explicit representation that the product melts like cheese, although that may be fairly implied when combined with references to "Cheesy? Without a doubt."

Is "melt" puffery? Like cheesiness, meltiness is hard to measure, and different cheeses may have different meltiness. However, many cheese substitutes don't melt at all, so it's possible to overclaim "melt" if nothing of the sort occurs. As a result, I would want substantiation for our "melt" claim from our meltologists—at minimum, to confirm that *some* melting occurs in ordinary usage, and preferably to show that our meltiness is comparable to cheese.

I would also want to confirm that the quesadilla photo depicts an ordinary and undoctored outcome.

Other Health Claims

- "cholesterol free"
- "trans fat free"
- "excellent source of calcium" on packaging
- "you can feel free to fall in love with" (as an implied claim that eating lots of this food won't have adverse health consequences)
- The company name "Galaxy *Nutritional* Food"

All of these claims need to be accurate and substantiated. Because they are health claims, they will attract extra attention. The company name, with the word "nutritional," is unresolvably problematic. It also heightens the implications of the other health claims.

"Vegan"

- the product names
- the reference to "Hey Vegans" in the title, although this claim might derive meaning only from the remainder of the ad
- "Dairy Free"
- "Lactose Free" on packaging
- "Casein Free"

The problem with "vegan" claims are that "vegan" doesn't have a universally accepted definition. Typically a vegan item is made without any animal products at all, and we would want to confirm that the product itself lacks any animal products. However, like the "green" claims, there could be an argument that a "vegan" claim reaches to the entire supply and distribution chain, which would be a much more difficult claim to verify. For example, in theory, vehicles moving the items as part of the supply or distribution chain could run on bio-diesel run on animal fat.

Other Issues

- Other IP clearances. We need to confirm the copyright permission to use the quesadilla photo, the photo of the male model, the letterboard depiction (was it a copied photo?), the product photos, and possibly the "What's Your Cheese Factor?" graphic.
    - Some of you also noted possible copyright concerns with the microphone, tuxedo and ring (see Davis v. Gap). In fact, the tuxedo wouldn't be protectable under copyright (there is a special exclusion for clothing design), and the microphone and ring probably lack "conceptual separability" to be protectable under copyright either. To the extent that any of these elements are trademarkable, there could be a problem with implied sponsorship/endorsement.
    - We also need to confirm a publicity consent from the male model.
- "Free coupon." The word "free" is heavily regulated. Here, even if we don't charge to acquire the coupon (a weird thought), consumers still need a computer to access it.
- The "everyone's a winner" statement sounds like puffery. (Compare the Nixon Peabody theme song).
- The rice and soy based claims need to be confirmed.

My scoring guidelines (these are my guidelines, not hard-and-fast point allocations):

- Wheel of Fortune discussion: 0-2 points
- Cheese/Cheesier: 0-2 points
- Melt: 0-2 points
- Up to 1 point each for
    - Price of Right discussion
    - Other Health Claims
    - Vegan
    - Other IP clearances
    - Free coupon

Question 2

It may be obvious, but *don't do what Macroshift did!* Even if Macroshift avoids liability from competitors or an agency, it is fully exposed to a publicity rights lawsuit from Jane.

Is This an Ad?

Note that the underlying source material comes from Jane's presumably truthful evaluation of the product. When Jane makes the video, it's not an ad. When Napple publishes the video on its website, did the video become an ad? Advertising law does not handle user-generated ads very well. If Napple's republication on its website doesn't make the content into an ad, does Macroshift's republication on its website now make it an ad? Unquestionably, publishing the video on TV makes it an ad. Notice that this might be a situation where we know an ad when we see it, even though content can change its status depending on who is publishing it and how.

Procedural Issues

We'll discuss the substantive merits of a challenge in a moment, but let's start by looking at Napple's procedural options. Napple can challenge the ad in the following ways:

- suing Macroshift in court
- initiating a NAD proceeding
- challenging the ad at the TV networks
- filing a complaint with a government enforcement agency (FTC or state AGs)
- publishing counter-speech, such as launching its own ad campaign or challenging Macroshift through a PR campaign

Napple also could choose to do nothing.

Some considerations to navigate through these options:

Timing: If Napple is willing to wait for results until after Macroshift finishes its ad campaign, then any of the options are fine timing-wise. For example, if the video will be online indefinitely, a resolution after the end of the TV campaign may still be useful.

However, if Napple wants to prevent Macroshift from running the TV ad campaign, its only time-responsive option would be to seek a TRO in court. The TRO would could disrupt Macroshift's advertising schedule and maybe force it to come up with new ad copy quickly to preserve the ad slots it has purchased. Challenging the ad at the TV networks could also be time-responsive, but it would require pursuing each ad network individually.

NAD proceedings will take longer than 6 weeks, and Macroshift could put the NAD proceedings on hold by moving the dispute to court or doing a publicity campaign. Government intervention from the FTC or state AGs will take much longer than all other options.

Coverage: NAD proceedings don't cover the web publication of the video. However, because Macroshift is publishing the video both on the web and via broadcast TV, the NAD proceeding implicitly reaches the claims made in the web video as well.

Risk of Backfiring: a court suit, a NAD proceeding or a government investigation all could adjudicate the industry's claims about MP6 batteries. This in turn could put Napple's own

advertising practices at risk. There's also the "Streisand Effect" risk, where legal enforcement could call more public attention to this issue than if it were ignored.

Freedom of Action: An NAD proceeding would handcuff Napple's ability to do a counter PR campaign.

Conclusion. Napple's best bet is likely to counter-advertise. This is a productive use of dollars, in the sense that Napple is investing in more exposure to consumers, rather than trying to tear down Macroshift. If Napple doesn't want to spend any money, Napple might also decide to do nothing and let Macroshift's ad run its course.

Bringing a lawsuit can be expensive and invites retaliation from Macroshift, plus it has a risk of backfiring depending on the court's ruling. A NAD proceeding, though quick, isn't timely enough for this circumstance and imposes handcuffs on Napple's counter-speech. Napple would be playing with fire seeking government scrutiny of the industry. Further, the odds of convincing a government agency to pursue the matter is low because the agencies could expect competitors to do the necessary policing work.

Substantive Issues

As a general principle, by converting her testimonial into an advertisement, Macroshift takes responsibility for Jane's words. See the FTC Endorsement and Testimonial Guidelines. Note that this may be a more colorable issue if Macroshift republished her testimonial only online due to 47 USC 230.

Battery Life Length. Did Jane state a fact or an opinion about the battery life length? The wording expresses her "feeling," and assuming that's a true sentiment, then we get into a tricky area about whether Macroshift offering up her sincere feelings is advancing its own claim.

Battery Temperature. Are Jane's statements puffery? It seems exaggerated to say that the device runs so hot that it could fry an egg.

Trademark Infringement/Dilution. As usual with comparative ads, Macroshift's ad references Napple's trademark Dopi. This could support a prima facie case of trademark infringement, although I'm skeptical about the likelihood of consumer confusion. Napple could also argue that the critical remarks constitute tarnishment to support a dilution claim, although that argument isn't all that persuasive given that Napple publishes the same content on its site.

I think Macroshift's use should qualify as a nominative use. The video uses the Dopi trademark to refer to the Dopi product, and given Jane's critical comments, consumers aren't likely to believe that Napple sponsored or endorsed the video. On the other hand, Napple did publish the same video for its own commercial benefit, so maybe consumers would think that Napple sponsored the content. Napple could also argue that showing its product wasn't necessary to make the comparative claims. I don't find these retorts from Napple very convincing. Nominative use would be a defense to both infringement and dilution.

My scoring guidelines (these are my guidelines, not hard-and-fast point allocations) (one point each):

- Macroshift's ratification of Jane's testimonial (converting content to ad)
- Procedural evaluations
    - ID all options
    - Evaluation (0-2 points)
    - Bonus: TRO > NAD timing-wise
    - Bonus: Legal proceedings could backfire substantively
    - Reach a conclusion
- Assessment of Jane's substantive statements
    - facts v. opinion
    - puffery
- Trademark
    - infringement
    - dilution