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(Exam Number)

Exam Name:

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BEST ANSWER FOR  
QUESTION 2

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~~Conclusion: Since non commercial use is an exception to Dilution, Foundation will likely prevail. However, Intel can attempt to cooperate with Foundation and work out a deal. it is possible that Intel give back to the community and donate profits or computers in exchange for Foundation changing its name and agreeing not to infringe.~~

*good!  
creative  
lawyer!*

*- Good use of the facts & clear outline  
- numerous spelling & grammar errors  
- could use deeper analysis in part*

Essay 2

Words and pictures may serve as Trademarks. Here, Mark has some possible causes of actions relating to the advertisement that induced him to buy the chemical avocados.

False Advertising

Mark may sue the manufacturer of Avojelly and John's Jelly Store for false advertisement. Lanham Act section 43(a), prohibits the use of a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact in commercial advertising or promotion, which misrepresents the nature, characteristic, qualities or geographical origin of his or her or another person's goods. The policy behind this law is to insure truthfulness in advertising and to delaminate misrepresentations with reference to the inherent quality or characteristic of another's product. Under the act, a Mark must prove the following:

1) defendant has made a false or misleading statement - Since words in the ad said, "Fresh" and "Green" these suggest that the jelly is made from fresh avocado. To the contrary, the mixture was a green chemical with no real avocado in it at all. Defendant will argue that the

green refers to the color and the fresh refers to being freshly sealed. However, the picture of the fresh avocados show suggests that the jelly is made from fresh avocados especially when linking the picture of the jelly jars with the avocado pictures.

2) the false or misleading statement has actually deceived or has the capacity to deceive a substantial portion of the intended audience - A consumer survey would be helpful of people who actually bought the avocado, asking them if they thought it was fresh avocado they were buying. And a survey of drivers on the highway who pass the advertisement, since the ad is intended for high way drivers, whether they believe the avocado is fresh. Furthermore, it seems likely that drivers would be deceived by the statement.



3) the deception is material in that it is likely to influence purchasing decisions - Fresh versus chemical is a huge difference especially in California (here, I'm assuming Mark is in Sacramento, CA). If this is California, healthy and fresh foods is highly desired and can be a material fact to influence a purchasing decision. Here, Mark who is a "health food nut" only eating organic foods was influenced to purchase the jelly due to the material deception that it was fresh avocados.



4) there is reasonable belief of likelihood of injury to plaintiff. Different standards apply depending on the relief sought Johnson & Johnson. Here, Mark should ask for a prayer of relief of monetary damages where he must prove that actual harm from the false ad - NA.

what are his actual damages?  
- cost of purchase?  
- lost job but volunteer position

5) the goods traveled in interstate commerce - assuming that the avocado traveled on the highway to get to John's Jelly Store, the goods traveled in interstate commerce and met this requirement.

Misdescriptive Marks

Lanham 2(a) bars registration of marks consisting of or comprises of deceptive matter. Separate labels/ads about the true quality of the product is not enough to negate the deceptive

mark, especially since buyers may or may not read the labels In Re Budge. The concern is whether the consuming public is likely harmed. Here, the small ingredient label would not be enough to negate the deceptive picture of which induced health nut mark to purchase the chemical avocados. A 3 prong tests determines whether a mark is misdescriptive:

1) misdescriptive of character/quality/function. Is it what it says? In In Re Budge, the mark "Lamb" was found to be deceptive as applied to synthetic fibers for car seat covers. Here, the word "Fresh" and pictures of fresh avocados is deceptive of the chemical jelly.

2) Are purchasers likely to believe misdescription? Looking at the sophistication of the consumers and the price, here, jelly is generally inexpensive and its purchase does not require much sophistication and investigation. ✓

3) is the misdescription likely to affect the decision to buy the good? Here, the "Fresh" and pictures induced "health nut" Mark was induced to buy the chemical avocado.

Therefore, this is likely a deceptive mark, and would not be allowed registration if one were sought. The best that Mark could get out of this law is to oppose Avojelly's manufacturer if it were to register the mark. ✓

Defense:

Avojelly will claim that Mark has no standing to bring a cause of action under unfair competition. In Colligan, the court held that the Lanham Act was to help those who engaged in commerce and only commercial parties have standing to sue since the intent of congress is against unfair competition. Alternatively, Mark can write letters to the company itself and/or lobby consumer protection groups to take action against such false representation/advertisements, or at the very least get a refund. ✓

good

- well written  
- good, creative,  
non-litigious  
solutions for Mark