



Advertising & Marketing Law (Law 712)
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Midterm Exercise Sample Answer
Spring 2013

Overall observation: if Kindle has multiple product models (the case today—including models without “buttons”), the ad should specify the model we’re depicting/comparing. Otherwise, the “Kindle” reference is ambiguous. The Kindle photo partially qualifies the claim by depicting a single model, but that may not be enough to cure the ambiguity.

Accurate Depictions of Kindle and Nook (including screen resolution and colors). Fact claim. I would verify that the product shots weren’t manipulated, either via funky lighting or Photoshop. The screens depict different device uses, but I’d confirm both are accurate depictions. I also would verify that the Nook screenshot shows only freely available features. If the depicted features cost extra, their prices should be disclosed or the claim should be qualified.

Relative Sizes of Kindle and Nook are Accurate. Fact claim. This might have been puffery, but Nook subsequently claims to be smaller than Kindle, so product size is part of the ad’s claims. I would verify the ratios based on official product specifications. If there’s any question about the ratios, it may be possible to use a disclaimer.

Books Don’t Need Buttons. Puffery. The implicit claim, that the Kindle “needs” buttons, is also probably puffery.

Kindle Has Buttons and Nook Doesn’t. Fact claim. Product shots normally substantiate this claim. Here, the Nook product shot has *something* like a button on its front. If it’s not an on-off switch, there should be at least one more button-like item on the Nook. So, what’s a “button”? How does it differ from a “key,” a “switch” or some other input device? Nook is clearly parsing words finely—maybe too finely. I don’t have an easy fix for this issue.

You Can Read Books on a Nook. Fact claim. The Nook screenshot seems to substantiate the claim, although it depends on what a “book” is. For more on the ambiguity of what constitutes a “book,” see http://blog.ericgoldman.org/archives/2011/10/did_california.htm.

Nook Is All-New. Probably puffery. It can’t be literally true that Nook is *all* new unless every single hardware and software element changed from Nook version X to version Y. However, there is an implicit claim that Nook has substantially new attributes. I believe that’s a fact claim that needs substantiation.

The Reader Operates by Touch. Fact claim. This can be substantiated through product use. Note an implicit claim that the touch function works properly; this is the kind of claim that the class action lawyers tendentiously try to stretch into a no-defect warranty.

The Reader's Touch Function is Simple. Puffery.

Nook is Smaller Than Kindle. Fact claim. To be accurate, the Nook should be smaller on all three dimensions (height, length, width). This should be easy to substantiate based on the official product specifications for both products. If it's smaller only on 2 of the 3 dimensions (e.g., the Nook is thicker than the Kindle), the claim should be modified accordingly. The photo suggests that the Nook may be wider than the Kindle. One possibility is that the height x width is smaller. If so, the smaller claim is ambiguous. If the photo misportrays the relative widths of the products, then that creates a different issue that needs to be fixed.

Nook is Lighter Than Kindle. Fact claim. This can be substantiated using official product specifications.

Nook Has Two Months of Battery Life. Fact claim. The most conservative substantiation would be an empirically rigorous product test that includes 24x7 active use of the Nook for 2 months. It would be less reliable to substantiate the current claim based on some usage designed to simulate actual field usage. I believe it would be a misrepresentation to substantiate the current claim based on the duration of idle/inactive mode (though the claim could be modified to reflect this). If we can't use the most conservative substantiation, I might ask the marketing folks to modify the claim to incorporate more details about how Nook achieves 2 months of battery life (e.g., "in ordinary use" if that's the substantiation). I don't think saying "up to" 2 months meaningfully qualifies the claim; consumers would likely disregard the "up to" part of that claim.

Note the implicit claim that Nook's battery life is longer than Kindle's. Nook ought to substantiate this implicit claim and do so on an apples-to-apples basis, i.e., no fair comparing Nook in idle mode vs. Kindle in active use.

ZDNet Quote is From ZDNet. Fact claim. This is simple to substantiate the claim through double-checking the ZDNet source, or Nook might have obtained prior approval to use the quote in the ad.

Nook Blows Kindle Out of the Water. Puffery. Note: even though this statement comes from ZDNet, Nook ratifies the statement by incorporating it into the ad, and therefore Nook takes responsibility for any fact claim in the quote.

Barnes & Noble Stores Are in the Reader's Neighborhood. Puffery.

The Local B&N Store Carries Nook. Fact claim. This is a tricky claim to substantiate because it's possible/probable that not every B&N store carries the Nook or has it in stock when the consumer arrives. Ads often disclaim that availability may vary. Unless we're convinced the Nook is truly available universally, I would recommend qualifying the claim.

Nook.com Carries Nook. Fact claim. This is easier to substantiate because Nook.com is only 1 outlet, compared to hundreds of physical space B&N retail outlets. Still, there's always a risk of stockouts. Some of you discussed the claim that the copy says prospective buyers may "touch" the Nook at Nook.com. I think that's puffery.

Nook Costs \$139. Fact claim. This is also a tricky claim to substantiate. If all B&N stores are company-owned, it's possible to have company-wide uniform prices; but if there are any franchise locations, they could price the Nook higher than MSRP. That's why ads often qualify the price claim, such as "prices may vary."

"Read Forever." Puffery. I could see this as an implicit claim that the Nook operates forever, though I think the earlier claim of 2 months of battery life likely preempts that claim.