Exam No. _____

ADVERTISING LAW

Final Exam—April 29, 2009
Professor Susan M. Richey

INSTRUCTIONS:

This exam is composed of one long essay question, one short essay question, and two short answer questions worth a total of 80 points—the questions are not evenly weighted, so, allocate your time accordingly. You have 2 hours to complete the exam unless otherwise stated by the proctor.

Do not use a blue book. Please confine your responses to the lined area of this exam but do not feel compelled to fill the entire lined area.

The exam is open-book and you may take any written material that you wish into the exam with you. ***Do not work with any of your classmates during the exam.***

Question No. 1 (50 pts.)

The print advertisement reproduced on the next page appeared in the March and April 2009 editions of "Cat Fancy," a monthly magazine targeted at cat owners with a U.S. circulation of approximately 3 million people. The ad campaign is due to run monthly for one year and the magazines are available in many sorts of retail establishments, including supermarkets, drug stores, and pet stores.

The ad relates to a new product—the Chip-Flip Pet Door—developed last year and introduced to the U.S. market in 2009 that can be installed in virtually all types of residence doors to allow a homeowner's cat to leave and enter the home without requiring human assistance. The scanner in the top of the product is programmed by the homeowner to read a coded microchip that can be implanted in the scruff of a cat's neck by a veterinarian. (Cat owners often have their pets "micro-chipped" so that they can be reunited with their pets if the animals become lost. Owners forward their name, address, and the chip's unique identifier to a central registry and, when a stray cat is taken to an animal shelter, the cat is scanned for a chip in the hopes of being able to link the cat with its owner through the registry.)

As the cat passes under the scanner in the Chip-Flip pet door, the scanner recognizes the chip and unlocks the door to allow the cat to enter the house. The scanner will not recognize a micro-chipped cat if the chip's unique identifier has not been programmed into the scanner. Once the scanner recognizes a micro-chipped cat, the scanner recalibrates, a process that takes approximately 12 seconds; during recalibration, the door remains unlocked from the outside. Most cats pass through the pet door in less than 5 seconds.

The scanner is in place only on the outside of the door to restrict cat traffic coming in the house. When the cat wants to leave the house to go outside, it can swing the door outward freely, unless the nighttime lockdown feature is engaged. The nighttime lock-down feature does not engage in strong light but, when the light fades, the feature automatically locks the door from the inside so that the cat cannot leave the house—although, if the cat is outside when the lockdown feature engages, the cat can always enter the house by passing under the scanner. The instructions for the Chip-Flip pet door, enclosed with the packing materials, suggest that homeowners turn off their porch lights at night to avoid disabling the nighttime lockdown feature.

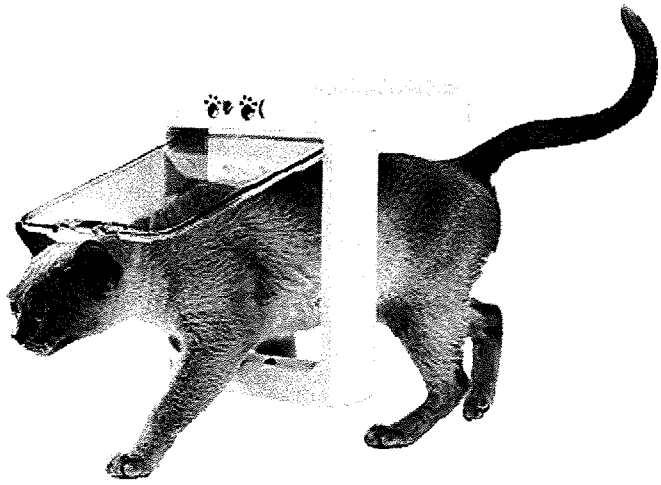
Stress in cats is an undesirable condition and may be triggered by a variety of factors, including a new person or pet in its environment, a change in cat food or cat litter, etc. Two studies have been conducted by the Tufts University School of Veterinary Science showing that cats develop high levels of anxiety if they are accustomed to going outdoors but are forced to stay inside for long periods of time, as for example, when no human is available to open the door for them. Scientists at Tufts conducted the studies by dividing the subject cats into two groups, those that had been raised with free access to the outdoors ("outside cats") and those that had been raised indoors and had never roamed outside ("inside cats"). All cats were subjected to prolonged confinement and observed

to determine their reaction. The inside cats did not react in any fashion whereas the outside cats began clawing furniture, urinating on carpets, and otherwise misbehaving. Both studies were published in reputable journals in the 2006-07 timeframe.

Because the FTC monitors advertising related to new technology, the CEO of the Chip-Flip Pet Door Corp. seeks your advice today as counsel experienced in advertising law issues with respect to each of the four claims made in the ad below. In response to your request for substantiation of the claims made, she has supplied you with technical information and data collected during the research and development phase of the product which indicate that the scanner and nighttime lockdown feature work as described in the paragraphs above. She has also given you photocopies of the two Tufts University studies. You should identify potential issues that the FTC might spot and advise the CEO accordingly, including any measures which the CEO should take now with regard to the ad—you do not need to address remedies that the FTC might impose except as they affect actions the CEO should take now. For purposes of your advice you should assume that the FTC would not view the following ad to be "unfair" under section 5 of the FTC Act and confine your analysis to the question of whether the FTC might view the ad to be "deceptive" under the Act.

Introducing the New Chip-Flip Pet Door—the future in cat care!

The Chip-Flip pet door contains a scanner that can be programmed to recognize the microchip implanted in your cat—it lets your cat come indoors and keeps all other cats out.



The nighttime lock-down feature detects lack of light to prevent your pet from going outside where it is vulnerable to car accidents in the dark or nocturnal cat fights.

Scientific studies show that the Chip-Flip pet door will reduce your cat's stress levels.

ADVERTISEMENT IN CAT FANCY MAGAZINE

Question No. 2 (20 pts.)

Pet Rocks were a specialty item sold for a brief period in the mid-1970s; they were ordinary gray stones bought at a builder's supply store and marketed as though they were live pets. Advertising executive, Gerry Sloan, conceived of Pet Rocks and, despite their short-lived popularity, the fad made Sloan a millionaire. Even millionaires have felt the effect of the present economic recession, however, so Sloan has decided to revive the product. He knows that the immense popularity of Dwayne "the Rock" Johnson would help him sell the new Pet Rocks—Johnson is a former professional wrestler turned action movie star and is widely known as "the Rock," the name under which he appeared in the wrestling ring and under which he has appeared in movies as well as several television commercials. Although Johnson's manager refuses to return Sloan's phone calls regarding this opportunity, Sloan has never met an actor yet who minded a little extra publicity so he has created the advertisement shown here and had it mounted on numerous billboards throughout New York City. In fact, Johnson does mind the use of his nickname and his photo without his permission and has sued Sloan in U. S. District Court for the Southern District of New York, alleging violation of his state-created right of publicity and violation of section 43(a)(1)(A) of the Lanham Act.



(a) Section 51 of the New York Civil Rights Law is the same statute at issue in *Burck v. Mars, Inc.*, in which the Southern District found that The Naked Cowboy had no viable state law cause of action, and *Ali v. Playgirl, Inc.*, in which the Southern District found that Muhammad Ali had a viable state law cause of action. Which decision is the court likely to following in this case and why?

(b) Johnson is fond of novelty items and, as it turns out, actually purchased a Pet Rock on eBay a year ago and has it prominently displayed in his office. Does the truth of the ad claim, "Even The Rock Has a Pet Rock," harm Johnson's cause of action under the Lanham Act and why or why not?

Question No. 3 (5 pts.)

Give one example of advertising regulation structured around consumer opt-in behavior and one example of advertising regulation structured around consumer opt-out behavior. Be sure to indicate which is which.

Question No. 4 (5 pts.)

Wikipedia is a free, open content online encyclopedia created through the collaborative effort of a community of users whose contributions generally are made anonymously. WikiScanner is a publicly searchable database that links millions of Wikipedia entries and edits to the organizations from which they originated, thereby allowing the reader to identify "the speaker." WikiScanner was developed as a technological response to a particular type of marketing taking place on Wikipedia. Identify the type of marketing and briefly explain your response.