THE GENERIC ADVERTISING CONTROVERSY

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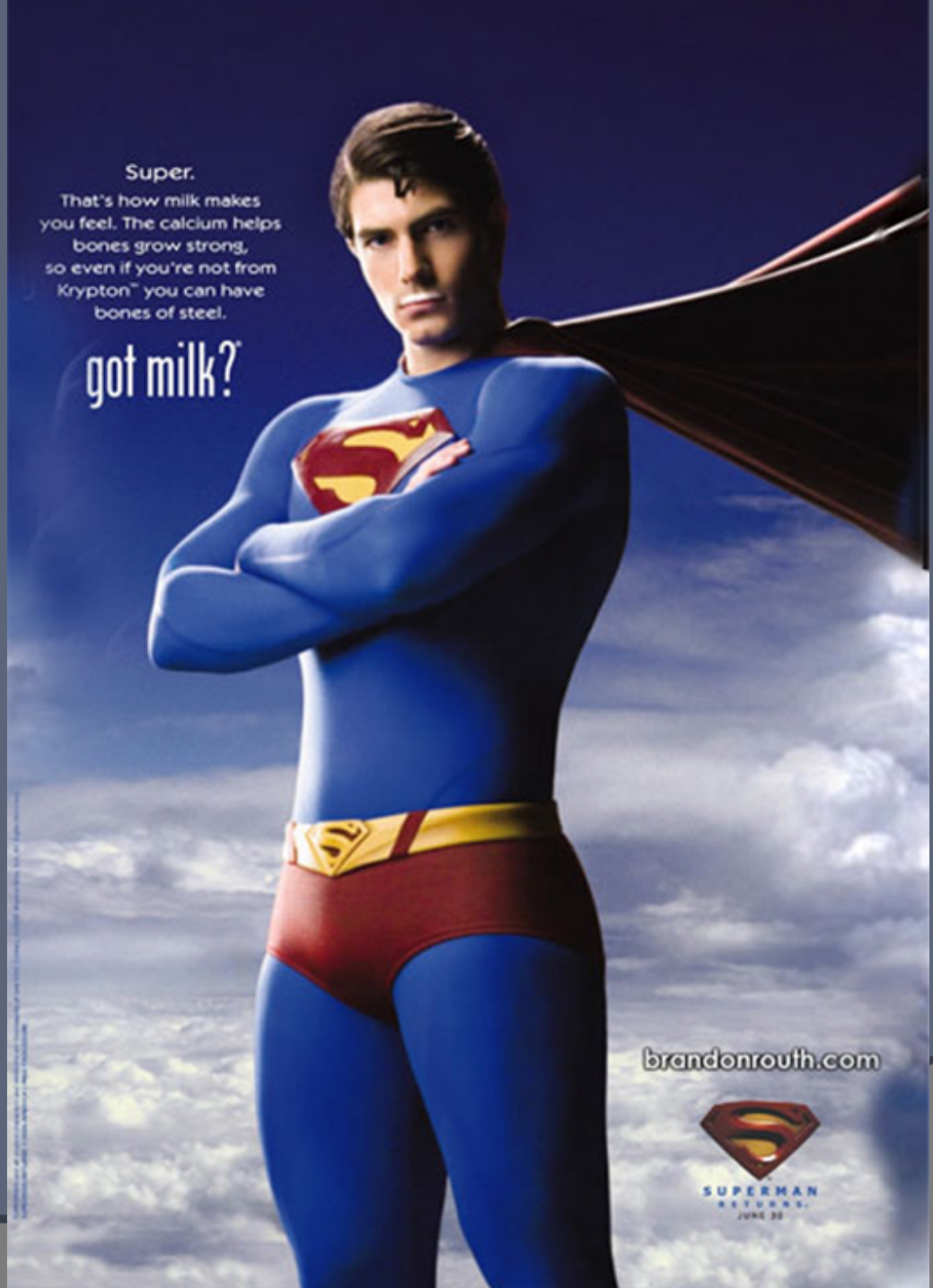
What is Generic Advertising?

"The cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."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Marketing Order

- A marketing order for promotion and advertising compels all growers under the order to jointly contribute funds for industry advertising.
- The Agriculture Marketing Agreement Act of 1937 created federal marketing orders and is often seen as merely a reaction to the dire economic consequences of the Great Depression.

Marketing Order (continued)

- Marketing orders must be for specific commodities and in as small a region as possible to further the objectives of the order.
- A federal marketing order can only be set up by the Secretary provided that a two-thirds majority of affected growers vote in favor of one, and the Secretary must nullify the order upon a simple majority vote by the growers to do so.

The 1937 Act

1. Restrictions on the quantity of a commodity that can be sold, either through marketing allotments or reserve pools.
2. Limits on the grade, size, or quality of the commodity.
3. Regulation of packing and container sizes
4. Some limited generic promotion and advertising allowances

The Rational Behind the Marketing Order

"If the cost of advertising makes you worse off in the presence of a free rider, profits will increase in the industry only if all growers are compelled to fund the program. The strong assumption is that a grower who advertises would be worse off in the presence of a free rider."

Example

Two growers of the same commodity:

- Neither contribute: each earn $10
- Both contribute: each earn $16
- One of them contribute: the contributor earns $8 and the free rider earns $18

		Grower A	
		Contributes	Does not contribute
Grower B	Contributes	($16, $16)	($8, $18)
	Does not contribute	($18, $8)	($10, $10)

United States v. Rock Royal CO-OP (1939)

- On October 27, 1938, the United States filed a complaint against several milk producers for failing to pay for their assessments under Milk Order No.27.
- The processors claimed that the Order and the 1937 Act were an unconstitutional infringement on their 5th, 10th, and 14th Amendment Rights.
- District Court concurred with processors so government took the case to the Supreme Court.
- Supreme Court ruled 5-4 in favor of the Government and upheld the 1937 Act

The Agricultural Act of 1954

This Act amended the 1937 Act to authorize the Secretary to establish “marketing development projects” including advertising and promotion of a broad range of commodities in order to further the goals of the 1937 Act.

Abood v. Detroit Board of Education (1977)

- A collective bargaining agreement between the Detroit Federation of Teachers and the Detroit Board of Education required teachers to pay a service fee equal to the regular Union dues if they do not become a Union member within 60 days of hire.
- D. Louis Abood and several Detroit teachers objected to the notion of collective bargaining in the public sector and did not want to pay the service charge because part of the money was being used for political endorsements.
- Supreme Court set up the Abood test which requires the compelled assessments be relevant to furthering the goals of the government interest and not be used for political or ideological activities.

Central Hudson Gas & Electric v. Public Service Commission of New York (1980)

- In 1973, the Public Service Commission of New York ordered electric utilities in New York to suspend all advertising that promoted electric usage to temper the demand on shrinking fuel stocks.
- In 1977 due to growing energy crisis, the government decided to make the advertising ban permanent. Central Hudson Gas & Electric Corp. opposed this ban on First Amendment grounds.
- Supreme Court set up “Hudson three prong” test that must be administered in appropriate commercial speech cases, provided the speech is lawful and not misleading. Failure of any one of the three means the regulation is unconstitutional.

Central Hudson Gas & Electric v. Public Service Commission of New York (1980) (continued)

"Hudson three prong" test:

1. Does the government's program involve a substantial government interest?
2. Does the regulation directly advance that government interest?
3. Is the government's program narrowly tailored to minimize adverse impacts on First Amendment rights?

Frame v. United States (1989)

- In 1985, Congress amended the Beef Promotion and Research Act of 1976 to strengthen and expand a foundering beef market through the use of advertising and promotion, which required cattle producers and importers to pay an assessment of $1 per head of cattle sold for a national beef promotional campaign.
- L. Robert Frame, Sr., refused to pay and argued that his First Amendment rights of free speech and association because the generic advertising program compelled him to associate with his competitors and pay for advertising when he would prefer to remain silent.

Frame v. United States (1989) (continued)

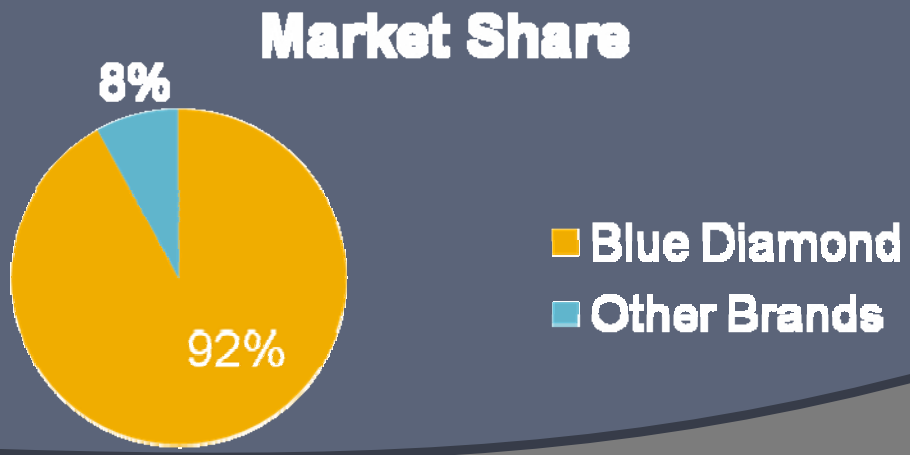
- The 3rd Circuit Court found that while Frame's First Amendment rights had been implicated by forced association and advertising, they ruled in favor of keeping the Act due to three reasons:

1. The act was put forward as a "self-help program" to insure the integrity of the independent cattlemen.
2. The promotion was ideologically neutral.
3. The Act "expressly prohibits spending for political activity"

- The 3rd Circuit Court rejected Frame's free speech and association argument because the government made the act to further an ideologically neutral compelling state interest and drafted the Act in a way that infringed on the contributors' rights no more than necessary to achieve the stated goal. Also, the Act passed the Hudson three-prong test.

Cal-Almond, Inc. v. U.S Department of Agriculture (1993)

- In 1950, the federal generic advertising marketing order for almonds was established and administered by the Almond Board of California, which consisted of industry members. Assessments are collected from growers to cover Board activities which included generic advertising and promotion.
- In 1980s, handlers could be reimbursed for the generic advertising portion of the assessment if the handler undertook its own consumer advertising program that met the requirements set by the board. Some handlers felt the requirements favored Blue Diamond Almonds, the largest almond cooperative, who had a 92% share of almonds sold in grocery stores along with its own retail stores.



Cal-Almond, Inc. v. U.S Department of Agriculture (1993) (continued)

- In 1984, two handlers, Saulsbury Orchards and Almond Processing, Inc. and Cal-Almond refused to pay the annual advertising assessment, due to the fact that they were refused a refund on their own advertisings when the products they advertised contained less than 50% almond. Both handlers sold their almonds to ingredient manufacturers, the cereal industry and the ice cream industry respectively, and had helped with advertising their products.
- The case appeared in the 9th Circuit Court of Appeals where the appellants argued that the generic advertising program was an infringement on their First Amendment rights of free speech and association.
- The 9th Circuit Court applied the Hudson three-prong test and found that it failed the second and third test. The Board could not prove that the Board's generic advertising directly advanced the government's interest and that there is no justification on the restrictions that denied credit on the refunds for the handlers. By failing two of the three prongs, the advertising portion of the almond order was ruled as an unconstitutional violation of the appellants' First Amendment rights.

Glickman v. Wileman (1997)

In 1995, 16 handlers of California nectarines, peaches, and plums had a dispute with the marketing order over size and quality regulations. After going through the courts and getting different rulings in favor of both sides, the handlers added a First Amendment argument and appealed to the 9th Circuit Court.

- The 9th Circuit Court again found that the tree-fruit generic program failed the second and third prongs of the three prong test since the government could not prove that the generic advertisements were more effective in increasing sales than the "specific, targeted marketing efforts of individual handlers" and was too restrictive in their marketing order for generic advertising.
- The Secretary of Agriculture appealed to the Supreme Court and in a 5-4 ruling the Supreme Court reversed the 9th Circuit Court decision due to the fact that the Supreme Court believed that the 9th Circuit incorrectly used the Hudson three-prong test.

Glickman v. Wileman (1997) (continued)

- The Supreme Court pointed out three characteristics that the generic advertising orders' regulatory scheme that makes them different from other laws found to violate the First Amendment.

1. The orders do not prevent producers from communicating any message to any audience which distinguishes from the Central Hudson case.
2. The marketing orders do not compel handlers to engage in any actual or symbolic speech.
3. The marketing orders do not compel handlers to endorse or finance any political or ideological views.

- The Supreme Court stressed that as long as the regulatory means furthered the goals of the acts and did not compel ideological speech, the acts' constitutionality has been satisfied and that whether individual handlers were hurt was not considered since they had chosen to operate in a regulated environment.

Mushroom Promotion Act of 1990

- In November 1999, the Mushroom Promotion Act of 1990 was ruled unconstitutional by the 6th Circuit Court of appeals because it was not in the same spirit as the broader, collective regulation embodied in the 1937 Act.
- United Foods, Inc. challenged the 1990 Mushroom Act on the grounds that the assessments were compelled commercial speech. The argument used by United Foods is that Mushrooms are heterogeneous and unlike the tree fruits' homogeneity which needed the generic program, the mushroom producers can freely differentiate their product and stimulate demand through individual competitive advertising.
- The Supreme Court upheld the 6th Circuit Court's ruling in a 6-3 decision due to the fact that the assessment was primarily for the generic advertising and not for a more comprehensive program.

Does Generic Advertising Work?

Most studies done by different economists have found Generic Advertising to be useful in increasing industry profit for the growers of the same commodity. Below are some of the results that they found:

Commodity	Marginal benefit-cost ratio
Table grapes	Domestic promotion: 20:1 Export promotion: 4:1
Prunes	3:1
Avocado	Short run: 5:1 Long run: 2:1
Almond	3:1 – 7:1 depending on alternative hypothesized values of the supply elasticity
Beef	6:1

The Controversies

"Incomplete" because they have not taken into account "supply response, demand interrelationships, trade, policy setting, marketing channel, opportunity cost, and tax shifting" – Kinnucan and Nichols (p. 463)

Examples:

- Beef advertising will increase sales of beef but decrease sales of pork.
- Milk advertising will promote healthier drinks like fruit juice and hurt the soft-drink industry.
- Foreign companies that export to the U.S. free-ride off the domestic commodity advertising.

Has the game changed?

Go back to the two growers game. Now we change the contributor's profit from $8 to $11 in the scenario where the other grower does not contribute at all and free ride off the contributor. Everything else remains unchanged.

		Grower A	
		Contributes	Does not contribute
Grower B	Contributes	($16, $16)	($11, $18)
	Does not contribute	($18, $11)	($10, $10)

THANK YOU!