



*2<sup>nd</sup> Annual Venable Advertising Law Symposium*

## **Mock Lanham Act Argument**

April 29, 2015

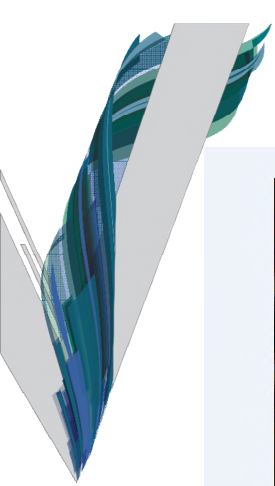
**Roger A. Colaizzi**, Partner, Venable LLP

**Randall K. Miller**, Partner, Venable LLP

**Nicholaus M. DePalma**, Counsel, Venable LLP

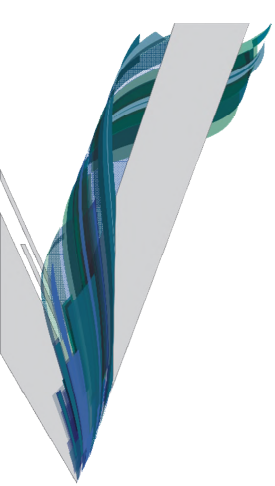
**Taylor S. Chapman**, Associate, Venable LLP

**Lee Peeler**, President and CEO, Advertising Self-Regulatory Council (ASRC)



I am not  
a federal  
judge...\*

*\*With apologies to Chris "I am not a doctor, I just play one on TV" Robinson, who portrayed Dr. Rick Webber on the daytime drama General Hospital from 1978 until 1986 and promoted cough syrup on television.*



## ***Acme-Connect v. Beta-Linx***



# Background

- Parties offer a competing social media platform for professionals
- Acme is the incumbent
  - In the market for 20 years
- Beta is a new entrant
- Both sites require payment of a 1-time fee of \$10 to join





## Key Facts (cont.)

- Both companies allow users to register “unique user names”
  - such as “advertisinglawyer”
  - But Beta claims that **all the good names on Acme are already taken** because Acme’s been in business for 20 years
- Beta registered 5 million users in a “**free give-away**”
- Many users in the free give-away program did not know they were given a Beta-Linx membership
- An “Op-Out” email was sent but this often went to spam



## Advertising Media – Blog and Letter

- Beta CEO posted a blog to BetaCEO.com and also wrote a letter to 5 key investors
- Blog is a personal blog that says: “The views expressed on this blog are solely mine”



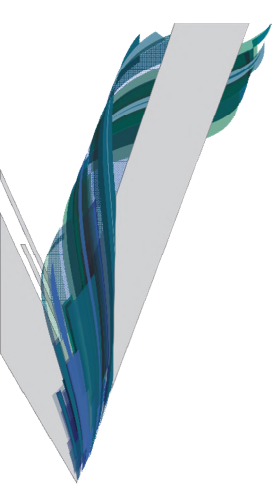
# Advertising Statements

- "Beta is the fastest growing new social media site for professionals and we now have more than 5 million users"
- Acme is "**yesterday's news**"
- Acme's interface is "**cumbersome and outdated**"
- "Beta has a fresh slate of unique user names and all the good names on Acme's platform are taken"



## Advertising Statements


- Comparative superiority claim based on Beta being the new thing
- Also uses visuals implying superiority



**ACME**

**BETA**





## Legal Issues

- Is CEO's blog and letter "commercial advertising or promotion"?
- Does Acme have standing under Lexmark, which requires a plausible showing of proximate cause and damages?
- Do the claims based on number of registrations "necessarily imply" that this number represents paying customers?
- Are the visual images and claims that Acme is "yesterday's news" puffery?

# Commercial Advertising or Promotion

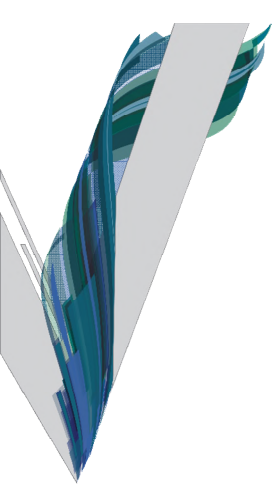




# Commercial Advertising or Promotion

- Broadly defined
- Not unlimited
- Does not include non-commercial speech
- Can include B2B communications, verbal communications
- *Reckitt v. Motomco* – slide decks and emails to retailers





Puff!





# Puffing?

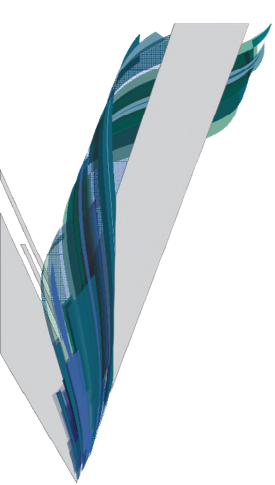
A yellow dotted line originates from the bottom of the word "Puffing?" and curves downwards and to the right, framing the Papa John's logo and tagline.





# Puffery

- **Puffery:**
  - “exaggerated, blustering and boasting statements upon which no reasonable buyer would be justified in relying”
  - or general claims of superiority over comparable products that are so vague that it can be understood as nothing more than mere expression of opinion.
- **You’re in good hands with Allstate**
- **Better Ingredients, Better Pizza**
- **Context matters**



# Lexmark





## Lexmark

- One of two Supreme Court decision from 2014
- Said that non-competitors can sue. BUT
- Also imposed a proximate causation test:
  - “a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by defendant’s misrepresentations”
  - “plaintiff must allege an injury to a commercial interest in reputation or sales.”

# Implied Claims





## Implied Claims

- Advertising statement that is DIFFERENT from literal words
- “We did not say that” is not a defense
- Shown by survey evidence
- Necessary implication doctrine allows plaintiff to state a claim without survey evidence
- Bacardi “Havana Club”
  - Alleged implied claim (that this was made in Cuba) failed
  - The label said “Puerto Rican Rum”