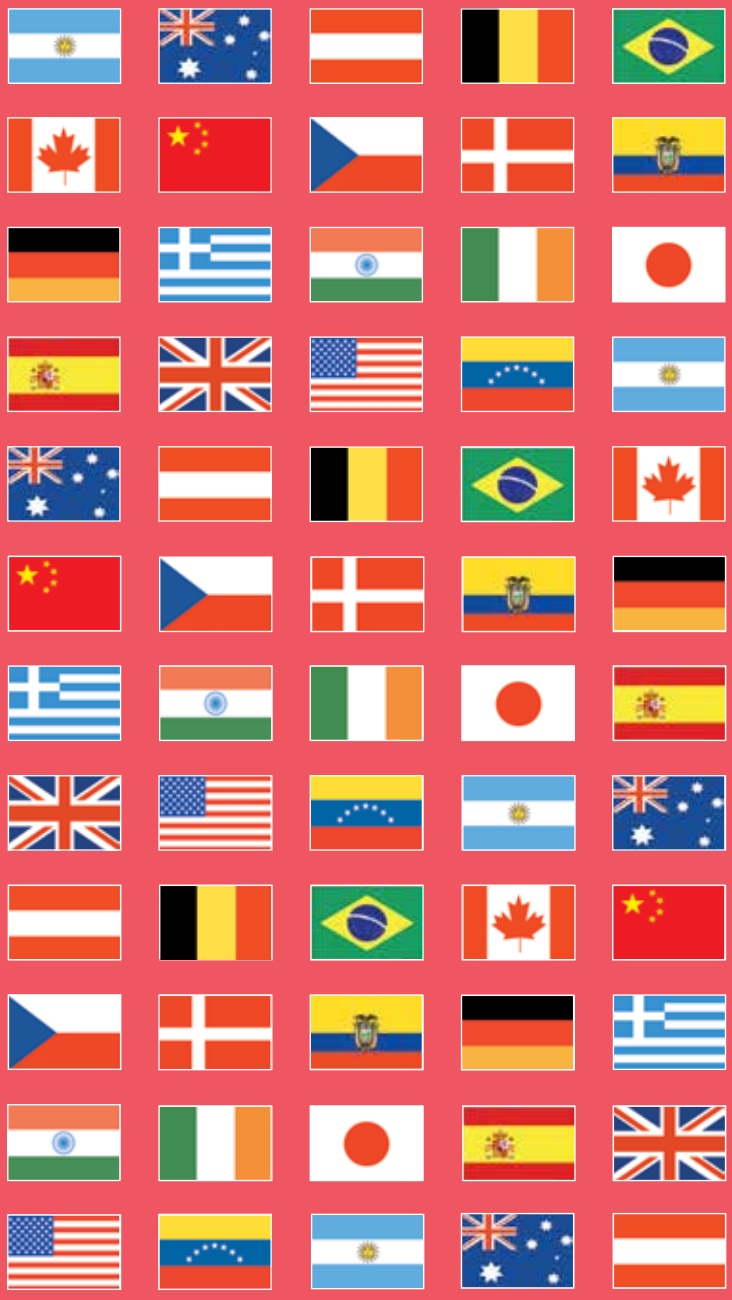
GETTING THE DEAL THROUGH

Advertising & Marketing

in 19 jurisdictions worldwide

2014

Contributing editor: Rick Kurnit



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Getting the Deal Through is delighted to publish the first edition of *Advertising & Marketing*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 19 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Introduction

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Advertising may be virtually any communication that affects consumers' impressions about a marketer's products or services, or even policies and practices. Traditional media did not have much difficulty distinguishing editorial content from the paid insertions that were authored by an advertiser, but today the integration of brand messages into the content stream is exploding. This puts the burden on brands to oversee a wealth of content being generated by many different sources. Public relations professionals who have grown up in a world where their communications were mediated through independent media and therefore not viewed as advertising are now facing the need to review their materials against the stricter tests of advertising. Press releases, letters to newspapers, content that is placed or even made available in the stream of digital media may be deemed to be advertising. The question of what constitutes 'advertising' in the online and social media arena is a moving target. Digital media afford an instant opportunity to move from editorial to purchase, perhaps with a revenue share for the content provider, and this too may cause the content to be viewed as advertising.

Truth in advertising is largely a matter of the techniques that salespeople have always used to overcome consumers' tendency to doubt the seller's claims. Grandiose claims couched in extraordinary superlatives, incapable of any kind of verification and not addressing any specific or absolute characteristic of the product are mere 'puffery'. They get the consumer's attention, but they are just 'hot air'. They are not likely to convince the consumer to purchase the product on any basis that the consumer cannot evaluate. Apparently objective or independent evidence that supports the advertiser's claims, particularly those the consumer cannot independently assess, provide the consumer with a reason to purchase.

The crucial issue is whether the advertising makes an actual, objectively provable claim about the product that is likely to influence consumers' purchasing decisions or whether the claim is an obviously exaggerated representation that 'ordinary consumers do not take seriously'. Is there some aspect of the advertising that serves to enhance the credibility of the advertiser? Is there some message that serves to overcome consumers' natural tendency to discount the claims because they are made by the seller of the product? These messages of enhanced credibility will often be the distinction between puffery and a factual claim requiring substantiation. The analysis of the advertising in this way helps to focus on whether or not there are in fact claims that must be substantiated.

A product demonstration or test of product performance permits the consumer to rely upon his or her own eyes. A consumer stating his or her own personal experience with the product provides 'independent, unbiased' verification of the seller's claims. Expert testimony and scientific explanations from professors or doctors make extraordinary claims believable. Reliable reports of many satisfied customers similarly provide a substitute for having to take the seller's word for the truth of his claims. And finally, a money-back guarantee suggests that performance is measurable and real. In short, facts, demonstrations, tests, endorsements, surveys, guarantees and other means to overcome consumers' natural cynicism about claims made by advertisers and enhance the credibility of the advertiser's message must be supported by hard data and controlled proof.

It is not a question of what was intended. Advertising is judged based on what is communicated and understood by the consumer. Thus we must define the relevant consumers who are likely to be influenced by the advertising in making purchasing decisions. This raises the question of what these consumers understand before seeing the advertising and what they take away from the advertising. Regulators may view the communication from the perspective of the reasonable consumer to whom the advertising is directed acting reasonably in the circumstances. Or they may seek to protect the 'village idiot': 'the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions'. Thus regulators may allow for a portion of the audience being confused, but in most jurisdictions advertising must meet the test with respect to any substantial portion of the audience.

In the digital world in which the current generation has grown up, the consumer is likely to become more sophisticated and experienced in perceiving communications and discerning what is authentic and unbiased. The content that is now being created and displayed on the world wide web is sponsored, supported, encouraged and disseminated by advertisers in new ways and with new technologies. Advertisers' greatest asset is the brand equity of a trusted brand. A misstep in communications that tarnishes that brand or damages the brand's relationship with consumers can be catastrophic. And in a global ecosystem a misstep in one part of the world can reverberate worldwide. Attorneys responsible for guiding advertisers on compliance with best practices and avoiding liability face an increasingly difficult task as different jurisdictions must be considered in reviewing global communications and training communications professionals to understand the universal principles that we call 'truth in advertising'.

United States

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Legislation and regulation

1 What are the principal statutes regulating advertising generally?

Federal law

There are numerous federal laws governing advertising in the United States, many enforced by the Federal Trade Commission (FTC). There are general statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices. Some key examples are:

- the FTC Act. The FTC Act prohibits 'unfair or deceptive acts or practices';
- the Lanham Act. The Lanham Act is the federal false advertising statute; and
- the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Consumer Financial Protection Bureau (CFPB) has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

State and local law

Each state also regulates advertising, both with general consumer protection statutes (many modelled on the FTC Act), as well as with statutes regulating specific practices (such as the administration of sweepstakes and contests). Some counties and municipalities also have consumer protection laws. These laws run the spectrum from general prohibitions on deception to specific requirements related to pricing and other retail practices. Some examples include:

- New York. The General Business Law in New York provides that 'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.' New York law also prohibits 'false advertising in the conduct of any business, trade or commerce or in the furnishing of any service'.
- California. The Business and Professions Code in California provides that it is unlawful to make any statement that 'is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading'. See *Williams v Gerber Products Co*, 523 F.3d 934 (9th Cir. 2008); *Kwikset Corp v Superior Court*, 51 Cal 4th 310 (2011).
- New York City. New York City prohibits 'any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts'. See N.Y.C. Admin. Code section 20-700. The New York Court of Appeals has interpreted the statute to give New York City broad authority to go after a wide range of deceptive practices. See, eg, *Polonetsky v Better Homes Depot, Inc*, 735 N.Y.S.2d 479 (2001) (real estate sales and repairs); *Karlin v IVF America, Inc*, 690 N.Y.S.2d 495 (1999) (medical services).

2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

As noted above, numerous regulatory bodies have authority over advertising and marketing. Among them:

- the FTC is primarily responsible for enforcing the nation's federal consumer protection laws, including the FTC Act, which prohibits 'unfair or deceptive acts or practices' (see 15 U.S.C. section 45); and
- state attorneys general and local district attorneys also have jurisdiction to enforce state and local consumer protection laws.

In addition, there are regulatory agencies charged with responsibility over specific industries and their advertising and marketing practices:

- the US Food and Drug Administration (FDA) is charged with regulating prescription drug and biomedical advertising (see, eg, 21 CFR 312.7(a));
- the CFPB has authority to implement and enforce federal consumer financial law for 'non-bank' financial companies (see, eg, 12 U.S.C. section 5491);
- the Department of Transportation has jurisdiction to regulate airline advertising (see, eg, 49 U.S.C. section 41712);
- the Securities Exchange Commission has control over the false advertising of securities (see, eg, Securities Act of 1933; Securities Exchange Act of 1934);
- the Financial Industries Regulatory Authority (FINRA) has a variety of rules and guidelines affecting advertising by its members (see, eg, FINRA Rule 2210); and
- the Federal Alcohol Administration regulates unfair competition, including false advertising, in connection with the interstate sale of alcoholic beverages (see, eg, 27 U.S.C.A. section 205(e), (f)).

3 What powers do the regulators have?

Remedies available for false advertising vary widely, based on the claims that were brought, and range from equitable relief to substantial money damages. Examples of the types of remedies that may be available to the FTC include:

- disgorgement: an order requiring the advertiser to pay the total amount of revenues or profits by refunds to consumers;
- penalties: civil penalties of up to $16,000 per violation, in certain types of cases;
- injunction: an order prohibiting the marketing method or practice;
- fencing in: a 'fencing in' order prohibits more than the current conduct and prohibits marketing practices or marketing a type of product;
- products: an order prohibiting advertising certain types of products;

- marketing practices: an order prohibiting engaging in certain types of marketing practices;
- trade name: an order barring the use of a deceptive trade name;
- disclosures: an order requiring certain disclosures to be included in future advertising;
- direct notification: an order requiring sending notices to consumers;
- consumer education: requiring the marketer to supply or publish information; and
- corrective advertising: an order requiring the advertiser to engage in corrective advertising. 'If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.' See, eg, *Novartis Corp v FTC*, 223 F.3d 783 (D.C. Cir. 2000).

4 What are the current major concerns of regulators?

Regulators in the United States have been particularly focused in recent months on 'native advertising'. The FTC and the states have been actively pursuing measures and cases that require marketers to sufficiently distinguish between editorial content and adverts designed to mimic the look of editorial content. Other areas of concern are claims about 'natural' products, environmental benefits, health and nutrition, and the sufficiency of digital disclosures on small screens and mobile devices.

5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

Self-regulation plays an important role in the advertising industry. Industry groups have promulgated respected and widely followed self-regulatory codes, and many advertising disputes are resolved through self-regulatory dispute mechanisms. Examples of self-regulatory groups, with advertising codes or dispute regulation programmes, include:

- the National Advertising Division (NAD) resolves truth-in-advertising disputes. See www.nadreview.org;
- the Children's Advertising Review Unit (CARU) resolves disputes regarding compliance with the CARU Self Regulatory Guidelines for Children's Advertising. See www.caru.org;
- the Electronic Retailing Self-Regulation Program (ERSP) resolves disputes regarding truth in advertising primarily for direct response advertising. See www.narcpartners.org/ersp, and also www.retailing.org;
- the Better Business Bureau has issued its own Code of Advertising. See www.bbb.org/membership/codeofad.asp;
- the Direct Marketing Association has issued numerous guidelines on marketing practices, such as the Guidelines for Ethical Business Practice. See www.the-dma.org;
- the Mobile Marketing Association has issued various guidelines for the mobile marketing industry. See www.mmaglobal.com;
- the Promotion Marketing Association has issued industry guidance, including its Best Practices for Rebates. See www.pmalink.org; and
- the Word of Mouth Marketing Association, which addresses the issues faced by buzz marketers, has issued its Word of Mouth Marketing Code of Ethics, see www.womma.org.

Participation in cases heard by advertising review programmes administered by the Council of Better Business Bureaus, such as the NAD, the CARU and the ERSP, is voluntary and their recommendations are not binding. However, regulators, particularly the FTC, have given notice that they will investigate cases referred to them by self-regulatory agencies where the marketer has declined to participate. Examples of remedies sought include:

- withdrawal: ceasing use of the advertising (or element of the advertising) that has been determined false or misleading;
- modifications: modifications to the advertising in the future as specified by the regulatory group;
- disclosures: adding specific information to the advertising that is deemed necessary in order to avoid consumer confusion or deception; and
- product name change: for example, removing 'all-day' from the 'one-a-day all-day energy' product name.

6 Must advertisers register or obtain a licence?

No, not in the United States.

7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

The FTC's Rules of Practice provide that the Commission or its staff, in appropriate circumstances, may offer industry guidance in the form of an advisory opinion. Advisory opinions serve a public informational and educational function, in addition to their value to the opinion requesters. The basic requirements for obtaining advisory opinions; the limitations on their issuance and application; and the point at which both a request for an advisory opinion and the advisory opinion will be placed on the public record are described in sections 1.1–1.4 of the Commission's Rules of Practice, 16 C.F.R. sections 1.1–1.4.

The major broadcast networks (such as ABC, CBS, NBC and Fox), as well as some others, require that commercials that air on their networks comply with their guidelines. In order to ensure compliance, the networks pre-clear commercials before they are accepted for broadcast.

Some industry groups provide ratings on entertainment products, to give consumers information about the content of those products. They include the Motion Picture Association of America (www.mpaa.org), the Entertainment Software Rating Board (www.esrb.org), and the Recording Industry Association of America (www.riaa.com).

Many industry groups have also issued self-regulatory guidelines, which are applicable to the marketing of specific types of products. Examples include the Distilled Spirits Council of the United States (www.discus.org) and the American Gaming Association (www.americangaming.org).

Private enforcement

8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging a competitor's advertising?

The federal Lanham Act provides the main remedy (in addition to state law claims) for competitors to address false advertising claims. Section 43 of the Lanham Act provides, in relevant part: 'Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person

who believes that he or she is or is likely to be damaged by such act.' See 15 U.S.C. section 1125(a)(1)(B).

Additionally, as noted above, many advertising disputes are resolved through self-regulatory dispute mechanisms such as the NAD and the CARU.

9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Private consumer actions for false advertising, including class actions, may be brought under state laws in various state and federal courts, as consumers in most states have standing under state false advertising statutes. See eg, Cal. Civ. Code section 1780(a); N.Y. Gen. Bus. Law section 350.

10 Which party bears the burden of proof?

Private plaintiffs, as well as administrative authorities, bear the burden of proof in false advertising litigation.

11 What remedies may the courts or other adjudicators grant?

Temporary restraining orders prohibiting publication of advertising pending a preliminary injunction hearing are possible, but they are rarely granted. First Amendment concerns and the need for evidence of the meaning actually communicated are grounds for waiting for a hearing. However, where advertising makes a claim that is found to be literally false a court may issue a temporary order prohibiting publication pending a hearing. Within a week to 10 days of a section 43(a) action it should be possible to have a hearing – usually devoted to the interpretation of the advertising and the adequacy of the substantiation. Irreparable injury is presumed if likelihood of success on the merits of a false advertising claim is established by a direct competitor. In most cases the ruling on a preliminary injunction has been dispositive. Frequently, the parties consent to one hearing, combining the preliminary injunction hearing with the trial. Altering the advertising that has been preliminarily enjoined is usually less expensive than continuing the litigation. Permanent injunctions are granted without proof of lost sales.

One tactic that has met with mixed results is to pull the offending advertising and submit revised material to the court. In order to recover damages, a plaintiff must establish actual consumer confusion or deception or establish that the defendant's actions were intentionally deceptive giving rise to a rebuttable presumption of consumer confusion. The court may treble actual damages and award attorneys fees under sections 35 and 36 of the Lanham Act. A competitor's damages may include the profits obtained during the time that the false advertising was in use, as well as an amount equal to the cost of the advertising campaign in order to permit advertising to correct the misimpression. Such damages may only be available where the advertising was published wilfully and in bad faith.

12 How long do proceedings normally take from start to conclusion?

A Lanham Act case instituted in a federal court may be concluded in a matter of months, if the parties consent to merge the trial with the preliminary hearing. However, the judge may reserve his or her decision and might take several months to decide, even whether to grant a preliminary hearing. Often the losing party will appeal the grant or denial of the preliminary injunction, since this a strong indicator of the way the judge will rule even after hearing additional evidence. The appeal can be expedited and therefore only take a month, or may proceed normally and take three to six months or more. A full trial can take a year or more and be followed by an appeal. Damages are usually left for a later hearing, after the rendering of the decision on liability, and are rarely pursued, as once the only issue is the amount of money, settlement makes more economic sense.

13 How much do such proceedings typically cost? Are costs and legal fees recoverable?

A federal false advertising case moves quickly with the attendant costs during the first few weeks culminating in the preliminary injunction hearing mounting rapidly. Depending on the complexity of the claim (and whether scientific evidence and experts will be necessary or whether the claim is implied so that consumer perception studies are necessary), the cost could range from $100,000 to $500,000 (if a large US or global firm is retained). The prevailing party may recover reasonable attorney's fees, but only in the discretion of the judge and only on proving that the deception was knowing and wilful.

14 What appeals are available from the decision of a court or other adjudicating body?

A decision of a trial court is appealable as a right to a higher tribunal to address claimed errors of law, but generally not errors of facts found by a trial court. NAD decisions can be appealed to the NARB, which composes a panel of five advertising experts to review the ruling of the NAD staff attorneys. These panels rarely reverse the NAD determinations about the competence of substantiation, but will frequently reassess the determination of what is communicated by the advertising.

Misleading advertising

15 How is editorial content differentiated from advertising?

Section 5 of the FTC Act prohibits 'unfair or deceptive acts or practices'. The FTC has held that it is potentially deceptive (or a 'misrepresentation or omission likely to mislead the consumer acting reasonably to the consumer's detriment') for an advertiser not to disclose that its content is not pure editorial content but is instead advertising. (See, eg, www.ftc.gov/opa/2012/01/fakenews.shtm). With titles such as 'News 6 News Alerts', 'Health News Health Alerts', or 'Health 5 Beat Health News', the sites often falsely represented that the reports they carried had been seen on major media outlets such as ABC, Fox News, CBS, CNN, USA Today and Consumer Reports). The FTC has also promulgated the Guides Concerning Use of Endorsements and Testimonials in Advertising. 16 C.F.R. section 255 et seq. Under the Guides, advertisers could ostensibly be subject to liability for failure to adequately communicate any material information that the consumer of the content should have to comprehend any material influence over its content other than the apparent author's unbiased choice. Id. section 255.1(a); *R.J. Reynolds Tobacco Co v FTC*, 192 F.2d 535 (7th Cir. 1951); *Cliffdale Associates*, 103 F.T.C. 110 (1984). Also, content deemed 'advertising' (as opposed to editorial content) can have implications for clearance issues. Once the content becomes advertising, or 'commercial speech', it is granted less First Amendment protection (eg, for fair use in copyright) and no protection against right of publicity claims.

16 How does your law distinguish between 'puffery' and advertising claims that require support?

Claims by advertisers must be able to be substantiated, but substantiation is not required for puffery. See *In re Pfizer Inc*, 81 F.T.C. 23 (1972). The crucial issue is whether the advertising makes an actual, objectively provable claim about the product that is likely to influence consumers' purchasing decisions or whether the claim is an obviously exaggerated representation that 'ordinary consumers do not take seriously'. (FTC Deception Policy Statement appended to *Cliffdale Associates, Inc* 103 F.T.C. 110 (1984).)

17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Section 5 of the FTC Act prohibits 'deceptive' acts or practices. The FTC defines a 'deceptive' act or practice as a misrepresentation or omission that is likely to mislead the consumer acting reasonably under the circumstances to the consumer's detriment. See the FTC Deception Policy Statement appended to *In the Matter of Cliffdale Associates, Inc*, 103 F.T.C. 110 (1984); see also *FTC v Telebrands*, 2005 WL 2395791 (2005) (FTC decision). If a disclosure is required in order to prevent a claim from being misleading, the FTC generally requires the disclosure to be 'clear and conspicuous'. The factors that the FTC considers when determining whether a disclosure is 'clear and conspicuous', include the placement of the disclosure in the advert, the proximity to the claim being modified, the prominence of the disclosure, and how the disclosure is presented (such as, are there other elements of the advert that distract consumers' attention from the disclosure and is the disclosure in language that is easy to understand?). See, eg, '. com Disclosures: How to Make Effective Disclosures in Digital Advertising'; FTC Deception Policy Statement ('Qualifying disclosures must be legible and understandable').

18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

The general rule is that all express and implied claims that are made in advertising must be truthful and not deceptive, and there must be proof for claims before they are disseminated. See 15 U.S.C. section 45. An advertiser must have a 'reasonable basis' for any claims that it makes in its advertising. See *In the Matter of Pfizer Inc*, 81 F.T.C. 23, 87 (1972); FTC Advertising Substantiation Policy Statement. In order to determine whether an advertiser has a 'reasonable basis' for its claims, the following factors are considered: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation, and the level of substantiation that experts in the field would agree is reasonable.

19 Are there specific requirements for advertising claims based on the results of surveys?

Surveys must conform to the appropriate research techniques. An expert in research methodologies is usually required in order to be sure that the survey is projectable both geographically and demographically over the scope suggested in any advertising. If no limitations are expressed, the survey must be projectable on a national basis. The population surveyed should be unbiased. Any bias or limitation with respect to the population should be disclosed. *Litton Industries*, 92 F.T.C. 1 (1981), aff'd, 676 F.2d 364 (1982) (survey was limited to Litton-authorised dealers).

20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

The FTC specifically encourages comparative advertising, when truthful and non-deceptive, since it is a source of 'important information to consumers and assists them in making rational purchase decisions' and because it 'encourages product improvement and innovation, and can lead to lower prices in the marketplace'. See 16 C.F.R. section 14.15(c). But comparative advertisements must be truthful, not deceptive or misleading and, if an advertiser chooses to compare unlike products, it has the obligation to clearly delineate the nature and limitations of the comparison and disclose material differences between the products. In a truthful comparative advertisement, an advertiser may use a competitor's name, mark, logo or likeness, but any advertising that contains disparaging, unfair, baseless, incomplete or false comments or comparisons of competitors' products, or any that makes false or misleading claims about a competitor (or its products or services) could put the advertiser at risk of liability under the Lanham Act.

21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

If an advertiser claims in its advertising to have specific substantiation for its claims (eg, 'tests prove...'), then it must, in fact, have that substantiation. See the FTC Advertising Substantiation Policy Statement. When dealing with health and safety claims, the FTC generally requires a higher level of substantiation. The FTC typically requires 'competent and reliable scientific evidence'. See, for example, *In the Matter of POM Wonderful LLC*, 2012 WL 2340406 (FTC 2012); *FTC v Garvey, et al* (2000) (consent order). The FTC has defined 'competent and reliable scientific evidence' as: 'tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results'. See, eg, *FTC v Garvey, et al* (2000) (consent order).

The FTC has indicated that 'competent and reliable scientific evidence' consists of 'at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other.' See *FTC v Iovate Health Sciences USA, Inc* (2010) (consent order) (claims by dietary supplement manufacturer that its supplements could help consumers lose weight and treat or prevent colds and other illnesses); *In the Matter of Nestlé Healthcare Nutrition, Inc* (consent order) (claims by Nestlé that its BOOST Kid Essentials protects against cold, flu, and other illnesses by strengthening the immune system).

22 Are there special rules for advertising depicting or demonstrating product performance?

If a product's performance is shown in an advertisement, the general rule is that the demonstration must be real, without any special effects whatsoever. In addition, the advertiser must also be able to substantiate that the performance shown reflects the performance that consumers can typically expect. Demonstrations must accurately show a product's performance, characteristics or features. Demonstrations must show the performance that consumers can typically expect to achieve. It is generally deceptive to use an undisclosed mock-up of product performance. Special effects should not generally be used to demonstrate (or misrepresent) product performance. Even if a demonstration is accurate, advertisers are still responsible for implied claims that may be communicated. Not all depictions of product performance are 'demonstrations', however. If the depiction is not understood to communicate product performance or specific product attributes, it may not be necessary for the depiction to be real. A dramatisation may be permissible, when the fact of the dramatisation is disclosed, so long as the dramatisation accurately reflects product performance.

23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

The FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (the FTC Endorsement Guides) set forth the FTC's views on the use of consumer, celebrity, expert and organisational endorsements in advertising. See 16 C.F.R. Part 255. Endorsements must be truthful, non-deceptive, and be substantiated by the advertiser. Any connection between the endorser and the advertiser, which might materially affect the weight or credibility of the endorsement (in other words, a relationship not reasonably expected by the audience), should be disclosed. See 16 C.F.R. section 255.5.

24 Are there special rules for advertising guarantees?

A guarantee serves to reinforce the advertiser's promise of performance and will often be treated as a factual claim that must be substantiated. It is not sufficient that the advertiser will in fact refund the purchase price if the product does not perform as advertised. The advertiser must have a reasonable basis for believing that the product will perform as advertised. In addition, certain products are subject to rules requiring that the terms of their warranty must be available before purchase. See FTC Pre-Sale Availability Rule, 16 C.F.R. section 702. Any advertising of such goods that references their warranty must disclose that the warranty document is available for examination prior to purchase. FTC Guidelines For Advertising Warranties, 16 C.F.R. section 239. A 'money back guarantee' is deemed to be unconditional unless the terms and conditions are clearly communicated. Thus, if the consumer must return the unused portion, or send in the proof of purchase, this must be disclosed. 16 C.F.R. section 239.3. A 'lifetime guarantee' is presumably the life of the original purchaser unless it is clarified in the advertising, for example, 'for as long as you own your car' or 'for as long as your car runs'. 16 C.F.R. section 239.4.

25 Are there special rules for claims about a product's impact on the environment?

The FTC Guides for the Use of Environmental Marketing Claims (the Green Guides) set forth general standards for promoting the environmental benefits of products in advertising. See 16 C.F.R. part 260.

26 Are there special rules for describing something as free and for pricing or savings claims?

'Free' suggests a special offer giving the consumer the free item at no cost over the cost previously established or actually planned (in the case of an introductory offer). FTC Guidelines on the Use of 'Free', 16 C.F.R. section 251; See *FTC v Mary Carter Paint Co*, 382 U.S. 46 (1965). Any conditions or limitations on the free offer must be clearly and conspicuously disclosed. Local regulations may specify type size and placement. See, for example, New York City Consumer Protection Regulation 2 requires a type size at least half the size of the word 'free'.

27 Are there special rules for claiming a product is new or improved?

An FTC advisory opinion suggests that 'new', 'introducing' and similar terms should be used only where the product has been generally available in the particular market where the advertising appears for less than six months. See FTC Guides concerning use of 'free'. 16 C.F.R. sections 15.20, 15.146(c). Under the rules governing the identification of textiles, fabric cannot be advertised as 'new' if it has been reclaimed or respun. The rules governing advertising claims for tires prohibit the use of the word 'new' to describe retreads. However, when no specific regulation applies, each case must be considered within the context of the advert. At least one FTC advisory opinion has suggested a six-month limit on the use of the word when advertising the introduction of a 'new' product not previously on the market.

The old FTC guidance says that a product may be described as 'new' if it 'has been changed in a functionally significant and substantial respect'. A product may not be called 'new' when only the packaging has been altered or some other change made that is functionally insignificant or insubstantial. In a staff advisory opinion in response to a Sony Electronics, Inc proposal, the FTC has also suggested that the term 'new' may be used to describe returned consumer electronics products when it can reasonably be determined that the products were never used.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Any legal product may be advertised. Disclosures, for example tobacco product warnings, may be required. Restrictions apply to targeting certain product advertising to minors, and advertising directed to children may require special disclosures.

29 Are certain advertising methods prohibited?

In 1974, the FCC issued a public notice defining subliminal advertising as: 'any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold level of normal awareness'. See Public Notice Concerning the Broadcast of Information By Means of 'Subliminal Perception' Techniques, 44 FCC 2d 1016, 1017 (1974). The same policy statement provides: 'We believe that use of subliminal perception [technique] is inconsistent with the obligations of a licensee, and we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive.' (Id.) Contemporary thinking is that subliminal advertising is ineffective and, if used, a form of deceptive advertising. In the current version of the FTC's 'Advertising FAQ's: A Guide for Small Business,' the FTC states that 'it would be deceptive for marketers to embed ads with so-called subliminal messages that could affect consumer behavior. However, most consumer behavior experts have concluded that such methods aren't effective.' (http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business.)

The Federal CAN-SPAM Act of 2003, 15 S.S.C. section 7701, pre-empts state law and regulates unsolicited commercial e-mail – any electronic mail message, with the principal purpose of promoting the sale of goods or services, which is sent to a consumer with whom the sender does not have an existing business or personal relationship and which is sent without the consumer's consent or prior request. See 15 U.S.C. section 7702 (2)(a). The Act requires any commercial e-mail to include:

- a working opt-out procedure;
- notice of the recipient's right to opt out;
- the sender's physical address;
- accurate header information and subject lines;
- labelling the message an advertisement (but not necessarily 'ADV' in the subject line); and
- warning labels on sexually explicit material.

In addition, the Act prohibits opening multiple e-mail accounts using false information, using open relays to transmit UCE, falsifying header information, deceptive subject lines, and harvesting e-mail addresses.

30 What are the rules for advertising as regards minors and their protection?

There have been numerous efforts, led primarily by the CARU, to protect children from inappropriate marketing messages and purchase solicitations. One of the CARU's most significant efforts is its Self-Regulatory Guidelines for Children's Advertising, which, although lacking the direct force of law, are – like the FTC's Fair Information Practice Principles – extremely influential and useful to advertisers, as well as e-commerce companies. Advertising for adult products should not be directed at minors. Advertising directed at minors may require additional disclosures, for example separation from the content on broadcast advertising, and hosts of children's programmes may not advertise products on the programmes.

31 Are there special rules for advertising credit or financial products?

Federal Reserve Board regulations govern advertising of financing terms. Truth in Lending Act disclosure under Regulation Z requires disclosure of certain terms, including the annual percentage rate of interest when any related representation is made. See 15 U.S.C. section 1601; 12 C.F.R. section 226. Consumer Leasing Act disclosures under Regulation M require disclosure of certain terms whenever any details of the lease terms are included in the advertising: (1) lease; (2) total amount up front, including security deposit; (3) schedule of payments and total; (4) whether there is an option to purchase; and (5) liability at end. See 15 U.S.C. section 1667; 12 C.F.R. section 213. Regulations permit advertising on radio and television to include (1), (2) and (3) with the remaining disclosures on an 800 telephone number or in a print advert. The FTC has aggressively enforced these regulations in leasing advertising. See Grey Advertising, CCH Trade Rep. paragraph 24, 373.

Further, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

32 Are there special rules for claims made about therapeutic goods and services?

The FDA regulates advertising for drugs – essentially any claims that a product affects the body or disease. Such advertising must present a fair balance between claimed benefits and disclosure of risks and side effects. All advertisements must be submitted to the FDA at the time of the initial dissemination (pre-clearance is the usual practice). Print advertising must include the 'brief summary' describing each specific side effect and contra indication in the FDA-approved labelling. Broadcast advertising must include a thorough description of the major risks in either the audio or in video and provide an effective means for consumers to obtain the approved labelling. See Guidance for Industry: Consumer-Direct Broadcast Advertisements. Off label (use of drugs other than as approved by the FDA) may not be advertised. Comparative claims must be supported by two well-controlled clinical studies.

33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Under the Nutrition Labeling and Education Act of 1990, the FDA was required to develop definitions for food labelling of terms such as 'free', 'low', 'light', 'lite', 'reduced', 'less' and 'high.' The regulations for labels became effective in May 1994. The FTC opposed legislation to require food advertising containing nutrient content claims or health claims to conform to the FDA regulations as overly restrictive of advertising. In May 1994, the FTC issued an Enforcement Policy Statement on Food Advertising. 59 Fed. Reg. 28388. It gives great weight to the FDA definitions. Thus, advertising contrary to the labelling regulations is likely to be investigated by the FTC. The FDA defines a health claim as 'any claim that characterizes the relationship of any nutrient to a disease or health-related condition', 21 C.F.R. section 101.14(a) (1). The health claims recognised by the FDA include calcium for osteoporosis, sodium and hypertension, fat and cholesterol in coronary disease, dietary fat and cancer, fibre found in fruits, vegetables and grains for cancer and heart disease, antioxidants found in fruits and vegetables for cancer, and soluble fibre for heart disease.

Nutrient content claims characterised as 'absolute' (low, high, lean etc), must be described in terms of the amount of the nutrient in one serving of a food, and claims characterised as 'relative' (less, reduced, more, etc), must be described in terms of the same nutrient in another product. Some of the most important definitions of 'low' are the following limits in the larger of a serving or 50 grams: 'low cholesterol' – no more than 20 grams; 'low sodium' – no more than 140 mg; 'low calorie' – no more than 40 calories. For 'reduced' or 'less', the regulations for 'calories', 'total fat', 'saturated fat', 'cholesterol', 'sodium' and 'sugars' require at least 25 per cent less per serving compared to an appropriate reference food. 'Healthy' cannot be used for any food high in fat or saturated fat. The FDA has also aggressively pursued labelling issues such as the use of 'fresh' as part of the name of orange juice that was processed and made from concentrate.

Under a memorandum of understanding between the FTC and FDA, 36 Fed. Reg. 18,538 (1971), the FTC has primary responsibility over food advertising. The FTC has been particularly active on health claims. See, *Tropicana Prods. Inc*, File No. 0422-3154 (claiming cholesterol-reduction benefit); *Conopco, Inc*, (claiming that consumers can get 'Heart Smart' based on low saturated fat in Promise Margarine, but high total fat required Promise to include, in future advertising, total fat information); *England's Best, Inc*, File No. 9320-3000 (serum cholesterol – corrective advertising ordered); *Stouffer Foods*, Dkt. No. 9250 (low sodium – but order expanded by the FTC to cover 'any other nutrient or ingredient'); *Bertolli Olive Oil*, File No. 902-3135 (health benefits of olive oil); *Campbell Soup Co,* Dkt. No. 9223 (sodium content). The FTC's order against Kraft for misrepresenting the amount of calcium in its American cheese slices was based on literally true advertising of the calcium in the milk used in making the product because some is lost in processing (*Kraft Inc v FTC*, 970 F.2d 311 (7th Cir. 1992)). The FTC has also been particularly active in policing misleading low-fat claims. See, *Haägen Dazs Co*, File No. 942-3028.

The FTC has also shown great interest in weight loss products and products touted as dietary supplements. See, *FTC v Pacific Herbal Sciences, Inc*, (C.D. Cal. 10/18/05). Its consent orders require advertising to disclose: (1) average percentage weight loss maintained; (2) period of time maintained; and (3) that 'for many dieters, weight loss is temporary'. FTC policies and concerns are summarised in 'A Guide for the Dietary Supplement Industry'. See, *FTC v Enforma Natural Prods, Inc*, No. 04376JSL (C.D. Cal. 4/26/00) ($10 million consumer redress); *FTC v Window Rock Enterpr., Inc,* (C.D. Cal. 9/21/05) ($4.5 million); *FTC v SlimAmerica, Inc*, No. 97-6072 (S.D. Fla. 1999) ($8.2 million consumer redress); *FTC v Airborne Health, Inc* (C.D. Cal. Aug. 13, 2008) (US$30 million consumer redress in conjunction with private class action lawsuit *Wilson v Airborne, Inc* 2008 WL 3854963 (C.D. Cal. 2008).

34 What are the rules for advertising alcoholic beverages?

Broadcasters have long voluntarily refused to air hard liquor adverts or even props or references in commercials for other products. NBC, in December 2001, proposed accepting them for airing after 9pm in connection with programming with an 85 per cent adult audience. Actors in the commercials would have to be over 30 years of age. Public objections forced NBC to abandon this experiment. Beverages with less than 24 per cent alcohol by volume may be advertised, but are subject to special review in terms of safety, over consumption, mood alteration, maturity or connection to athletic or other prowess. Models should be 25 years old and appear to be at least 21, and advertising should not be targeted at underage drinkers. See *Becks NA*, 127 FTC 379 (1999) (consent order) (young people holding beers on a sailboat at sea). *Allied Domecq*, 127 FTC 368 (1999) (consent order) (5.9 per cent alcohol by volume misleadingly claimed to be a 'low alcohol' beverage, since the alcohol content is much higher than numerous other alcoholic beverages).

In March 2011, the FTC announced that it planned to conduct a new study of the self-regulatory efforts of the alcoholic beverage industry (see www.ftc.gov/opa/2011/03/alcohol.shtm). The study would serve as the foundation for the FTC's fourth major report on the efficacy of voluntary industry guidelines designed to reduce alcoholic beverage advertising and marketing to an underage audience.

The FTC plans to explore alcoholic beverage company compliance with: 'voluntary advertising placement provisions, sales, and marketing expenditures'; 'the status of third-party review of complaints regarding compliance with voluntary advertising codes'; and 'industry data-collection practices'.

Additionally, the Distilled Spirits Council of the United States (DISCUS) issued new self-regulatory guidelines governing online marketing practices. The guidelines, which became effective 30 September 2011, apply to marketing on social media sites and other digital communications platforms, including websites, blogs and mobile communications and applications. Key requirements of the new DISCUS guidelines include:

- 'age-gating' on websites before any direct communication between advertisers and consumers;
- regular monitoring and moderating of websites that include user-generated content, and removal of inappropriate content;
- where online content is intended to be forwarded by users, marketers must include instructions that content should only be forwarded to those who are of legal purchase age;
- clear identification of online communications as advertising;
- inclusion of social responsibility statements in all communications, where practicable; and
- standards for privacy policies.

The guidelines are intended to supplement, and be read in conjunction with, the DISCUS Code of Responsible Advertising Practices.

35 What are the rules for advertising tobacco products?

Since 1971, broadcast advertising of cigarettes and little cigars has been banned by federal law. Broadcast advertising of smokeless tobacco was banned in 1986. Surgeon General's warnings are required in all print advertising. Tar and nicotine values measured in accordance with the FTC-approved test methodology are included in advertising based on a voluntary agreement with the FTC. The FDA lacks jurisdiction to regulate tobacco advertising (*FDA v B&W Tobacco Corp*, 529 U.S. 120 (2000)). The multi-state settlement of tobacco litigations includes substantial limitations on permissible advertising including restrictions on: cartoon characters; outdoor, store window or stadium billboards; transit advertising; advertising seen by children; product placements; merchandise and sponsorships; and point-of-sale displays. See www.tobacconew.edu.

36 Are there special rules for advertising gambling?

Prohibitions on depicting gambling in broadcast adverts for casinos, at least in states with lotteries, violate First Amendment rights. See *Greater New Orleans Broadcasting Ass'n v US* and *US v Edge Bag Co*. However, national networks do not permit them, except state lotteries. Advertising for online gambling sites is not protected by the First Amendment. *Casino City, Inc v US DoJ*. The DoJ asserts that offshore gambling by customers in the United States violates sections 1084 (the Wire Act), 1952 (the Travel Act) and 12955 (the Illegal Gambling Business Act) of the US Code. Letter from John G Malcolm to National Association of Broadcasters, 11 June 2003. The WTO on 7 April 2005 ruled that the United States may restrict internet gambling. United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS 285/AB/R. A number of States Attorneys General have also taken the position that online gambling from within the state violates state gambling laws. The state of Washington passed its Internet Gambling Act, SB 6613, effective 7 June 2006 making it a Class C felony. Creating or publishing advertising may be viewed as aiding and abetting (see 18 U.S.C. section 2).

37 What are the rules for advertising lotteries?

According to the Federal Communications Commission, a lottery is 'any game, contest or promotion that combines the elements of prize, chance and consideration'. Federal law generally prohibits the broadcast of any advertisement or information concerning a lottery. Advertisements or information about the following activities, however, are permitted: lotteries conducted by a state acting under the authority of state law, where the advertisement or information is broadcast by a radio or television station licensed to a location in that state or in any other state that conducts such a lottery; gambling conducted by an Indian tribe pursuant to the Indian Gaming Regulatory Act; or lotteries that are authorised or not otherwise prohibited by the state in which they are conducted, are conducted by a not-for-profit or governmental organisation, or are conducted as a promotional activity by a commercial organisation and are clearly occasional and ancillary to the primary business of that organisation. Casino gambling is a form of lottery because it has the elements of prize, chance and consideration. The FCC has determined that it is permissible to broadcast truthful advertisements for lawful casino gambling, regardless of whether the state in which the broadcaster is licensed permits casino gambling (www.fcc.gov/guides/broadcasting-contests-lotteries-and-solicitation-funds).

38 What are the requirements for advertising and offering promotional contests?

The terms 'contests' and 'sweepstakes' are often used interchangeably, but contests are usually promotions that have some element of skill to them. In skill contests, chance does not play a dominant role in determining the outcome. Examples include essay, cooking, and art and photography contests. Most states permit requiring a fee in a skill contest, although some require certain disclosures if a fee is required. Sponsors of skill contests should make sure skill determines the outcome; a tie-breaker should not be determined by chance. It is very important to set out the criteria for winning the skill contest and judging (by qualified judges) must be based on the criteria. The sponsor does not need to award a prize if no one satisfies the contest requirements (for example, getting a hole-in-one). The sponsor must be careful about what is said in advertising to avoid a deception issue. The following are not skill contests: answering multiple choice questions, guessing the number of beans in a jar, determining winners in upcoming sports events. See Terri J Seligman, Marketing Through Online Contests and Promotions, 754 PLI/ Pat 429, 438 (July 2003).

There are numerous state laws governing the administration and advertising of chance sweepstakes and skill contests in the United States. All states permit sweepstakes in connection with promotions of other products or services provided that no consideration is required. For example, 'no purchase necessary' and an explanation of the 'alternate means of entry' must be prominently disclosed. In order to avoid creating an illegal lottery, one of the following must be eliminated: the award of a prize, determined on the basis of chance, where consideration is paid to participate. Prize includes anything of tangible value. The rules of the sweepstakes are the terms of an offer resulting in a contract and are subject to varying state law requirements.

39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

The Lanham Act provides a cause of action where communication 'is likely to cause confusion... as to the affiliation, connection, or association of [the advertiser] with another [person, firm or organization], or as to the origin, sponsorship, or approval of [the advertiser's] goods, services, or commercial activities by [the other person, firm or organization]'. 15 U.S.C.A. section 1125(a) (1) (A). It is not necessary to prove that consumers believe a party has endorsed the

advertised product, only that consumers think the party has authorised the advertising or promotion. Disclaimers are a favoured way of alleviating consumer confusion as to source or sponsorship.

The Communications Act of 1934 and FCC Rules require that when consideration has been received or promised to a broadcast licensee or cable operator for the airing of material, including product placements, the licensee or cable operator must inform the audience, at the time the programme material is aired, both that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied.

Further, the FTC has said that disclosures may be needed when objective product claims are being made if consumers will be confused about whether those claims are being made by the advertiser or an independent third party. The reason for this is that consumers may give more weight to claims if they think that the claims are being made by someone other than the advertiser. The FTC said, however, that it does not believe that advertisers are generally using product placements to make objective claims about their products. Therefore, the FTC believes that it is not generally deceptive to fail to disclose when something is a product placement. The FTC has cautioned that it can still take action against an advertiser if a product placement is used to make a false claim (www.commercialalert.org/FTCletter2.10.05.pdf).

40 Briefly give details of any other notable special advertising regimes.

First Amendment protection for even commercial speech prohibits government regulation of truthful speech. Consequently unless speech rises to the level of conduct, such as inciting violence or physical action (crying 'fire' in a crowded theatre), there can be no government regulation. Political campaign advertising is not subject to regulation as to truth, and does not have to be substantiated.

Social media

41 Are there any rules particular to your jurisdiction pertaining to using social media for advertising?

Although sites like Facebook, Twitter, Instagram, Pinterest and YouTube have transformed traditional notions of advertising, as the law in this area develops, it becomes increasingly clear that legal principles governing 'traditional' advertising often apply equally to advertising via social media. Advertising through social media can implicate many areas of law, including copyright, trademark, right of publicity, defamation, unfair competition, union issues, idea misappropriation, obscenity and indecency, hate speech, other tort liability, criminal law and privacy. Advertising involving user-generated content that has become quite common in social media, can also pose special liability risks for advertisers. Social media advertising is also subject to the terms and conditions of the host platform's own terms of use.

Update and trends

Adequate disclosure of bias or connection between advertisers and 'native advertising' and the sufficiency of digital disclosures on small screens and mobile devices have been of particular concern in the United States in recent months. Tracking of web users (behavioural advertising) and geographical location of mobile devices will be undergoing scrutiny.

42 Have there been notable instances of advertisers being criticised for their use of social media?

The following are select examples of recent social media advertising cases:

- The FTC brought reviewed numerous social media advertising cases in recent years: *HP Inkology*, FTC file No. 122-3087, (27 September 2012) (closing letter) (FTC investigation into HP and its PR firm for providing gifts to bloggers in exchange for posting content about HP Inkology, without adequately disclosing the material connection); *In re Hyundai Motor America*, FTC file No. 112-3110 (16 November 2011) (closing letter)(FTC investigation of Hyundai where bloggers were given gift certificates as an incentive to comment on or post links to the adverts, and were explicitly told not to disclose this information); *FTC v Reverb Communications, Inc* (August 2010) (proposed consent order) (marketing and PR agency Reverb, hired by videogame developers, settled charges that its employees posed as consumers and posted game reviews online without disclosing their affiliation with Reverb); and *Ann Taylor Stores Corp*, file No. 102-3147, 20 April 2010 (closing letter) (Ann Taylor allegedly provided gifts to bloggers to post about the company's LOFT division without having the bloggers adequately disclose their material connection to the company).
- The maker of Titleist golf balls challenged its competitor, alleging that the competitor's Twitter name, '#1BallFitter', constituted a claim that it was the leading golf ball fitter. The competitor argued that its name on a social media site did not constitute 'advertising'. The NAD disagreed and noted that, since advertisers are responsible for all reasonable messages conveyed by their claims, it was reasonable to assume that, when users used the '#1BallFitter' to tweet about or find tweets about the advertiser's golf ball fittings, they understood the meaning of the '#' symbol to be a 'Number 1' claim. *Bridgestone Golf, Inc*, NAD case No. 5357 (08/02/11).

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- In 2008, the NAD reviewed a video clip disseminated by Cardo Systems, the manufacturer of wireless Bluetooth technology, as part of a viral marketing campaign on YouTube. The video depicted individuals using their mobile phones to pop popcorn kernels in close proximity. The NAD requested that the advertiser address concerns that the video clip communicated that mobile phones emit heat and radiation at a level that allows popcorn kernels to pop. Cardo argued that the video was created to create a 'buzz' and to depict something absurd. Cardo also questioned whether the popcorn video was 'national advertising' as the term is defined and used in the NAD's Policies and Procedures. The NAD found that video clips placed by advertisers on video-sharing websites such as YouTube, when controlled or disseminated by the advertiser, may be considered national advertising, and that the absence of any mention of a company or product name does not remove a marketing or advertising message from the NAD's jurisdiction or absolve an advertiser from the obligation to possess adequate substantiation for any objectively provable claims that are communicated to consumers (*Cardo Systems*, NAD case No. 4934 (11/14/08)).
- The NAD reviewed Nutrisystem, Inc's 'Real Consumers. Real Success' Pinterest board, featuring photos of 'real' Nutrisystem customers with weight-loss success stories. The customer's name, weight loss and a link to the Nutrisystem website appeared below each photo. The NAD determined that such 'pins' showcased atypical results and thus required clear and conspicuous disclosures noting typical results consumers could expect to achieve. Nutrisystem, Inc, NAD case No. 5479 (06/29/12).
- DOT advertising rules require air travel price advertising to mention the full price a consumer can expect to pay, including carrier-imposed surcharges. Spirit Airlines settled allegations that it failed to comply with such rules when it tweeted about its fares but did not disclose that taxes and fees applied, or that a round-trip purchase was required. Such information was only disclosed after consumers clicked on a link to a landing page (2011-11-23 Consent Order (Spirit Airlines, Inc) – Violations of 49 U.S.C. section 41712 and 14 CFR 399.84).
- The NAD reviewed advertising claims made by Coastal Contacts in a Facebook promotion offering 'free' products to consumers who 'liked' its Facebook page. It was the first time the NAD addressed 'like-gating' promotions, which require consumers to 'like' a company's Facebook page in order to gain access to sweepstakes, a coupon code or savings noted in an advertisement. The NAD determined that material terms of an offer should be disclosed before a consumer is required to 'like' a page (*1-800 Contacts*, NAD case No. 5387 (10/25/11)).

43 Are there regulations governing privacy concerns when using social media?

California requires every commercial website that maintains personally identifiable information from a consumer residing in California to conspicuously post a privacy policy indicating what use, if any, will be made of users' information. The FTC has held that failure to adhere to the published privacy policy of the website is actionable as false advertising. The FTC has also held that failure to take appropriate security measure to protect customers' sensitive information and credit and debit card and checking account information is required.

The Children's Online Privacy Protection Act regulates the online collection of personal information of children under the age of 13. It requires verifiable parental consent, the ability for parents to obtain details of collection and to prevent any further use or collection of such information and procedures to ensure the confidentiality, security and integrity of the personal information collected.

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