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The Good, the Bad, and the Airbrushed:
A Review of Puffery in Advertising

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INTRODUCTION

As the economic outlook for Asean Nations steadily improves, marketers are poised to flood each developing market with their goods and services. Advertising will become an indispensable mechanism in accelerating awareness, acceptance, and distribution of these offerings. However, if history bears witness, as the level of advertising increases so will its scrutiny and subsequent criticism. For example, advertising will almost certainly be implicated in the escalation of consumer prices and in the corruption of societal values. These criticisms have doggedly pursued advertising in its journey about the globe. However, other more subtle and pervasive advertising excesses will also be identified as competition for consumers' limited resources intensifies.

One form of advertising "practice" that will likely gain industry adoption and a healthy share of criticism is the phenomenon of puffery. Puffery is the use of gross hyperbole or of nebulous, subjective claims in advertisements. From a cursory examination, it already appears to be well represented in those markets that have adopted a quasi-western style of advertising (e.g., Singapore and Malaysia).

This paper examines the issue of puffery from both a consumer response perspective and a regulatory perspective. Furthermore, the paper briefly traces advertising regulation in the United States, suggesting that the genesis and widespread use of puffery there is a response to augmented governmental powers and stringent industry regulation. Hopefully, this exploration will assist policymakers in Asean Nations to affect advertising regulation from a prudent, proactive stance rather than a non-strategic posture, which could seriously fetter economic development.

THE EVOLUTION OF COMMERCIAL SPEECH IN THE UNITED STATES

Commercial speech has undergone numerous incarnations under first amendment interpretation in the United States. As recently as 1942 in a case involving a clash between an anti-littering ordinance and the distribution of commercial flyers, the Supreme Court affirmed the notion that commercial speech was not afforded first amendment protection.¹ Justice Black stated that, although the government is restrained from placing undue burdens on the dissemination of public information and opinion, the constitution places no such restraint on the government with respect to commercial speech. Judge Jerome Frank echoed this notion in the dissenting opinion: "Such men as Thomas Jefferson and John Milton were not fighting for the right to peddle commercial advertising." The decision firmly established that commercial speech was beyond the pale of the first amendment, and that it, therefore, was subject to governmental regulation. Furthermore, the decision clearly separated "core" speech from purely commercial speech, thereby creating a defacto commercial speech doctrine, which served as the standard for 34 years.

The Court undertook a significant reinterpretation of commercial speech vis-à-vis the first amendment in two cases in the mid-1970's. These cases spelled the demise of the commercial speech doctrine. If it was dealt a telling blow in Bigelow v. Virginia,² it was dealt a lethal blow in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.³ Bigelow, the managing editor of a small newspaper, was convicted of violating a Virginia statute by accepting an advertisement detailing a New York City abortion clinic's services. This conviction was overturned

¹ *Valentine v. Chrestensen*, 122 F. 2d. 511 (2d cir. 1941).

² *Bigelow v. Virginia*, 421 U. S. 809 (1975).

³ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748 (1976).

by the Supreme Court. The court concluded that speech should not be "stripped" of first amendment protection merely because it is of a commercial nature. Advertising was recognized to have some societal value. In the Court's opinion, Justice Blackmun concluded "the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." Blackmun asserted that the advertisement did more than simply propose a commercial transaction. Rather, it was a vehicle for conveying information of public interest to the newspaper's readers.

In Virginia Pharmacy, a consumer group challenged the Virginia State Board of Pharmacy's statute banning the advertising of prescription medications. Justice Blackmun suggested "the free flow of commercial information...may be as keen, if not keener, by far than [the consumer's] interest in the days most urgent political debate." The Court acknowledged that it would be impossible to separate commercial speech, which is devoid of "public interest" from that which is significant to the public. Furthermore, the Court emphasized that as long as the United States operates within a free enterprise system, the free flow of commercial information is essential to well informed, intelligent consumer decision-making. An essential ingredient in this ruling was the declaration that an advertisement, which does "no more than propose a commercial transaction", is entitled to first amendment protection.

Although Virginia Pharmacy came close to an absolutist interpretation for commercial speech, the Court did not adopt a fully hands-off policy. The state was reserved the right to impose time, place, and manner restrictions. And certain forms of regulation were deemed permissible. Based on Gertz v. Welch,⁴ the Court placed false or misleading commercial speech outside the bounds of

⁴ Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974).

first amendment protection. Justice Blackmun stated "the first amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial speech flows cleanly as well as freely." The Supreme Court made this distinction even more explicit in a four-part test promulgated in Central Hudson Gas and Electric v. Public Service Commission.⁵ To determine whether commercial speech should be protected, the test's first criterion requires that the speech not be false or misleading.

Deceptive commercial speech, therefore, was placed outside of first amendment protection along with other unprotected forms of speech (i.e., libel and obscenity). Initially, the Court placed the Federal Trade Commission (FTC) in the position of watchman and jury, dubbing the FTC the expert body to enforce and set policy in the area of deceptive advertising.⁶

Advertising Regulation and the FTC

The FTC was created in 1914 by an act of Congress for the purpose of regulating unfair methods of interstate commerce.⁷ Deceptive advertising was placed under the rubric of unfair practices. It was thought that a firm employing deceptive advertising would have an unfair advantage over its competitors. The concern here, then, was with economic injury to business competitors; consumer protection was incidental. In Federal Trade Commission v. Raladam Co. the Supreme Court made this distinction explicit.⁸ Through Justice Sutherland the Court held that the FTC could not protect

⁵ Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U. S. 557 (1980).

⁶ Jacob Siegel Co. v. FTC, 327 U. S. 608 (1946).

⁷ Federal Trade Commission Act, 15 U.S.C.A., 41-51 (1914).

⁸ FTC v. Raladam Co., 283 U. S. 643 (1931).

consumers against false advertising unless an unfair competitive advantage also could be demonstrated.

The FTC's powers were strengthened in 1938 by the Wheeler-Lea Amendments to the FTC Act.⁹ The FTC Act was amended to read that it was unlawful "for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement...for the purpose of inducing..., directly or indirectly, the purchase of food, drugs, devices or cosmetics." The Supreme Court and the FTC have interpreted this as applying to both the regulation of advertising and the regulation of practices that injure the consumer. The injured consumer, therefore, was placed on par with the disadvantaged competitor. This act also granted the FTC the power to be proactive. That is, the Commission could initiate cases rather than waiting for formal complaints.

The decision as to what is or is not deceptive is left in the hands of the FTC's five presidentially-appointed commissioners. The commissioners rely on an evolving definition of deception; a definition that they are instrumental in shaping. The FTC currently defines deception as "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances to the consumer's harm." Some commission members and marketing analysts feel this definition is too narrow. The former standard, incorporating the phrase, "the tendency or capacity to deceive," did not require complainants to prove that actual deception or injury had occurred.

The FTC does not specifically define deception as it applies to advertising. Review courts and the FTC, therefore, must deal on a case-by-case basis, balancing protection of both consumer and competition against the advertiser's interest in freely disseminating information. Without a defini-

⁹ Amendment to the FTC Act, 15 U.S.C.A., Sec. 5(b).

tive standard of deception, the results of this case-by-case approach have been unpredictable (Welti, 1983).

The FTC began to regulate deceptive advertising more judiciously in the 1970's. The catalyst for this increased vigor may have been two separate, critical reports -- one by "Naider's Raiders" and one by the American Bar Association (ABA). Both of these studies concluded that the FTC had failed to effectively detect sellers engaged in deceptive practices; the FTC was issuing less than 70 such complaints per year (Udell and Fischer, 1979). The ABA report concluded that unless major changes were made within the FTC, disbanding of the organization was warranted. President Nixon and Congress opted for making the required changes. Casper Wienberger was installed as the FTC's Chairman in 1969. He reorganized and re-staffed the Commission in his brief nine-month stay. He is credited with "injecting new vigor into the operations" (Feldman, 1980, p. 54). Wienberger was replaced by an equally vigorous Miles Kirkpatrick, who was head of the ABA when its critical report was produced.

Spurred by increased power, the critical reports, and an increased budget, the FTC pursued corrective advertising and affirmative disclosure, fines for deceptive advertising, and formulated regulations for advertising to children. There was a great deal of unrest in the business community over what was seen as new intrusions of government into the private sector. Corrective advertising in particular raised the ire of many legal scholars and market analysts (Wilkie, McNiel and Mazis, 1984). It is possible that the ill will and turmoil that this engendered in the business community dissuaded the FTC from exercising this option with impunity. Even when corrective orders were issued, disclosure requirements were vague or minimal. And, for the most part, the firms saddled with corrective orders were small, not major corporate entities (Feldman 1980).

The increased and more stringent regulation of the marketplace resulted in a reduction in the incidence of gross distortions, misrepresentations, and unconscionable lies (Simonson, 1995). However, it is posited that strict regulations on the use of data in advertisements and the legal decisions emanating from them may have discouraged advertisers from including factual material in their advertisements (Armstrong and Russ, 1975; Vanden Bergh, James and Rifon, 1990). This has been held as the foment for an increased reliance on the use of nebulous, evasive, and subjective claims. Thus, the trend in the United States has been a shift from objective (hard) data to the use of unsubstantial claims.

RESEARCH ON PUFFERY

One specific area of subjective advertising, commonly referred to as "puffery," has received a great deal of attention from both legal and behavioural scholars. Puffery remains a volatile issue in the United States and will no doubt draw scrutiny in Asean Nations within the foreseeable future.

In general terms, to puff is "to blow up, exaggerate, overstate, or state superlatives concerning matters of subjective judgment and opinion in the assessment of taste, beauty, pleasure, popularity, durability, and similar qualities" (Preston, 1978, p. 558). Puffery remains unregulated in the United States and is currently unchallenged in most Asean advertising. Several reasons appear responsible for this rationale: puffery does not involve overt, factual misstatements;¹⁰ it can seldom be challenged by an objective truth standard; it is assumed that reasonable consumers do not rely on it; it lacks substantial public interest and, therefore, legal momentum;¹¹ it is an expression of the

¹⁰ Colgate-Palmolive Co., 59 FTC Decisions 1452 (1961).

¹¹ Ira M. Millstein (1964). The Federal Trade Commission and false advertising, Columbia Law Review, 64, 439.

seller's opinion and is assumed will not be construed as fact;¹² and interpretations of it differ from person to person.¹³

Yet, most all puffery is false at the literal level (Preston and Johnson, 1980). Examples would be the candy manufacturer stating that "Nestle makes the very best chocolate," or the television manufacturer claiming "the biggest breakthrough in color TV (Zenith Chromacolor)," or the brewer's contention "Tiger Beer is Asia's finest." In each instance the product advertiser does not know for a fact that its product is the best or the biggest or the finest.

However, research on puffery indicates that consumers do not readily distinguish between what is "seller's opinion" and what is fact. To the contrary, evidence suggests that consumers readily expand what they perceive advertisers to be telling them. Puffery and puffery implied claims appear to be just as believable as fact and fact implied claims (Harris, 1977). Critics indicate that facts derived from puffery statements are false and deceive a substantial portion of the population (Preston and Johnson, 1978; Rotfeld and Preston, 1981). In the United States, numerous scholars have chastened the FTC for not paying heed to this mounting evidence and for ruling on non-empirical grounds when it concludes that puffery does not deceive (Brandt and Preston, 1977; Hyman, 1990; Richards, 1990).

More Findings on Puffery

A survey was conducted in 1971 to determine how much truth consumers place in advertising claims (Preston and Johnson, 1978). Some of the advertising statements in the survey were puffery

¹² Liggett and Myer's Tobacco Co., 55 FTC Decisions 354 (1958).

¹³ Gulf Oil Corp., v. FTC, 150 F 2d. 106 (1945).

claims. Minute Rice's claim of "perfect rice every time" was thought to be completely true by 43 percent of those surveyed and partly true by 30 percent. Twenty three percent of those responding felt Pan Am's claim that it was "the worlds most experienced airline" was completely true while 47 percent thought it was partly true.

Subjects in another study demonstrated faulty syllogistic reasoning in puffery contexts (Preston, 1967). For example, if a statement says "if X then Y," it cannot be inferred logically "if Y then X" or "if not-X then not-Y." Yet this is exactly what occurred when subjects viewed advertisements. A Bell System advertisement stated, "You'll get a Royal welcome when you call long distance." The illogical inference, "if you don't call long distance, you won't get a Royal welcome" was accepted as an accurate restatement of what the message said or implied by 65 percent of the subjects. The same researcher in a follow-up study concluded "illogical behaviour may be greater with advertising than with other forms of communication" (Preston and Scharbach, 1971).

Further studies suggest that people readily make inferences from advertising materials, incorporate them into memory, and later are unable to distinguish what was inferred from what was factually asserted. For example, the TV commercial containing the verbal statement "Mennen E goes on warmer and drier" was the stimulus in another study (Shimp, 1978). The advertisement, obviously, does not specify what Mennen E is warmer and drier than. It was speculated that the statement would produce implications since the incompleteness of the statement would prompt consumers to seek closure. Each of three groups in the study was exposed to a different closure alternative: (1) "than any other deodorant on the market;" (2) "than deodorants made with chemicals;" and (3) "than a lot of other spray alternatives." In each group, over 50 percent of the subjects felt the advertisement explicitly made the closure claim.

Regulating Puffery

As elusive as puffery seems to be, it becomes even more elusive when trying to apply a deception standard. It is difficult to discern the truth or falsity of an evaluative statement. For example, if Alpo claims it is the best choice in dog food, is that the actual state of affairs? Since there are no objective data, the statement's veracity is difficult to determine. Certainly there are instances when the falsity of the claim is more easily recognizable, but there are a myriad of instances when the claim would be hard or impossible to assess. Moreover, trying to determine whether claims (or implications therefrom) are represented in consumer's memory or that consumer's buying behaviour has been affected by the claims is no small task. Although it is possible to demonstrate that erroneous beliefs are created by puffed claims, it is still another to demonstrate that these beliefs prompt mispurchase. One researcher, who has expended a considerable amount of research energy in the area, concludes that at best "a modicum of evidence supports the possibility that deceptive advertising may at least initiate trial purchase behaviour (Shimp, 1983, p. 203). Therefore, attempting to regulate puffery using a deception standard would necessitate groundbreaking research. This is beyond the scope, desire, and expertise of policy-makers worldwide.

On methodological grounds, it could be argued that research on puffery has been conducted in a laboratory setting and its findings will not generalize to the real world. While it is true that very little research has been conducted outside of the laboratory, the preponderance of evidence suggests that the phenomenon of puffery is robust and most likely replicable in the real world.

However, to regulate puffery without sound evidence establishing a more articulated, causal linkage between puffery statements and buyer behaviour, would be an area for considerable

argumentation. Furthermore, even if a linkage could be established, a question still may be posed: "What harm is there if people try brands as a result of puffery claims? It stands to reason that they will discontinue the use of a brand or product if their expectations are dashed." This line of reasoning possesses face validity, yet there is research evidence suggesting that people do not disconfirm prepurchase expectations when implied claims are concerned (Olson and Dover, 1978; Oliver, 1979). Whether due to an avoidance of psychological discomfort or an inability to evaluate an implied claim, people do appear to be "taken in" by puffery claims.

The fact that people do not accurately store or accurately draw inferences from subjective assertions is neither novel nor peculiar to advertising. Studies have demonstrated repeatedly that man does not process information in accordance with Aristotelian logic. Data from interpersonal communication, cognitive psychology, and mass communication cast doubt on the notion that humans are fully rational (i.e., making all the right decisions according to normative rules). Moreover, research has demonstrated that people are not passive tape recorders. They do not record everything that is presented, even when they are paying attention. Instead, they rely on simple intuitive heuristics when extracting information (Kahneman and Tversky, 1982; Nisbett and Ross, 1980), and they distort what information they do extract to comport with their perception of the world (Krech and Crutchfield, 1958; Vidmar and Rokeach, 1974). This indicates that we should never expect a one-to-one correspondence between what is presented and what is received and stored. And since evaluative advertising claims are more complicated than factual material, they are even prone to more error. If people had been able to apply the formal canons of logic in advertising situations, it would have been a novel finding indeed.

EDUCATION VERSUS REGULATION

It is suggested here that a less intrusive first line of defense against advertising excesses should be education instead of regulation. For example, a public education program could be devised which would detail the methods and practices that are used in advertising, paying particular attention to puffery. This tact would be less intrusive than regulation and potentially as effective. The programs could be tailored to reach all levels of a population. Included in the program would be public service announcements, educational packets for distribution at strategic locations (e.g., stores, churches and temples, etc.) and curricula designed for use in both primary and secondary schools. Since it is apparent that policy makers cannot protect consumers against all marketing abuses, a program emphasizing the nature of and practices associated with advertising could prove a viable and practical defense against advertising excesses.

Some researchers have suggested consumer information should be marketed similar to a product (Capon and Lutz, 1979; 1983). The goal of public policy, then, should be to get relevant information into the appropriate hands. By educating consumers, less regulation will be necessary since with more education will evolve better consumer decision-making. This approach posits a direct linkage between consumer, information, and decision making. In addition, scholars have suggested a less direct, but equally potent effect for consumer education (Mazis, Staelin, Beales and Salop, 1981; Sarel, 1983). They suggest marketers are wary of any forces, which may affect consumer behaviour. If information is available to consumers concerning unsavory marketing practices, marketers will alter their practice to correct the inadequacies. Of course, this not only benefits the consumers who were privy to the information, but those who were not.

Information processing and education

The results from prior consumer education programs have been mixed. However, lessons can be gleaned from the less than successful programs. Although consumer rights were given extensive consideration in these programs, little concern was expended as to how consumers process information and as to how they behave. Often experts determined what was best for consumers from an expert perspective, rather than determining what was useful for and compatible with consumers' day-to-day activities. Moreover, the information disseminated was often highly technical and few consumers had the ability or motivation to decipher the material (Healey and Kassarijian, 1983).

Future consumer education programs should be devised with an information processing paradigm (e.g., McGuire, 1969, 1981) as its foundation. The sequence of the information processing model takes the message recipient from exposure to a message through attention, comprehension and utilization of information in the message. The model is probabilistic in that the likelihood of reaching any stage is dependent upon having achieved the prior stage. Consumer education planners must be certain that message recipients allocate active mental participation in terms of attention, comprehension and retention.

Exposure. Consumers must come into contact with the program's material if their knowledge structure is to be affected. The material must be easily accessible. Evidence points to the fact that consumers often will not go out of their way to obtain worthwhile information. Thus, the material should be targeted to consumers via different media vehicles and place of frequency (e.g., schools, retail stores, etc.).

Attention. Messages should be designed to attract attention, but attention-getting devices should not be so powerful so as to detract from the goal of imparting knowledge. For example, humorous appeals are well and good as long as the degree of levity does not conflict with the consumer extracting meaning from the message. The material should be related to tangible elements in the consumer's life, like saving money or avoiding mispurchase by "reading" advertising.

Comprehension. The information in the messages must be understandable. Consumers must be able to grasp the essence of the message in order for it to be stored properly in memory for later utilization. Messages, therefore, will differ for each target audience (e.g., children versus adults).

Retention. The message will go a long way towards its goal of educating if the information is concrete. By showing actual advertisements (or mockups) that use puffery, and by explaining the problems associated with this form of advertising, consumers will be more apt to store the material in long term memory. Furthermore, program designers must realize that each medium has limitations associated with it. For example, broadcast cannot be relied on to convey the most complex material. Consumers need time to mull over details in complex messages, and, thus, print media in these contexts would better serve them.

Utilization. If the information in the educational program has been concrete, that is, it has detailed how to deal with puffery claims in advertisements, then, consumers should be prepared to face the advertising environment with a greater level of protection. Puffery claims should provide cues that will invoke information that has been stored in long-term memory concerning the puffery issue. According to Hans Thorelli (1980, p. 232) "Informed consumers are protected consumers -- more than that, they are liberated consumers."

Conclusion

Many of the best remembered, most creative advertisements have turned on the use of puffery. To regulate all puffery would certainly limit creative strategists. In fact, such limitations could be to a degree that both consumers and policymakers would find too broad, rendering advertising a sterile tool. The ultimate question concerning advertising is "Should it disseminate only hard, cold facts or is there room for more?" If "purely fact" is the answer, then, advertising is in for a banal future. For then we must ask how celebrity endorsers, attractive spokespersons, music and attractive imagery fit into the picture. Do they also affect consumer decision-making? If so, is that fair? Should they be regulated as well?

Possibly the puffery issue is part of a much broader issue – media literacy. In a world that is so dependent on the media for information, we must pay more heed to how the citizenry uses the media and the information it conveys. Educational efforts should be directed at helping people understand and use media to their utmost advantage.

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