PUFFERY IN ADVERTISING

Institute for Information Law and Policy
New York Law School

April 22, 2009
BS&P Mission

Ensure all aspects of commercial content are tasteful, truthful, accurate and compliant with ABC and industry guidelines.

- Substantiate all express and implied claims.
- All advertising messages should be prepared with proper consideration of the type of product being advertised, the time of broadcast, and the audience to whom the advertised product is directed.
- Good taste must always govern the content, presentation, and placement of the advertising.
Commercial Clearance Process

- Review advertising from script to final cut:

<table>
<thead>
<tr>
<th>Client</th>
<th>Product:</th>
<th>SRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Job Description:</td>
<td>Medium:</td>
<td>3D TV</td>
</tr>
<tr>
<td>Original Job Number:</td>
<td>ISCI:</td>
<td></td>
</tr>
<tr>
<td>Re-taping Job Number:</td>
<td>Producer:</td>
<td></td>
</tr>
<tr>
<td>Creative Team:</td>
<td>Date:</td>
<td>3/308</td>
</tr>
<tr>
<td>Title:</td>
<td>Comments:</td>
<td>with new offer</td>
</tr>
</tbody>
</table>

**VIEW/AUDIO**

PAUL:
LEGAL:

**ANNIE:**

**SCRIPT**

| Date: 02.06.08 |
| Agency: |
| Client: |
| Title: |
| ISCI: |
| Length: 30 |
| Audio: Stereo |

Wednesday, April 29, 2009
Commercial Clearance Process

Advertiser and agency develop commercial material and submit to ABC BS&P for review.

Advertiser and agency work together to ensure that commercial material complies with all applicable rules and regulation.

BS&P Editor and agency work together to ensure that commercial material complies with all applicable rules and regulations.
Commercial Clearance Process

- Ensure compliance with **FTC** rules and Regulation.
- Ensure compliance with **FCC** rules and Regulation.
- Ensure compliance with **ABC** business policy.
Advertising Law Basics

- Advertisers must possess substantiation for all express and implied advertising claims.

- Advertisers can be challenged for making unsubstantiated claims.

- Advertisers can be challenged in court, at the N.A.D., or at TV Networks (BS&P’s Challenge Team).

- Advertisers may resolve the issue amicably between themselves.
The Significance of “Puffery”

- Puffery is *not actionable*.

- Puffery is an advertiser’s *defense* to a challenge or allegation of false or misleading claims.

- Professor Prosser
  - “The puffing rule amounts to a seller’s privilege to lie his head off so long as he says nothing specific, on the theory that no reasonable man would believe him or that no reasonable man would be influenced by such talk.”
Puff On This – The Law of Puffery

Second Circuit Court of Appeals

Puffery Constitutes:

- “Subjective claims about products, which cannot be proven either true or false.”
- “An exaggeration or overstatement expressed in broad, vague, and commendatory language… The ‘puffing’ rule amounts to a seller’s privilege to lie his head off, so long as he says nothing specific.”
Puffing Away…

Second Circuit Court of Appeals (Cont.):

“[P]uffery can come in two different forms…The first form…‘a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion’…The second form…is ‘an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying.’”
Puffing Away…

The National Advertising Division

American Saw & Manufacturing Co. D/B/A Lenox (Lenox Edge and Irwin Blue Blades), Report #4278, NAD Case Reports (Feb 2005).

“In determining whether a claim is ‘puffery,’ or an objective, measurable claim, the NAD considers several factors, including: whether the representations concern general matters that cannot be proven or disproved; whether the statements are distinguishable from representations of specific characteristics that are measurable by research or test; or whether the wording uses expressions of opinion that will be discounted by the buyer.”
Puffing Away…

The National Advertising Division (Cont.):

- “Obvious hyperbole, exaggerated displays of manufacturer’s pride in its product and other non-provable claims, the truth and accuracy of which cannot be determined, have been found to constitute puffery.”
Puffing Away…

**FTC – Federal Trade Commission:**

- “[Puffery is a] term frequently used to denote exaggerations reasonably to be expected of a seller to the degree of quality of his product, the truth or falsity of which cannot be precisely determined…[It is a statement that] is either true, or it is false; and accordingly such a determination must be made.”
A Framework for Thinking About Puffery

**Starting Point:** An advertiser does not have substantiation and/or argues that its statement is puffery.

- **Is the statement a claim or is it puffery?**
  - Would a reasonable buyer be justified in relying on the claim?
    - a) Can the challenged statement alone be proven *true* or *false*?
    - b) Are there other objective statements in the context of the commercial that would lend objectivity to the challenged statement?
A Framework for Thinking About Puffery (cont.)

2) “Yes” to a) and/or b):
   - Advertiser’s statement is a claim, not puffery.
   - Advertiser must discontinue or modify the claim.

3) “No” to a) and b):
   - Advertiser’s statement is puffery.
   - Advertiser can continue to use statement.
Puffery Cases


- Commercial claims:
  - Papa John’s uses “Fresh, vine ripened tomatoes,” “clear filtered water” for dough, and lets yeast “work its magic for several days.”
  - “The biggest chain” (i.e., Pizza Hut) used “remanufactured tomato paste,” “whatever comes out of the tap,” and “frozen dough or dough made the same day.”
Puffery Cases

_Pizza Hut, Inc. v. Papa John’s International, Inc., 227 F.3d 489 (5th Cir. 2000). (Cont.)_

- Each phrase independently was a “general statement of opinion regarding the superiority of [the] product over all others.” – “Typical Puffery.”
- Merely joining the two phrases did not change the analysis or the outcome.
Puffery Cases

*Pizza Hut, Inc. v. Papa John’s International, Inc.*, 227 F.3d 489 (5th Cir. 2000). (Cont.)

- Commercials included objective claims about dough and sauce preparation.
- Dough and sauce claims were factually true but misleading because there was no evidence that Papa John’s ingredient-preparation methods were superior to Pizza Hut’s, as implied.
- Conclusion: the misleading ingredient claims converted the slogan into a misleading statement.
Puffery Cases

Italian American Pasta Company v. New World Pasta, 371 F.3d 387 (8th Cir. 2004).

- Challenged statement: Italian American Pasta’s slogan on its packaging, “America’s Favorite Pasta.”
- Additional claims:
  - “Quality Since 1867,” “Made from 100% Semolina,” or “Made with Semolina.”
  - Pasta lovers have enjoyed Mueller’s (the brand) pasta for 130 years and Mueller’s pasta cooks to perfect tenderness every time because Mueller’s uses 100% pure semolina milled from the highest quality durum wheat.
Puffery Cases

*Italian American Pasta Company v. New World Pasta*, 371 F.3d 387 (8th Cir. 2004). (Cont.)

- “America’s Favorite Pasta” alone.
- Court looks to dictionary:
  - “favorite”: “markedly popular”
  - “popular”: “well liked or admired by particular group or circle”
- “America” is a “non-definitive person.”
- “Well-liked” and “admired” are subjective and do not provide a benchmark for measurement or a “quantifiable threshold in sheer number, percentage, or place in a series.”
- Alone, the statement was puffery.
Puffery Cases

*Italian American Pasta Company v. New World Pasta*, 371 F.3d 387 (8th Cir. 2004). (Cont.)

- “America’s Favorite Pasta” in context.
- The paragraph and phrases that accompanied “America’s Favorite Pasta,” did not transform the slogan into a factual one.
- Claims in paragraph did not suggest a benchmark by which the veracity of the statement, “America’s Favorite Pasta,” could be determined.
- In context, the statement was puffery.
Puffery Cases

*Italian American Pasta Company v. New World Pasta, 371 F.3d 387 (8th Cir. 2004). (Cont.)*

- “America’s Favorite Pasta” and a consumer perception survey.
- 33% of New World’s survey participants perceived the statement to mean “number one brand.” 50% perceived the statement to mean “national brand.”

- Cited to a 7th Cir. case, *Mead Johnson & Co. v. Abbott Laboratories*, “never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held…It would be a bad idea to replace the work of [dictionary] professionals with the first impressions of people on the street.”

- Conclusion: the statement was still puffery.
Puffery Cases


- Issue: Visual puffery.
- Internet banner ads with side-by-side visual comparison of HD service.
- TWC’s HD service was depicted as being grossly pixilated.
- Generally, images are specific and measurable.
- Here, depiction of TWC’s service was literally false, but “the comparison [was] so obviously hyperbolic that ‘no reasonable buyer would be justified in relying’ on it in navigating the marketplace.”
- Conclusion: visual depiction was puffery.
Puffery Cases

**American Saw & Manufacturing Co. D/B/A Lenox (Lenox Edge and Irwin Blue Blades), Report #4278, NAD Case Reports (Feb. 2005).**

- Lenox print ad: “**One of our blades cuts three streets and two cul de sacs worth of insulation. Theirs won’t even get you to the house next door.**”

- Ad does not specifically quantify performance, but could be reasonably understood to mean that Lenox blades will last substantially longer than Stanley blades when cutting insulation.

- Conclusion: statements were claims.
Puffery Cases


- Nescafe advertisement: “*Nescafe delivers brand credibility as the world’s #1 coffee brand.*”
- Claim was quantifiable; it could be measured and defined.
- Moreover, the audience for this ad consists of food service consumers who are likely to rely on such a claim.
- Conclusion: statement was a claim.
Nestle USA (Nescafe Frothe cappuccino), Report #4263, NAD Case Reports (Jan. 2005) (Cont.)

- Nescafe advertisement: “[Nescafe] delivers consistently great flavor” and “Highest quality ingredients.”

- Cited to Pizza Hut v. Papa John’s: the statement, “Better Pizza,” “epitomizes the exaggerated advertising, blustering and boasting by a manufacturer upon which no consumer would rely.”

- NAD found Nescafe’s claims to be monadic and without qualifying attributes that would subject the claims to objective measurement.

- Conclusion: statements were puffery.
Puffery Cases

Nestle USA (Nescafe Frothe cappuccino), Report #4263, NAD Case Reports (Jan. 2005) (Cont.)

- Nescafe advertisement: “The best compact specialty coffee solution.”
- In context, Nescafe also advertised product’s “compact design,” beverage options, including “specialty” items, and pricing.
- These attributes were all objective and measurable against competitors.
- The touted attributes provided a basis of measurement for the challenged statement.
- Conclusion: statement was a claim.
Did They Puff?

Which of the following were found to be puffery:

- Advil’s statement: “Like Tylenol,” “doesn’t upset …the stomach.”
- Bayer’s statement: “the world’s best aspirin” that “works wonders.”
- Dannon’s statement: our yogurt is “nature’s perfect food.”
Did They Puff?

ANSWERS

- Advil’s statement: “Like Tylenol,” “doesn’t upset … the stomach.” = NOT PUFFING

- Bayer’s statement: “the world’s best aspirin” that “works wonders.” = PUFFING

- Dannon’s statement: its yogurt is “nature’s perfect food.” = NOT PUFFING
Did They Puff?

Which of the following were found to be puffery:

- **Penzoil’s statement:** “longer engine life and better engine protection."

- **3DO’s statement:** “The most advanced home gaming system in the universe.”

- **Nestle’s statement:** it sells the “very best chocolate.”
Did They Puff?

ANSWERS

- Penzoil’s statement: “longer engine life and better engine protection.” = NOT PUFFING

- 3DO’s statement: “The most advanced home gaming system in the universe.” = PUFFING

- Nestle’s statement: it sells the “very best chocolate.” = PUFFING
Thinking about Puffing…


“[T]he doctrine of puffery is shabbily under-theorized…If puffery were as inconsequential as the puffery doctrine holds it to be, then profit-maximizing corporations would not engage in it…And, sure enough, empirical evidence reveals that advertising conventionally categorized as ‘puffery’ does indeed influence the behavior of ordinary consumers…”
Thinking about Puffing…

Influence & Reasonableness & Policy

- Where do you think the influential effect of a statement fits within the puffery analysis?

- The (reasonable) consumer is presumed to value objective statements over mere influential statements in their buying decisions.

- Policy point: protecting the consumer through more regulation versus allowing the consumer to freely decide.
Recap…

- Claims are statements capable of measurement and can be proven true or false.
- Advertisers must possess substantiation for all express and implied claims.
- Puffery statements either cannot be proven true or false or are overblown statements upon which no reasonable consumer would rely.
- Puffery statements do not require substantiation and they are not actionable.
- Puffery law presumes that consumers think critically about advertising and apply that critical thinking to buying decisions.
- Policy points of advertising law and puffery: protecting the consumer versus allowing the consumer to freely make buying decisions.