

Designing Survey Questions to Determine the implied Claims in a Television Commercial

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When a television advertisement implies a statement that is not accurate, it runs the risk of infringing legislation prohibiting misleading advertising. One way of showing that a television advertisement implies a particular claim is to undertake some sort of audience survey. This paper considers the problem of designing questions for such a survey. It proposes the use of questions of the form "Is the advertisement claiming that X?" where X corresponds to the claim alleged to be implied. The view that this form of question is particularly sensitive to changes in the wording of the question is empirically investigated.

Keywords: misleading advertising, false, television, question wording, litigation, surveys, legislation

Introduction

A distinctive feature of the Fair Trading Act 1986, which prohibits "misleading" as opposed to "false" advertising, is that the legislation can be infringed not only by what is explicitly stated in the advertisement but also by what is implied. This feature considerably broadens the potential for television advertisements to infringe the legislation. A characteristic of much television advertising is the relative paucity of information that is explicitly stated and the wealth of information that is conveyed by implication (Shimp 1979). The risk in this approach for advertisers is that if any of the implied statements prove inaccurate, they could be held to have contravened the legislation.

Many researchers have commented on the potential relevance of audience surveys to the task of determining the implied claims in an advertisement (Aaker 1974; Gardiner 1975; Preston 1983). To date, no methodology for measuring such claims has achieved general acceptance. This is partly due to the fact that researchers have been pursuing two separate objectives. One of these is to devise a routine test that advertisers could use to detect any unintended interpretations of the commercial. These interpretations could then be checked for accuracy prior to the broadcast of the commercial. Clearly tests of this type would need to detect all the implied claims in an advertisement.

A second objective of researchers has been to devise a test that could provide evidence on this question in legal proceedings. In this case, there is no need for the test to detect all possible interpretations of the advertisement. The initiator of legal proceedings is required to precisely specify each inaccurate claim that they allege is implied by the commercial. The task of the court is to decide if those particular claims are implied by the advertisement.

A researcher who is commissioned to provide evidence on this question needs to be aware of the way the evidence will be scrutinised in court. Firstly, the opposing party will usually call one or more experts in market research to criticise the design and implementation of the survey. Secondly, judges, because of their familiarity with the traditional methods of adducing evidence in court, seem to be predisposed to certain types of criticisms.

The traditional method of producing legal evidence involves witnesses responding to questions under oath in the witness box (Tapper 1990). The party calling the witness is forbidden to ask "leading questions". Each witness may be subjected to cross-examination by the other side, during which leading questions are permitted. The rule against hearsay evidence generally prevents witnesses giving evidence of statements made to them by people who are not themselves called as witnesses (Hodgkinson 1990). For a time, market surveys were considered to infringe this rule unless all the respondents were called to repeat their responses in the witness box. While this view was rejected in New Zealand over two decades ago (Weston 1987), it has only very recently been overcome in Australia. In *Arnotts v Trade Practices Commission* (1990 ATPR 41-061) the court held that market surveys should be admitted despite the hearsay rule. It stated:

In a civil case in which a market survey may cast light on relevant issues, it is desirable in principle to admit into evidence a report of a professionally conducted survey, upon proof that it has been satisfactorily conducted using relevant and unambiguous questions; and without requiring evidence from each of the participants.

Despite that pronouncement, and previous judicial pronouncements to the same effect in New Zealand, none of the market surveys that have been considered in legal proceedings in New Zealand or Australia has been found to carry any weight. In virtually all the cases, the main reason given for disregarding the market research evidence has concerned the wording of the questions (Dwyer & Katekar 1994). Judges, by virtue of their background and training, tend to be very suspicious of the formulation of survey questions. They appear much less concerned with matters such as sample selection or non-response bias - matters to which the traditional rules of evidence paid scant regard (Preston 1987).

It is clear that researchers who design surveys for use in litigation need to pay particular attention to the wording of questions. An obvious dilemma will be whether to use open-ended or some form of forced-choice question. Open-ended questions have the advantage that they accord with the traditional method of introducing evidence in court and thus avoid the charge of being leading questions. However two deficiencies in such questions have attracted the attention of judges. The first is the general point that the coding of the responses, being a subjective task, can always be attacked as biased.

A dramatic illustration of this point occurred in the recent Australian case of *State Government Insurance Corporation v Government Insurance Office of NSW* (1991) ATPR 41-109. The case concerned a dispute between two insurance companies. Following a "corporatisation", the plaintiff changed its name from State Government Insurance Office to State Government Insurance Corporation. However, it continued to use the logo *SGIO*. It alleged that the advertisements of a new entrant to the market which used the logo *GIO Australia* were likely to mislead consumers into thinking there was a connection between the two companies. To gather evidence to support this view, it commissioned a survey comprising about 800 face-to-face interviews. The first question asked was "*What comes to mind when I say GIO?*" Forty-five percent of responses to this question were coded as being "SGIO related". After noting that this figure included many responses to the effect that *GIO* was *not related* to *SGIO*, the judge simply disregarded this question with the comment that "*the utility of that particular group of results is not clear*".

A second criticism levelled at open-ended questions is that they tend to elicit only the *explicit* content as opposed to the *implied* content of the commercial. An example of this view is provided by the Wonder Bread case in the United States. Respondents were asked "What is the most important thing that the commercial told you about Wonder Bread?". Despite the fact that only 50 out of 789 of the responses mentioned that Wonder Bread induces remarkable growth, the Federal Trade Commission held that this claim was implied. It justified this position as follows:

The questions were not designed and would not be likely to elicit consumers' perception of the latent or implied messages contained in the advertising such as those challenged in the complaint. Rather, the questions asked were designed to and usually only elicited the interviewee's recall of the explicit message projected by the advertisement.

To overcome the criticisms of open-ended questions, researchers have sometimes resorted to forced-choice questions. Forced-choice questions are, of course, leading questions in the sense that they require respondents to select from a limited range of responses. Not surprisingly, judges have been very suspicious of the way the response options have been formulated. They have also been concerned about the effect of guessing (Preston 1987). Both these concerns were evident in the case, discussed above, concerning similar insurance company logos. Following the open-ended question, respondents were shown both logos and asked which of the following statements best represented their view:

- They are different logos for the same insurance company
- They represent two different divisions of the same company
- They represent two completely separate insurance companies
- None of the above statements is true

The judge declined to place any weight on the responses to this question. The reasons he gave for this decision were as follows:

A question presenting three positive statements followed by a "none of the above" option is itself likely to engender the belief in some proportion of respondents that one of the first three is correct. That concern is heightened in the present case by the fact that the first two statements effectively put the same or very similar propositions. A roughly even distribution of responses between the two real choices that remain in these circumstances gives rise to doubt about the extent to which any useful inferences may be drawn from them. . . . It is nevertheless, in my opinion, probable that some unquantified but non trivial proportion of answers accepting the truth of one of the first three statements would reflect a best guess derived from the survey situation and the form of the question, rather than the respondent's state of mind.

An alternative approach to asking respondents to select from a closed list of alternatives is to ask a series of yes/no questions. An example of this approach is the question: "Is the advertisement claiming that X?" where X corresponds to the claim allegedly implied by the advertisement. This approach has been explored in previous research and found general

support among barristers practising in the area of deceptive advertising (Langton & Trotman 1992). Most of the barristers surveyed believed that audience surveys using this form of question would be accorded substantial weight in legal proceedings. They did however express two concerns about this form of question. The first was that the wording of the questions might be manipulated to produce the desired responses. The second was that the questions were leading questions in the sense that they seem to invite an affirmative response. It seems likely, therefore, that both these concerns would be exploited by an opposing expert who was hired to undermine the validity of a survey using this form of question.

The purpose of this study was to assess the extent to which the first of these concerns is justified. As Gendall and Hoek (1992) have noted, no general rules exist for predicting when a change in the wording of a question will produce different responses. They argue that only a systematic investigation can determine whether a particular form of question is sensitive to alternative phrasing. In line with their suggestion, the objective of this study was to examine the extent to which the responses to questions of the form "*Is the advertisement claiming that X?*" are affected by variations in wording. Given that the researcher has no control over the wording of the claim alleged to be implied in the proceedings, the variations of interest are those relating to the introductory words of the question.

Method

Subjects for the study were 191 first year commerce students. They were given a self-completion questionnaire, the first page of which explained that the aim of the study was to investigate how different people interpret television advertisements. They were then shown a video tape containing thirteen television advertisements. Following each advertisement, the tape was stopped and participants answered one question about that advertisement. Each question appeared on a separate page and subjects were instructed not to turn the page until after they had watched the relevant advertisement.

Four versions of the questionnaire were produced. Each version contained one of the following versions of the question:

Is the advertisement claiming that X?

Is the advertisement suggesting that X?

Does the advertisement convey the idea that X?

Does the advertisement contain the idea that X?

The first of these variants was included because it had been used in previous research. The other three were formulated from the language commonly used by judges in defining the question facing the court. The classic interpretation of this question is whether the advertisement "*conveys a misrepresentation*" (Healey & Terry 1991). Variants incorporating the terms "*imply*" and "*infer*" were avoided since controversy exists over which of these terms can properly be predicated of an advertisement and which of a viewer. It was anticipated that "*claiming*" variant was the strongest form of the question in the sense that fewer people would agree that a plausible inference from the advertisement was "*claimed*" than "*suggested*" or "*conveyed*" or "*contained*" in an advertisement.

To avoid the risk of sensitising subjects to the differences in wording, the same version of the question was used throughout each questionnaire. All versions of the question incorporated the same set of response options (yes/no/don't know) and the same test claim for each advertisement. None of the test claims was explicitly stated in the advertisement. In some instances, the claims were plausible inferences from the explicit verbal content of the advertisement. In other instances, they were possible interpretations of the pictorial content.

None of the advertisements had been the subject of court proceedings. They were selected on the basis of two criteria. Firstly, it was possible to formulate relatively concise factual statements that appeared to be plausible inferences from the advertisement. Secondly, a small sample of lawyers was asked to estimate the likelihood that a judge would, in the absence of audience survey data, find these factual statements to be implied by the commercials. The cases selected for inclusion in this study were those where little consensus existed on this question. Being "borderline" cases they represent the type of cases that might be litigated.

The four versions of the questionnaire were randomly distributed among the 191 students so that about 50 students completed each version of the questionnaire. If the wording of the questions is an important factor in shaping the responses, then one would expect significant differences in the proportion of each group of students who agreed, disagreed or selected the "don't know" option. Furthermore, one would expect these differences to exhibit a consistent pattern across the thirteen advertisements. In particular, it was hypothesised that the "claiming" version of the question would produce the fewest "yes" responses in each of the thirteen cases. No particular ideas were held about the logical relationships between the other versions of the question.

Results

The distribution of responses to each version of the question for each of the thirteen advertisements, and the order of presentation of the advertisements, is shown in Table 1.

As is evident from Table 1, there was a large variation in the extent to which respondents thought the commercials implied the statements embedded in the questions. At one extreme, about 80% of subjects perceived the Panadol advertisement to imply the statement "*Clinical tests show that Panadol is more gentle on the stomach than any other pain reliever*", which is a claim of product superiority. The explicit claim in the commercial was one of product parity - "*Clinical tests show that no other pain reliever is more gentle on the stomach than Panadol*".

At the other extreme, less than 10% perceived the Miracle advertisement to imply the statement that "*French bread and Miracle margarine constitutes a healthy diet for adult New Zealanders*." The commercial begins with Felicity Kendall entering a kitchen and saying "*What I feel like now is a healthy lunch*." She reads a recipe aloud from book entitled 101 Healthy Recipes. The recipe includes brown rice, tomatoes, leeks and Miracle margarine. Once she discovers that the recipe has a cooking time of fifty minutes, she decides to have a large slice of French bread with a thick layer of margarine instead.

The aim of the study was to assess the extent to which the wording of questions affected the responses. Two forms of analysis were undertaken to investigate this issue. First, each advertisement was examined separately and the differences in responses to the four versions of the question were compared to that which might arise purely by chance.

Table 1. Distribution of responses to four versions of the question.

Advertisement	Order of Presentation		Responses			
			claiming (n=40)	Suggesting (n=47)	Convey (n=50)	contain (n=54)
			%	%	%	%
Miracle	7	Yes	3	9	12	7
		No	95	91	88	89
		Don't Know	3	0	0	4
Drive ¹	11	Yes	10	14	32	15
		No	90	81	54	74
		Don't Know	0	5	14	11
British Airways	1	Yes	8	23	28	15
		No	80	70	64	80
		Don't Know	13	7	8	6
Mitsubishi	6	Yes	13	23	30	17
		No	78	70	62	70
		Don't Know	10	7	8	13
Honda ²	4	Yes	18	26	38	37
		No	75	51	52	43
		Don't Know	8	23	10	20
Buritos	2	Yes	5	16	24	20
		No	75	67	52	59
		Don't Know	20	18	24	20
Pine'ocleen ³	9	Yes	20	16	34	15
		No	68	79	64	83
		Don't Know	13	5	2	2
Simpson	3	Yes	28	46	34	31
		No	60	44	54	54
		Don't Know	13	11	12	15
White Magic	13	Yes	50	44	34	30
		No	35	44	44	48
		Don't Know	15	12	22	22
Reach	5	Yes	48	56	62	52
		No	45	42	38	43
		Don't Know	8	2	0	6

Advertisement	Order of Presentation		Responses			
			claiming (n=40)	Suggesting (n=47)	Convey (n=50)	contain (n=54)
Toyota	10	Yes	58	61	68	74
		No	40	37	32	20
		Don't Know	3	2	0	6
Palmolive	8	Yes	60	56	50	54
		No	38	40	46	44
		Don't Know	3	4	4	2
Panadol	12	Yes	88	79	80	76
		No	5	19	14	17
		Don't Know	8	2	6	7

Notes:

1 $X^2 = 18.80$, d.f. = 6, $p < 0.01$

2 $X^2 = 14.22$, d.f. = 6, $p < 0.05$

3 $X^2 = 14.02$, d.f. = 6, $p < 0.05$

It was found that the differences in responses were statistically significant in only three of the advertisements (Drive $p < 0.01$, Honda $p < 0.05$, Pine'ocleen $p < 0.05$). In each of these three cases, the highest proportion of affirmative responses was produced by the "convey" version of the question. The lowest proportion of affirmative responses was produced by the "claiming" version in two cases (Drive and Honda) and the "contain" version in the remaining case (Pine'ocleen).

The second form of analysis investigated the degree to which the responses followed a consistent pattern across all thirteen advertisements. Each version of the question was compared with each other version across the thirteen advertisements. If the wording had made no difference, one would expect that the proportion of affirmative responses produced by one version would be higher than that produced by another version in about half the cases

The most significant finding was that the "convey" version produced a higher proportion of affirmative responses than the "contain" version in eleven out of the thirteen advertisements. The probability of this occurring purely by chance is close to 1% ($p = 0.011$). The "convey" version also produced more affirmative responses than both the "claiming" and "suggesting" versions in ten of the advertisements. The probability of this occurring purely by chance is close to 5% ($p = 0.046$). Conversely, the results indicate that the "claiming" version did, in fact, produce fewer affirmative responses than each of the other versions.

Discussion

The study suggests that changes in the wording of questions of the form "Is the advertisement claiming that X?" can sometimes produce statistically significant differences in the proportion of the audience who agree that a particular claim is implied by an advertisement. A general pattern emerged to the extent that the "convey" version of the question appears to be the weakest form of the question in that it generally produces the highest proportion of

affirmative responses. The hypothesis that the "*claiming*" version was the strongest version, in the sense that it produces the lowest proportion of affirmative responses, was supported by the study. "*Claiming*" produces the lowest proportion of affirmative responses for nine of the thirteen cases. For one item (Pine'ocleen), very similar results were obtained for "*claiming*" "*suggesting*" and "*containing*". For the other cases, a majority of respondents indicated a "yes" for all the versions, suggesting that in more obvious cases, respondents will make a stronger statement, whereas in less clear cut cases, they will be more conservative. The question arises whether these findings carry much *practical* importance in the context of misleading advertising litigation.

In proceedings under the Fair Trading Act 1986, the first task of the court is to decide whether the advertisement *implies* the claim alleged. In deciding this question, the court will consider whether "a significant proportion" of the audience perceived the claim to be implied (Goldring, Maher & McKeough 1993). However the courts have steadfastly refused to specify a particular proportion as "significant" in this regard. One common justification for this position is that the proportion should vary depending on the seriousness of the consequences of consumers being misled by the advertisement (Jacoby & Small 1975). Thus, what amounts to a significant proportion in relation to pharmaceutical advertisements might be much smaller than that which is appropriate to entertainment advertisements.

Nevertheless, it is possible to suggest some limits to the concept of a "significant proportion" in this context. It is clear that an advertisement will not be held to be misleading where only a very small proportion of people are misled by it. Thus, the fact that several credible witnesses testify in court to the effect that they perceived the advertisement to be making the inaccurate claim is not treated as conclusive evidence that the advertisement is misleading. The court will consider the extent to which this interpretation can be extrapolated to the general audience. Where the court believes that more than half the audience perceived the claim, the advertisement will be categorised as misleading. However, the courts have repeatedly emphasised that 50% is *not* a critical figure and that an advertisement may be held to be misleading where less than half of the audience are misled by it.

Where no audience research data is presented to the court, much of the evidence and argument at the trial is devoted to speculating on the proportion of the audience that is likely to perceive the alleged claim. Where audience research data is presented, the debate tends to focus on the methodology used to collect the data. In this debate, the influence of the wording of the questions is often a contentious matter. It can easily be suggested that alternative wording of the questions would have produced dramatically different proportions of people who agree that the challenged claim is implied.

The findings in this study could be of some assistance in rebutting that suggestion with respect to questions of the form "*Is the advertisement claiming that X?*" The study suggests that it is reasonably difficult to produce large changes in the responses to such questions by altering the introductory words of the question. The responses to such questions appear to be determined more by the extent to which the alleged claim is an "*obvious*" inference from the advertisement than the wording of the questions. There are likely to be few instances in which the issue of question wording will determine whether the evidence favours the plaintiff or the defendant.

The study does not assist in identifying the "*best*" version of the question for the purposes of misleading advertising litigation. This is because no criteria are available to decide what is

meant by the "best" version. Given the findings of the study, it might be thought that a plaintiff is likely to prefer the "convey" version of the question which appears to encourage an affirmative response. On the other hand a plaintiff might choose the "claiming" version on the grounds that it would be easier to refute the allegation that wording of the question has inflated the proportion of affirmative responses.

In this study, few people selected the "don't know" option (about 8%). This finding, which is consistent with previous research (Jacoby & Hoyer 1982), suggests that respondents found the questions relatively easy to answer. While for most purposes the "don't know" responses might simply be ignored, it would appear unwise to delete this category from the response options. This is because judges have sometimes seen the absence of a "don't know" option as a fatal flaw in forced-choice questions.

This study investigated the effect of wording variations in one type of forced-choice question. It should be noted, however, that the same issue can arise with respect to open-ended questions. It is conceivable that the question "What is the advertisement claiming?" would produce quite different responses to the question "What does the advertisement convey to you?" While, intuitively, it seems that wording effects are likely to be less noticeable in open-ended questions, this possibility could be empirically investigated. Any attempt to do so would have to confront the additional problem of coding the responses to open-ended questions.

References

- Aaker DA (1974). Deceptive advertising. In Aaker DA & Day GS (Eds). *Consumerism: Search for the consumer interest*. Free Press: New York.
- Dwyer JW & Katekar BF (1994). Information is preferable to intuition - but will survey evidence in trade mark cases provide any? *Australian Intellectual Property Journal*, 37-55.
- Gardiner DM (1975). Deception in advertising: A conceptual approach. *Journal of Marketing*, 39, 40-46.
- Gendall P & Hoek J (1990). A question of wording. *Marketing Bulletin*, 1, 25-36.
- Goldring J; Maher LW & McKeough J (1993). *Consumer protection law*. Federation Press: Sydney, 254-255.
- Healey D & Terry A (1991). *Misleading or deceptive conduct*. CCH: Sydney, 165
- Hodgkinson T (1990). *Expert evidence: Law and practice*. London: Sweet & Maxwell, 289-292.
- Jacoby J & Hoyer WD (1982). Viewer miscomprehension of televised communications: Selected findings. *Journal of Marketing*, 46, 12-26.
- Jacoby J & Small C (1975). The FDA approach to defining misleading advertising. *Journal of Marketing*, 39, 65-68.

Langton RJ & Trotman LGS (1990). An empirical study of the weight of survey evidence in deceptive advertising litigation. *Canterbury Law Review*, 5, 147-170.

Preston IL (1987). Extrinsic evidence in federal trade commission deceptiveness cases. *Columbia Law Review*, 633-694.

Preston IL (1983). Research on deceptive advertising: Commentary. In: *Information processing research in advertising*. London: Lawrence Erlbaum, 289-305.

Shimp TA (1979). Social psychological (mis)representations in television advertising. *Journal of Consumer Affairs*, 13, 28-40.

Tapper C (1990). *Cross on evidence* (7th ed). London: Butterworths, 269.

Weston TC (1987). Market survey evidence: Admissibility and weight. *New Zealand Law Journal*, 28-29.

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