



Advertising Law

EXAM NO. _____

GEORGETOWN UNIVERSITY LAW CENTER
EXAMINATION IN ADVERTISING LAW
(Take-Home Examination)

Professor Rebecca Tushnet

Fall 2011

INSTRUCTIONS:

1. This is an OPEN book exam. You may consult any inanimate object; however, no credit will be given for citations to any materials that were not assigned for this course. You may not discuss the content of this exam with any other person, whether or not that person is enrolled in this class. Although the questions are based on real situations, I have changed the facts in ways subtle and not-so-subtle, so you could really do yourself more harm than good by looking for outside information on the fact patterns.
2. This 8 hour exam must be picked up and returned using the Online Exam/Paper Management System. This exam will be available beginning at 8:30 am on December 6. You may only work on the exam for 8 hours. The exam must be submitted within the 8 hour time limit and no later than 6:30 pm on December 17.
3. Structure: There are 4 questions. Each is worth a stated percentage of the total exam grade. You should allocate your effort accordingly.
4. **There is no specific word limit. Thus, please think, organize, and prioritize carefully before you write.** Cogent, well-structured answers that devote the most analysis to the most important issues will be graded more highly; poorly-organized, ungrammatical, or chronically misspelled answers will receive lower grades. Please do not waste space by restating the question or the facts of cited cases. If you need additional facts to answer a question, please state the specific facts needed and how they would affect your analysis.
5. This exam is final. There will be no clarifications or any changes. If you believe there is an error, inconsistency, or omission in the exam, please state your assumptions about the issue within your discussion of that issue.
6. **Citation to relevant materials is required in order to receive full credit.** Please indicate why the cited materials are relevant. You do not need to use Bluebook form. For example, simply state: (Wal-Mart) or (§43(a)) or (§1127(a)) – either form for the statutory citation is fine. You can use italics, bold, or whatever you're most comfortable with to indicate case names.
7. **In answering these questions, consider only causes of action we have studied in this course** (for example, do not consider trespass to chattels or the patent false marking statute). **READ THE RELEVANT STATUTE.** Remember that laws differ among states. Assume that jurisdiction is proper and that there are no statute of limitations or other general procedural bars.

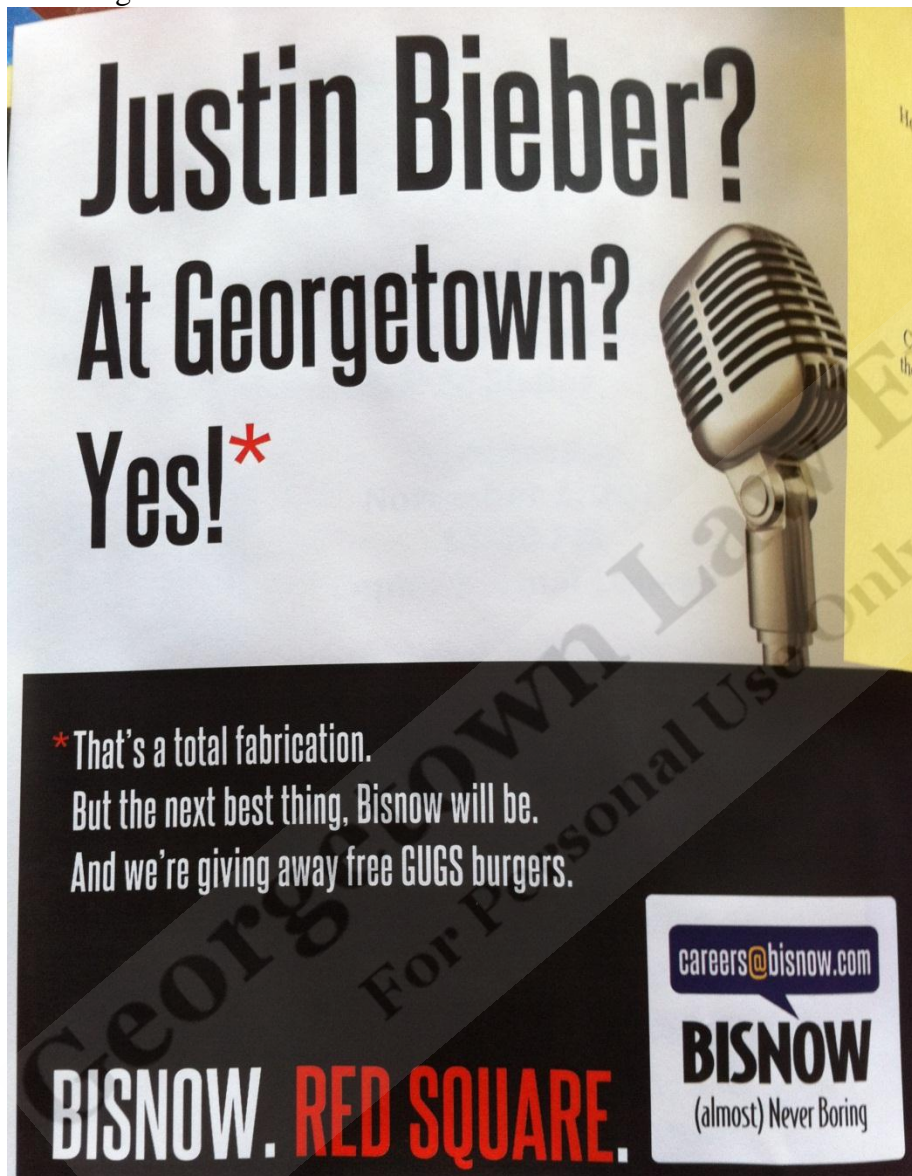
This exam consists of 8 pages, including this cover page. Please be sure your exam is complete.

Please be sure that you use your exam number (not your student ID number or social security number).

BY SUBMITTING THIS EXAM THROUGH THE ONLINE SYSTEM, I AFFIRM ON MY HONOR THAT I AM AWARE OF THE STUDENT DISCIPLINARY CODE, AND I HAVE NOT WORKED MORE THAN 8 HOURS ON THIS EXAM.

Question 1 (30%): Bisnow

Your client Bisnow, which provides services to college students seeking jobs, wishes to run the following ad:



Red Square is an area next to the Georgetown Campus Intercultural Center that is used to advertise for events and performances, causes and organizations. Bisnow plans to be present in Red Square 10 am-1 pm during the Monday-Friday period following the posting of this notice, each day with 100 burgers on hand to give out, one for each Georgetown student who fills out a card providing Bisnow with his or her contact information. Assume that the governing law is identical to that in New York (ignoring choice of law). **Evaluate the potential legal issues with the ad (including the potential sources of any claims), and offer your client recommendations for what it should do.**

Question 2 (25%): Tom Tomorrow

Background: U.S. News gets its information from the colleges it ranks. One important statistic is the salary range for graduates in full-time private sector jobs. Schools in turn rely on graduate self-reports both of employment and of salary, and some graduates answer the first question and not the second. Hundreds of colleges provide salary figures taken from half or fewer of the graduates with private full time jobs. While the reporting rate generally goes higher the further up the rankings one goes, some lower ranked schools have relatively high response rates, well over 80%, probably because it is possible to provide more information with more effort put into collecting it.

Bronx College, ranked #435 in U.S. News, reports the following salaries for full-time private sector jobs in its US News profile: \$40,000 (25th percentile), \$80,000 (median), \$80,000 (75th percentile). The response rate was 28%. To find the response rate, a user of the US News profile would have to have bought a subscription to US News's college report. These salary numbers compare favorably with the reported salaries for much higher-ranked schools, including Duke, Michigan, Texas, UCLA, and Fordham, which also have much higher response rates.

When questioned, the dean defended the numbers as accurate but admitted that they were incomplete. More detailed data is provided on the college website. "In these materials and in our conversations with students and applicants," the dean asserted, "we explicitly tell them that most graduates find work at salaries between \$35,000 and \$75,000." He continued, "Students are not stupid and they're not naïve."

The information provided on the Bronx College employment statistics page on its website, however, did not state the range identified by the dean. Nor did Bronx College directly inform its students that only 62 percent of the class of 2007 (nine months after graduation) had obtained jobs, and 27 percent of these jobs were part time. The website did state that "Approximately 20% of our 2007 graduates reported salary information."

(For these purposes, assume the date is June 2012.) Tom Tomorrow, a 2012 graduate of Bronx College who majored in political science and graduated in the top 60% of his class, has not found a job. He read the U.S. News report but didn't purchase a subscription; he also visited the Bronx College website. He chose Bronx College over similarly-ranked schools with worse U.S. News employment numbers because he believed Bronx College would offer him the best job prospects. He has incurred over \$60,000 in debt as a result of attending college. Unemployment in the US is generally high, with a 9% national average that goes substantially higher in some areas.

Tomorrow, acting as a putative class representative, sues Bronx College for violation of New York's General Business Law §§349 and 350. G.B.L. §349 states: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful," and provides that "any person who has been injured by reason of any violation of this section may bring an action."

G.B.L. § 350 states that "False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful," and § 350-a states:

The term “false advertising” means advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect. In determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. For purposes of this article, with respect to the advertising of an employment opportunity, it shall be deemed “misleading in a material respect” to either fail to reveal whether the employment available or being offered requires or is conditioned upon the purchasing or leasing of supplies, material, equipment or other property or whether such employment is on a commission rather than a fixed salary basis and, if so, whether the salaries advertised are only obtainable if sufficient commissions are earned.

Tomorrow seeks certification of a class of graduates who did not find employment paying at the 25th percentile reported to U.S. News. **Evaluate Tomorrow’s claims.**

Question 3: Black Friday (10%)

Consider the following description of sales techniques:

Retailers have an arsenal of evidence-based strategies for making sure you walk out of their stores with far more than you intended to buy.

1. An inflated "suggested list price" clearly labeled next to the store's discounted price. Neuroscientists know that nothing lights up the brain's reward center faster than a bargain. Discount stores show you the high "suggested price" so that when you see the real price, you'll automatically calculate how much money you're saving. Normally when you consider buying something, the brain registers a kind of pain response at the thought of spending money. But with these sneaky price labels, the brain feels the bliss of saving \$40, not the pain of parting with \$19.99.
2. Take a deep breath. What's that you smell? Scents to put you in the mood for shopping, wafting at you from carefully hidden scent delivery systems. Retailers know that a tempting smell can be the fastest way to a shopper's wallet, and studies confirm that people spend more when the scent of a store triggers positive associations. Scent marketers take advantage of this by creating unique scent profiles designed to appeal to a store's typical customer, like this profile created by Scent Air for Bloomingdale's: "The soft scent of Baby Powder speaks to a mother's memory in the infant department. The intimate apparel department is inviting with the soothing scent of Lilac, while Coconut wafts through the swimsuit department. And during the holiday shopping season the scents of Sugar Cookie, Chocolate and Evergreen create a warm and pleasant experience."
3. Food sales in stores that specialize in non-food products. More and more superstores are adding fast-food restaurants and snack bars. The goal isn't just to turn a profit on cinnamon buns and popcorn, or to keep you fueled for shopping. They're betting that the sight and smell of these treats will make everything—even wire-mesh trash cans—more tempting. And they have good reason to believe this: studies show that high-fat, high-sugar foods shift the brain into a state that makes you more likely to take financial risks and seek instant gratification. It doesn't matter if you indulge or not -- in fact, if you resist the snacks, you may have less willpower to resist the sales.
4. Time pressure. By putting a deadline on the best deals (think 4-6 AM specials), stores create a sense of urgency. You'll be less likely to think twice about a purchase and more likely to throw questionable buys into your cart. It also helps retailers pack the aisles with a little competition for the best deals. We are, in our evolutionary hearts, still hunters and gatherers. The challenge of beating other shoppers to a bargain can leave us just crazed enough to fill our carts with stuff we don't need -- but certainly don't want to lose out on because another shopper grabbed it first.
5. The give-away. Expect stores to advertise or prominently display an item so deeply discounted, they are probably taking a loss on it. They aren't doing this out of the holiday giving spirit. The trick here is to stun you with a price so low that you won't doubt the value of less

steeply discounted items. First impressions carry a lot of weight, and if a store impresses you with the very first bargain you see, you'll trust the prices of other merchandise.

Pick one (and only one) of these techniques, and present arguments for why the FTC should or should not regulate them under §5 (“unfair or deceptive acts or practices in or affecting commerce[] are hereby declared unlawful”). Do not consider the details of administrative procedure, but you may make any legal or policy argument you consider relevant.

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Question 4 (35%): Hurlosec

In June 2011, Acme Co., which produces the over-the-counter anti-nausea medicine Hurlosec, launched a nationwide advertising campaign that included print advertising and point-of-sale materials using the following headline:

HURLOSEC
Anti-Nausea Medicine
Better Than No-Nausea At Preventing Sea Sickness.

The claim was supported by a well-controlled clinical study which showed that 4 of 5 patients had a substantial-to-complete reduction of sea sickness symptoms when taking Hurlosec.

The same clinical trial evaluated a competing anti-nausea medicine, No-Nausea, made by Beta Co. The study showed that No-Nausea provided substantial-to-complete reduction of symptoms in 3 of 5 users.

Beta Co. is the market leader with 45% of the market. Acme Co. has 25% of the market.

By August 2011, Beta Co. determined that its sales had trended downward, and that the beginning of this trend correlated to the launch of the Acme Co. ad campaign. Beta Co. commissioned a national mall intercept survey by expert Dr. Ivan Smith. Dr. Smith performed a 400-consumer survey divided equally into two cells.

The control cell was shown an ad for Hurlosec claiming that it “prevents sea sickness.” The test cell was shown the ad at issue. The survey asked “Did the ad (1) compare Hurlosec to No-Nausea, (2) not compare Hurlosec to No-Nausea, or (3) are you not sure?” In the test cell, 85% perceived a comparative message, while only 12% perceived a comparative message in the control cell. The survey then asked those subjects who perceived a comparative message what that message was. All of those subjects gave answers with some variation on the term “better.” After that, those subjects were asked “Did the ad say that Hurlosec was better than No-Nausea for some types of nausea, all types of nausea, or are you not sure?” In the control cell, of the 24 respondents who received a comparative message, 18 of them (9% of the total) said that Hurlosec was better than No-Nausea with regard to all forms of nausea relief. In the test cell, 80 respondents (40% of the total) said that that Hurlosec was better than No-Nausea with regard to all forms of nausea relief. The remainder in both cells was almost equally divided between respondents who said “some types” and respondents who weren’t sure.

Dr. Smith concludes that 31% of consumers shown the Hurlosec “better” advertisement take away the following false implied message: Hurlosec is superior to No-Nausea with regard to all forms of nausea relief.

This message is false because Acme’s superiority claim relates only to sea sickness and not other forms of nausea. Sea sickness is a type of motion sickness or kinetosis, which is marked by the symptom of nausea (other symptoms are dizziness and fatigue). However, nausea can also be caused by other factors such as stomach flu, stress, a bad meal, and pregnancy. Where the

nausea is caused by any factor other than motion sickness, No-Nausea is clinically proven to be superior to Hurlsec.

On the basis of Dr. Smith's survey, Beta Co. has filed a Lanham Act false advertising complaint and a motion for preliminary injunction in the district court for the state of Utopia, in the mythical Thirteenth Circuit. Beta Co. also submits a declaration from John Thompson, the head of marketing, establishing the sales trend and substantial investment in the No-Nausea brand.

Analyze the Lanham Act claim and determine how the case should be resolved, recognizing that precedents from other circuits may be persuasive authority but are not controlling.

END OF EXAM

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