MARKETING BORED

Jim Fischer

"Got Milk?" "Beef. It's What's For Dinner." "Behold The Power Of Cheese."

"Honey..." ummm, uh... I dunno...

Hey! Wait a second – I'm a beekeeper, and I don't know what the snappy saying is for honey. Do we even have a snappy saying? If not, why not?

The votes have been counted from this summer's Honey Board referendum, and a majority of those who pay assessments on domestic and imported honey voted to continue the National Honey Board.

But regardless of if you voted, or how you voted if you voted, did your vote matter?

Apparently, not at all.

Producers of other foods have been crowding the courthouses, subjecting their own marketing boards to what can only be called "the death of a thousand paper cuts" in lawsuits that will decide the fate of the National Honey Board, regardless of what beekeepers, honey packers, or honey importers want.

The Cattlemen's Beef About The Beef Board

In July, the U.S. Court of Appeals for the 8th Circuit refused to overturn a lower court's decision that it was unconstitutional for ranchers to be forced to pay fees for marketing programs. The ranchers complained that forcing them to pay for marketing campaigns and commercials violated their First Amendment rights.

"Wait a moment," you may be thinking. "Doesn't the First Amendment PROTECT speech?" Yes, it does, but it also protects your right to not have words put in your mouth by someone else. The cattlemen felt that they were "compelled to speak" by being forced to pay for promotions that they might not like, or might not agree were effective.

The USDA argued that the assessments were constitutional because the ads were "government speech," but the court ground that claim into hamburger, saying:

[The cattlemen] "in the present case are challenging the government's authority to compel them to support speech with which they personally disagree. Such compulsion is a form of 'government interference with private speech,' not the government speaking for itself."

The Court went on to rule that the Beef Board was dead meat:

"No remaining aspects of the [Beef Marketing] Act can survive when the 'principal object' of the Beef Act [the promotional campaign] is the very part that makes it unconstitutional."

But the ranchers still have to pay $1-per-head assessments until further notice, because the Eighth Circuit granted a "stay" of its own ruling until the U.S. Supreme Court can decide if it wants to review the ruling. Other courts of appeal have ruled that other commodity assessment programs are constitutional, so the USDA will certainly appeal the ruling to the U.S. Supreme Court.

And this is where it starts to get really bizarre – the USDA is fighting to keep the commodity programs, since they feel obligated to represent the interests of producers who support the beef promotion program. At the same time, the USDA's new "food pyramid," which replaces the old "four food groups," tells people to eat less red meat.

To summarize, our tax dollars are being spent by the USDA to both defend the promotion of beef using music by Aaron Copeland, and at the same time to warn people to eat less beef. Suddenly, the explanation that the USDA simply "forgot" to fund the bee labs in their last budget seems slightly less incredible.

To summarize the summary, the only unifying theme is that there IS no unifying theme. That's gotta cost more.

But the cattlemen were not presenting a new argument, they were quoting the U.S. Supreme Court's opinion about the Mushroom marketing board.

Not Much Room For Mushrooms

In 2001, the U.S. Supreme Court ruled that forcing mushroom growers to pay for generic mushroom advertisements violated the First Amendment by compelling growers to pay for "speech" that some of the growers did not like. The court said, in its ruling on "USDA vs. United Foods":

"First Amendment values are at serious risk if the government can

Continued on Next Page

MARKETING ... Cont. From Pg. 29

compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. Just as the First Amendment may prevent the government from prohibiting speech, the First Amendment may prevent the government from.....compelling certain individuals to pay subsidies for speech to which they object."

Mandatory assessments now only fund mushroom *research*. (I will refrain from making a joke about mushroom research to avoid retaliatory jokes about bee research from the mushroom growers, so the reader should insert his or her own favorite mushroom joke here.)

Voluntary contributions are solicited to fund promotional activities, so while promotion continues, those who do not agree with the promotional effort need not contribute.

"A board that promotes, but does not regulate the commodity or its producers cannot impose mandatory assessments."

Shades Of Difference Under the Fruit Trees

The mushroom decision did not instantly render all commodity board mandatory assessments unconstitutional. In 1997, the U.S. Supreme Court ruled that the mandatory assessments of the California Tree Fruit Board (nectarines, plums and peaches) did not violate the First Amendment rights of growers. A major reason was inept oral arguments presented by a lawyer whose specialty is employment law in Fresno, CA. The growers' case could have been presented by Michael McConnell, one of the leading First Amendment scholars in the USA, but both lawyers wanted the honor of presenting the case to the Supreme Court, so the question of which attorney would argue the case for the growers was decided by a coin flip. Why the mushroom-grower clients did not choose the advocate to present the case remains a mystery.

The other reason why the assessments were constitutional was that the promotion was only one part of a much broader set of activities funded by the assessments, including a quality control program that set standards for things like fruit maturity and minimum sizes for fruit.

Bad Apples

Not all the lawsuits were filed by angry producers. There was one case where a marketing board sued producers. But this was a very "friendly" lawsuit. The board promised to pay the legal fees for the producers they sued. The Washington Apple Commission got two growers to agree to be "defendants" in a case and pretend to be "unwilling" to pay the assessment, all so a court could rule in favor of the marketing board. One of the growers was even a former Chairman of the Commission, but somehow, the judge did not throw the case out as an attempt to perpetrate a fraud upon the court.

The Apple Commission's little scheme backfired. Other growers, who felt that their 25 cents per 42-pound box of apples ($22 million a year total) was not being spent wisely, turned the lawsuit into a class action suit, and got the case moved from county court to federal court. They asked for a refund of all assessments paid since the suit was filed, and also asked that all current and future assessments be placed into escrow pending a final court ruling.

In August, the court accepted a settlement proposal that cuts the 25 cent assessment per box of apples to 3.5 cents. (Let this be a lesson to anyone who thinks that climbing the courthouse steps is anything other than a last resort, or that any legal action can ever be a "sure thing.")

"Got Milk," or Got Milked?

The 12 biggest commodity boards together collect nearly $700 million in assessments per year. In contrast, the California Raisin Marketing Board, known for their singing and dancing raisins, made those dancing raisins famous for a mere $40 million a year.

Admit it – you're humming "Heard It Though The Grapevine" aren't you? And you are smiling too, I bet. You are likely thinking "Gee, I LIKE those little raisin guys!" You are not alone – a recent survey by the Raisin Board found that about 49 percent of those polled still remember the raisins fondly, and more importantly, remember that they are CALIFORNIA raisins. Results like that have a way of raisin expectations, don't they?

But how did a small bunch of grape growers in one state create a more memorable promotional program than all the rest of the promotion programs put together? Just to make us even more envious, they promoted CALIFORNIA raisins, not imported raisins, not even raisins from another state.

Most important of all, you have not seen any of the raisin ads since the 1990s. The marketing board that was responsible for the dancing raisins was disbanded, and a new board was established after a period without any marketing board.

The singing and dancing raisins were such a success, they even made a cash profit from "merchandising." They generated about $200 million in revenue from toys, coffee mugs, tee shirts, and such. There was even a Saturday-morning children's television program featuring the raisins. That's right, the "logo" made big money all by itself. Promoting the crop was better than free.

But here's a sobering thought – when they stopped advertising, raisin sales shriveled more than the raisins themselves, from 200,000 tons in 1994 to 174,000 tons in 1998.

Now they have a new raisin board, funded by growers who will pay a $20-per-ton assessment. This will give them a budget of about $4 million total, half of which is allocated for advertising. Clearly, the raisins will be back soon, but there may not be enough money to buy them new dancing shoes.

Up To Our You-Know-What In Alligators

Alligators? Yes, alligators. (Sometimes, these articles just

write themselves!) The Louisiana Department of Wildlife and Fisheries decided one day that alligator products needed to be promoted, so they imposed state-level mandatory assessments, presumably to convince people to buy more alligator shoes, alligator handbags, and alligator-skin luggage. The opponents promptly made some photocopies of the First Amendment complaints from the other marketing board cases, and the circuit court judge stopped laughing just long enough to rule:

"The undersigned admits to a certain degree of difficulty in maintaining an appropriately straight judicial face while attempting to apply the Supreme Court precepts that explain the simple language of the First Amendment to the alligator advertising program at issue here. When important constitutional issues must be resolved by a determination of whether an alligator is more like a mushroom than a peach, then in the words of Justice Thomas: 'Surely we have lost our way.'"

So, Alligators, a protected species for years, now also appear to also have the constitutional protection of the First Amendment.

The AHPA's Suit

The American Honey Producers are pressing exactly the same argument as other producers, but are still in the "preliminary administrative" phase, where they are required to submit their grievances to a USDA Administrative Law judge. The entire "First Amendment issue" will likely be decided in the other cases long before the AHPA gets anywhere near any federal courthouse.

The "free speech" argument has been raised 14 times in suits against nine different USDA agricultural promotion programs (almonds, beef, plums, dairy, mushrooms, pork, tree fruits, watermelons, and honey). The arguments have taken place in five different federal circuit courts. Two cases have been reviewed by the U.S. Supreme Court, and one case was reviewed by the California Supreme Court. Two cases (including the Honey Board suit) are still in in USDA administrative adjudication.

In all these cases, the USDA has argued that mandatory assessments for advertising and promotion are constitutional as long as the ads are nonpolitical and individual producers were not restricted in their own advertising.

The distinction set by the Supreme Court rulings between the fruit and mushroom programs are clear. ***A board that promotes, but does not regulate the commodity or its producers cannot impose mandatory assessments.***

Since the Honey Board *does not regulate* the industry or set quality standards, the precedent set by the mushroom decision would appear to apply directly to the question of mandatory assessments for honey promotion.

The Tyranny Of Which Minority?

Don't expect the USDA Agricultural Marketing Service to concede that mandatory assessments are unenforceable. They likely feel obligated to defend each existing program to the best of their ability and feel that by doing so, they are serving the majority of producers and importers who support the promotion efforts.

But was the "majority" a majority of producers? Put another way, what would the USDA do if money was withheld by some packers and handlers, and diverted to an ad agency instructed to promote U.S.-produced honey rather than generic honey? Would the USDA sue? If they did, it would only result in an earlier court date for presentation of a "friend of the court" brief from the AHPA's lawyers questioning the constitutionality of the assessments.

What can we say about all this?

It seems reasonable to conclude that:

1) It pays to advertise.
2) It really pays to advertise when other people are doing most (or all) of the paying.
3) It doesn't pay to advertise if you promote your direct competitor's products with your money.
4) One good ad agency is worth more than a dozen commodity marketing boards, and costs only 1/20th as much.
5) "Free speech" includes the right to not be forced to pay for a lame promotional effort.
6) Lawsuits are no more predictable than a coin flip, even when both plaintiff and defendant agree on the intended outcome ahead of time.
7) The USDA may continue the fight to promote honey and the other "commodities" all the way to the Supreme Court, but at the same time, they will continue to warn in their food pyramid literature "No specific serving size is given for the fats, oils, and sweets group because the message is USE SPARINGLY." Gee, thanks guys!
8) Suddenly, making peace with the packers and importers on the issue of promotion should seem much easier than making peace with the USDA. Let's try to replace the current "zero-sum death grip" with a simple handshake, OK?
9) For a few million dollars a year, we should at least have a snappy slogan. Heck, send your ideas to this magazine, and the big winner gets **a five-year subscription.** Note that neither approach uses a single dime of my money, so I will like whatever results.*
10) When you stop advertising, your sales go down. BC

James Fischer keeps unassessed bees in the mountains of Virginia, and hopes that any slogan developed for honey has better grammar than "Got Milk?"

*Send as many slogans as you wish on a postcard (if the writing is so small we can't read it, we won't) to: Honey Slogan, 623 W. Liberty Street, Medina, OH 44256.

January 1, 2004 we'll sort out the duplicates (earliest postmark), study them late into the night and publish the top 10 in the February (maybe March, or even April if we get lots) 2004 issue. Then, everybody votes for the best (2 and 3 get a one-year free subscription). There'll be no copyright, patent or other foolishness connected to this (soon-to-be) excellent marketing tool. Send in *your* slogans today! Get your friends to send in theirs too. Have everybody in your club send in some. Call people. Send emails. The more we have, the better the final choice. Do it today!