

Advertising: Overview

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An overview of advertising regulation in the US, focusing on the key legal issues to consider when planning an advertising campaign, including industry-specific regulations, restrictions on advertisements to children, protection and use of intellectual property rights and the use of endorsements.

When investing in media advertising (whether print, television, radio or other forms), an advertiser must design its campaign to achieve the greatest possible market impact, while avoiding legal difficulties and other circumstances that may result in costly disputes or adverse and unwanted publicity.

This Note examines the following matters that may influence the design and implementation of an advertising campaign:

- Regulatory and legal framework.
- Complaint procedures and remedies.
- Controls on certain advertising methods.
- Controls on advertising content.
- Industry-specific regulation.
- Restrictions on advertising to children.
- Protection and use of intellectual property rights (IPRs).
- Endorsements and the use of people in advertisements.

Many legal regulations that apply to traditional forms of advertising, such as those relating to misleading advertisements and comparative advertising, also apply to online advertising and marketing. For a discussion of issues that apply to online advertising specifically, see *Practice Note, Online Advertising and Marketing* (<http://us.practicallaw.com/4-500-4232>). For more information on the rules that apply to direct marketing techniques, see *Practice Note, Direct Marketing* (<http://us.practicallaw.com/5-500-4203>).

REGULATORY AND LEGAL FRAMEWORK

Advertising is subject to substantial regulation from a combination of federal, state and local laws, as well as self-regulatory codes of conduct. These include:

- The Federal Trade Commission Act (FTC Act) (15 U.S.C. §§ 41-58).
- The Federal Communications Commission Act, as amended by the Telecommunications Act of 1996 (FCC Act) (47 U.S.C. §151 et seq.).
- The Food, Drug and Cosmetic Act (FD&C Act) (21 U.S.C. §§ 301-399).
- Section 43(a) of the Lanham Trademark Act (Lanham Act) (15 U.S.C. § 1125(a)).
- The National Advertising Division of the Council of Better Business Bureaus (NAD).
- Common law restrictions on commercial speech.

An increasing number of goods and services, for example, financial services, tobacco and alcohol, are subject to industry-specific legislation (see *Industry-specific Legislation*).

THE FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission (FTC) is the primary federal consumer protection agency responsible for advertising regulation. It does so by prescribing rules under the FTC Act, investigating suspected violations of the FTC Act and bringing lawsuits against companies conducting illegal activity.

Deception, Unfairness and Substantiation

Under the FTC Act:

- **Advertising must be truthful and non-deceptive.** An advertisement is deceptive if it contains a statement or omits information that is:
 - likely to mislead consumers acting reasonably under the circumstances; and
 - material (that is, likely to affect consumers' conduct or decisions regarding the product at issue).

(See *FTC Policy Statement on Deception*.)



- **Advertisements cannot be unfair.** An advertisement is unfair if:
 - it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid; and
 - the injury is not outweighed by the benefit to consumers.

(See *FTC Policy Statement on Unfairness*.)

- **Advertisers must have evidence to back up their claims.** An advertiser must have a reasonable basis for all objective product claims before making those claims. If an advertisement indicates a particular level of support for the product claim (for example, laboratory tests or scientific studies), the advertiser must be in possession of the advertised substantiation. To determine whether an advertiser has a reasonable basis for its claims, the following factors are considered:
 - type of claim;
 - type of product;
 - consequences of a false claim;
 - benefits of a truthful claim;
 - cost of substantiating the claim; and
 - amount of substantiation that experts in the field believe is reasonable.

(See *FTC Policy Statement Regarding Advertising Substantiation*.)

Practices that the FTC has found misleading or deceptive include:

- False oral or written representations.
- Misleading price claims.
- Sales of hazardous or systemically defective products or services without adequate disclosure.
- Failure to disclose information on pyramid schemes.
- Use of bait and switch techniques.
- Failure to perform promised services.
- Failure to meet warranty obligations.

Clear and Conspicuous Disclosures

If the disclosure of qualifying information is necessary to prevent an advertisement from being deceptive or misleading, that information must be presented clearly and conspicuously so that consumers will notice and understand it. To ensure that disclosures are effective, advertisers should:

- Use clear and unambiguous language.
- Place any qualifying information close to the claim being qualified.
- Avoid using small type or any distracting elements that could undercut the disclosure.
- Prominently display the disclosure.

In evaluating whether a particular disclosure is clear and conspicuous, advertisers should also consider whether:

- Items in other parts of the advertisement distract attention from the disclosure.
- The advertisement is so lengthy that the disclosure needs to be repeated.
- Disclosures in audio messages are presented in an adequate

volume and cadence.

- Visual disclosures appear for a sufficient duration.
- The language of the disclosure is understandable to the intended audience.

Although there is no specific rule about the size of type in a print advertisement or the length of time a disclosure must appear on television, the FTC often takes action when a disclaimer or disclosure is:

- Too small.
- Flashed across the screen too quickly.
- Buried in other information.
- Otherwise hard for consumers to understand.

In early 2013, the FTC updated its advertising disclosures guides for mobile and other online advertisers. The revised guides are entitled *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*. For a detailed discussion of the revised guides, see *Practice Notes, Online Advertising and Marketing and Advertising* (<http://us.practicallaw.com/4-500-4232>) and *Promotions in Social Media* (<http://us.practicallaw.com/1-538-6609>).

THE FEDERAL COMMUNICATIONS COMMISSION ACT

The FCC interacts with the advertising industry in several contexts. It accepts complaints about:

- Broadcast advertising.
- The nature of the products advertised.
- The timing of certain ads.
- The volume and taste of commercials.

The FCC also administers rules about junk fax advertising. For more information, see *Fax Advertising: What You Need to Know*.

In 1992, the FCC adopted rules to implement the Telephone Consumer Protection Act (TCPA), which restricts telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages. These rules included the requirement that entities making telephone solicitations institute procedures for maintaining company-specific do-not-call lists.

In 2003 the FCC revised its TCPA rules to establish, in coordination with the FTC, a national *Do-Not-Call registry*. The registry is:

- Nationwide in scope.
- Covers all telemarketers (with the exception of certain nonprofit organizations).
- Applies to both interstate and intrastate calls.

The registry has been in effect since 2003 and is administered by the FTC.

In October 2013, the FCC's new telemarketing rules amending the TCPA became effective. The FCC now requires prior express written consent for all:

- Telephone calls and text messages that use an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers.

- Prerecorded telemarketing calls to residential lines.

The written consent must be signed by the consumer and be sufficient to show that the consumer:

- Received clear and conspicuous disclosure of the consequences of providing the requested consent.
- After receiving this disclosure, agreed unambiguously to receive these calls at a telephone number the consumer designates.

For more information on the telemarketing rules, see *Legal Update, New FCC Telemarketing Rules to Become Effective* (<http://us.practicallaw.com/2-544-1945>).

THE FOOD, DRUG AND COSMETIC ACT

The FD&C Act gives authority to the Food and Drug Administration (FDA) to oversee the safety and labeling of food, drugs, devices (such as medical devices) and cosmetics. In particular, the FD&C Act:

- Requires product labeling and other marketing communications to be true and complete.
- Prohibits misbranding and provides a range of civil and criminal enforcement mechanisms against inaccurate labeling.
- Gives the FDA authority to require certain information on product labels, such as nutritional content on food labels and potential side effects and drug interactions on pharmaceutical labels.

Under the FD&C Act, nutritional labels claiming particular health benefits of a substance, whether a conventional food, ingredient or dietary supplement, must:

- Be truthful and not misleading.
- Meet the validity requirements set by the FDA, which includes evidence of significant scientific support for the health claims.
- Be limited to describing the value that ingestion (or reduced ingestion) of the substance, as part of a total daily diet, may have on a particular disease or health-related condition.
- Include certain information and meet various other labeling requirements specific to the relevant substance.

(21 C.F.R. § 101.14.)

In the field of prescription drug advertisements, different advertisements require different amounts of benefit and risk information. The FDA requires that all broadcast "product claim" advertisements (ads that name a drug and discuss its benefits and risks) include both:

- The drug's most important risks (major statement) presented in the audio.
- Either:
 - all the risks listed in the drug's prescribing information; or
 - a variety of sources for viewers to find the prescribing information for the drug.

This means that drug companies are not required to include all of a drug's risks in a broadcast ad. Instead, the ad may tell viewers or listeners where they can find more information about the drug in the FDA-approved prescribing information. This is called the "adequate

provision" requirement. For broadcast ads, the FDA has said that including a variety of sources of prescribing information fulfills this requirement.

For more information on how the FDA defines these and other terms related to drug advertising, see *Drug Advertising: A Glossary of Terms*.

The FDA has suggested that broadcast ads give the following sources for finding a drug's prescribing information:

- A healthcare provider.
- A toll-free telephone number.
- The current issue of a magazine that contains a print ad.
- A website address.

For more information, see *Basics of Drug Ads*.

SECTION 43(A) OF THE LANHAM ACT

Section 43(a) of the Lanham Act provides a private right of action to any person who believes that he or she is or is likely to be damaged by the use of any false description or representation in connection with any goods or services in commerce. It also provides companies with a federal cause of action against false advertising by their competitors for any false designation of origin (15 U.S.C. § 1125(a)).

Specifically, anyone engaged in false advertising under Section 43(a) is liable to any person who believes that they are or are likely to be damaged by the advertisement.

The question, then, is what is required to demonstrate that one is "likely to be damaged" by false advertising. Courts have traditionally interpreted this inquiry narrowly, finding that only business entities have standing to sue under Section 43(a). Further, the circuits have split on which test is even applicable in these situations. However, the US Supreme Court recently granted certiorari in *Lexmark International, Inc. v. Static Control Components, Inc.*, which may clarify the requirements for a plaintiff to establish standing for a false advertising claim under Section 43(a) (697 F.3d 387 (6th Cir. 2012), cert. granted, 133 S. Ct. 2766 (2013)).

NATIONAL ADVERTISING DIVISION OF THE COUNCIL OF BETTER BUSINESS BUREAUS

The NAD was established by the advertising community as a self-regulatory program to help maintain truth and accuracy in national advertising. The NAD investigates complaints about misleading advertising claims (see *Complaints to the NAD*). It is managed by the Council of Better Business Bureaus.

RESTRICTIONS ON COMMERCIAL SPEECH

Commercial speech is generally defined as speech that proposes a commercial transaction. While commercial speech is entitled to First Amendment protection, the US Supreme Court has held that commercial speech has a lower degree of protection than other types of speech that are not related to the economic interests of the speaker and its audience. The US Supreme Court has developed a four-pronged test to measure the validity of restraints on commercial expression. A restriction on commercial speech that does not seek to regulate the content of that speech is constitutional if:

- The speech concerns a lawful activity and is not misleading.
- A substantial state interest is furthered by the restriction.
- The restriction directly furthers that state interest.
- The restriction is narrowly tailored to serve that state interest.

(*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).)

COMPLAINT PROCEDURES AND REMEDIES

Various complaint procedures and remedies for advertising that infringes applicable legislation and codes of practice are available. Sanctions range from injunctions against the use of an advertisement to monetary damages.

COMPLAINTS UNDER THE FTC ACT

When a complaint is made (either by the public or a company) that an advertisement violates the FTC Act, the FTC conducts an investigation. If the FTC has reason to believe that a violation has occurred, it may initiate an enforcement action. Parties charged with violations may voluntarily settle the charges by entering into a consent order. A company that signs a consent order does not have to admit to the violation, but it must agree to stop the disputed practices.

If no consent agreement can be reached or the respondent elects to challenge the charges, formal adjudication is conducted before an administrative law judge. If a violation is found, appropriate relief is issued. The remedies that the FTC or other courts have imposed include:

- **Cease and desist orders.** These legally binding orders require companies to:
 - stop running the deceptive advertisement or engaging in the deceptive practice;
 - provide substantiation for claims in future advertisements;
 - report periodically to FTC staff about the substantiation they have for claims in new advertisements; and
 - pay a fine of up to \$16,000 per day per ad if the company violates the law in the future.
- **Civil penalties, consumer redress and other monetary remedies.** Civil penalties range from thousands of dollars to millions of dollars, depending on the nature of the violation. Sometimes advertisers have been ordered to give full or partial refunds to all consumers who bought the advertised product.
- **Corrective advertising, disclosures and other informational remedies.** Advertisers have been required to:
 - take out new advertisements to correct the misinformation conveyed in the original advertisement;
 - notify purchasers about deceptive claims in advertisements;
 - include specific disclosures in future advertisements; or
 - provide other information to consumers.

Initial decisions by administrative law judges can be appealed to the full FTC. Final decisions issued by the FTC can be appealed to the US Court of Appeals and, ultimately, to the Supreme Court.

COMPLAINTS UNDER SECTION 43(A) OF THE LANHAM ACT

A claim of false advertising under Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) is typically brought in federal court, although it is possible to bring the claim in state court. The burden of proof is on the party bringing the claim. A prevailing claimant is entitled to injunctive relief or monetary damages, or both. Monetary damages are rarely awarded under the Lanham Act because a higher level of proof is required in a claim for damages than in a claim for injunctive relief. To receive monetary damages, the party must show both that:

The buyers were actually deceived by the defendant's false advertising.

There is a direct causal connection between the alleged false advertising and the injury.

COMPLAINTS TO THE FCC

Consumers can submit complaints to the FCC about advertisements they consider offensive due to obscenity, indecency or profanity concerns.

COMPLAINTS TO THE NAD

Instead of pursuing litigation, consumers and businesses can file complaints about advertisements with the NAD, which is viewed as a low cost alternative. The NAD only reviews national advertisements. The advertising may be on broadcast or cable television, radio, in magazines or newspapers, on the internet or commercial on-line services, or provided direct to the home or office. The organization accepts cases about product performance claims, superiority claims against competitive products and all kinds of scientific and technical claims.

The NAD evaluates claims and issues rulings in 60 to 90 business days. Complainants can expect advertising challenges to be resolved while the ad campaign at issue is still running. The organization's ruling may be accepted or rejected by the parties to the dispute. While the NAD's decisions are rarely rejected, the National Advertising Review Board exists to hear appeals from NAD rulings.

COMPLAINTS TO TELEVISION NETWORKS

Each major television network employs a process similar to the NAD, in which a party may complain directly to the station running the advertisement in question.

CONTROLS ON CERTAIN ADVERTISING METHODS

The techniques used in the advertising process have become progressively more complex, creating a greater need for regulatory controls. For example, some non-traditional advertising methods include:

- Product placement (see *Product Placement*).
- Subliminal advertising (see *Subliminal Advertising*).
- Outdoor advertising (see *Outdoor Advertising*).
- Aerial advertising (see *Aerial Advertising*).
- Online advertising (see *Online Advertising*).

PRODUCT PLACEMENT

Marketing campaigns often involve arrangements to ensure that a newly-launched product receives press exposure in some form other than traditional (for example print, television or radio) advertisements. It is common for advertisers to feature branded products in films and television programs in exchange for fees or other consideration.

FTC

In 2005, the FTC said it would not propose rules requiring advertisers (or television networks) to make clear and conspicuous disclosures of product placements or require them to specifically identify product placements when they appear on screen with the disclosure "ADVERTISEMENT." The FTC stated that product placement (or failing to disclose product placement) does not violate Section 5 of the FTC Act, which prohibits unfair and deceptive acts and practices. The FTC's stance is that product placements that are deceptive or misleading can be dealt with under existing laws.

FCC

Section 317 of the Communications Act of 1934 requires radio and television network broadcasters to disclose to listeners and viewers any matter that has been aired in exchange for money, services or other valuable (in other words non-nominal) consideration. This provision has been interpreted to require disclosure of paid product placements (which the FCC refers to as "embedded advertising"). The FCC requires that the announcement be aired when the subject matter is broadcast. To satisfy this requirement, broadcasters may and typically will disclose this information at the end of a program during the credits. (47 U.S.C. § 317.)

In 2008 the FCC issued a proposed rule that new FCC rules mandate larger letter formatting for product placement disclosures at the conclusion of television programs or that the disclosures air for a longer period of time. A further-reaching proposal that product placements should be identified when they occur, as suggested by the non-profit organization Commercial Alert, was not considered.

In early 2013 the General Accountability Office issued a report urging the FCC to revise standards for disclosing television sponsorships, whether for product placement, video news releases or political advertising. The FCC indicated that it will consider the recommended actions and how to address the concerns discussed in the report. For more information, see *Requirements for Identifying Sponsored Programming Should Be Clarified*.

SUBLIMINAL ADVERTISING

The FTC, FCC and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) (formerly, the Bureau of Alcohol, Tobacco and Firearms, which was reorganized under the Homeland Securities Act and its law enforcement functions transferred in 2003 from the Treasury Department to Justice Department, with the previous acronym retained) have each enacted regulations against subliminal advertising.

If an advertiser attempts to use subliminal advertising and fails (that is, the message is visible), the advertisement is subject to customary advertising regulations.

FTC

The FTC prohibits deceptive advertisements, which includes those that are embedded with subliminal messages that could affect consumer behavior.

FCC

The FCC issued a policy in 1974 proscribing subliminal advertising, under which FCC-licensed television and radio stations are banned from knowingly broadcasting programming containing subliminal messages of any nature. The FCC will revoke a company's broadcast license if the use of subliminal messages is proven. While broadcasters are not expected to screen advertisements or programs for subliminal messages, they must stop airing them as soon as they become aware of their existence.

The National Association of Broadcasters also prohibits its members from using subliminal messaging.

ATF

The ATF banned subliminal advertising from advertisements relating to alcohol products. Prohibited advertisements include those that attempt to convey messages by images or sounds of a brief nature that cannot be perceived at a normal level of awareness.

OUTDOOR ADVERTISING

The outdoor advertising industry is largely self-regulated. There are four main industry organizations:

- Outdoor Advertising Association of America.
- Institute of Outdoor Advertising.
- Traffic Audit Bureau for Media Measurement.
- National Outdoor Advertising Bureau.

Several issues may arise in connection with outdoor advertising (such as posters and billboards), for example:

- Planning restrictions.
- Trespass.
- Aesthetics.

The restrictions on size, type and location of billboards are controlled by myriad zoning regulations, which differ considerably by state and by community across the country.

The federal government also influences outdoor advertising and billboards through the Highway Beautification Act of 1965 (23 U.S.C. § 131) (HBA). The HBA is meant to prompt states to conform to certain aesthetic guidelines and to exert control over outdoor advertising in their respective states. Under the HBA, the federal government can:

- Reduce by 10% the federal highway aid to any state that fails to comply with the guidelines.
- Reimburse a state up to 75% of the amount the state pays to all sign and land owners who remove nonconforming signs that were lawfully erected under state law.

AERIAL ADVERTISING

Aerial advertising is subject to the general requirements of advertising laws. Federal regulations also prohibit the operation of certain categories of aircraft used for advertising purposes in certain locations (such as over densely populated areas, in congested airways and near busy airports) without a certificate of waiver from the Federal Aviation Administration (FAA). Recent decisions suggest that these federal laws do not preempt state and local ordinances. Any airplane designated as an aerial advertiser by the FAA is prohibited from carrying passengers.

ONLINE ADVERTISING

The FTC vigorously applies the FTC Act to online advertising. Deceptive advertising on the web is treated the same as more traditional forms of deceptive advertising and the general principles of truthfulness and fairness also apply.

For more information on the use of the internet as an advertising tool, see *Practice Note, Online Advertising and Marketing* (<http://us.practicallaw.com/4-500-4232>).

CONTROLS ON ADVERTISING CONTENT

Numerous controls exist to regulate advertising content. These various rules address issues such as:

- Bait advertising (see *Bait Advertising*).
- False or misleading advertising (see *False or Misleading Advertising*).
- Comparative advertising (see *Comparative Advertising*).
- Contractual terms created by advertising claims (see *Advertising Claims as Contractual Terms*).
- Obscene or indecent material (see *Obscenity and Indecency*).

BAIT ADVERTISING

Bait advertising is an offer to sell a product or service which the advertiser does not wish to sell. Its aim is to persuade the consumer to purchase something else, usually at a higher price or on better terms to the advertiser (*16 C.F.R. § 238.0*).

Bait advertising is prohibited by the FTC. When determining whether an advertisement makes a bona fide offer to sell the advertised product or if the advertiser has engaged in a bait scheme, the FTC considers the following practices:

- A refusal to demonstrate or sell the product as offered.
- False or excessive disparagement of the advertised product.
- Failure to meet reasonably anticipated demands for the advertised product unless a limited supply is clearly disclosed.
- Refusal to take orders for the advertised goods within a reasonable period of time.
- Showing a product that is defective or ineffective for its advertised purpose.
- Use of a sales or compensation plan used to discourage or prevent employees from selling the advertised product.

(*16 C.F.R. § 238.3*.)

FALSE OR MISLEADING ADVERTISING

Various federal and state laws regulate the use of false descriptions of products in advertisements. Misleading advertising and false advertising generally are dealt with under the same legislation and regulatory provisions. In particular, Section 43(a) of the Lanham Act provides a private right of action against false advertising or any "false designation of origin" (see Section 43(a) of the Lanham Act).

COMPARATIVE ADVERTISING

Comparative advertising compares alternative brands on objectively measurable attributes or price, identifying the alternative brand by name, illustration or other distinctive information. The FTC's position is that comparative advertising, when truthful and non-deceptive, is a source of important information to consumers.

The FTC has stated that:

- Disparaging advertising is permissible if it is truthful and not deceptive.
- Comparative advertising should be evaluated in the same manner as all other advertising techniques in terms of the requisite substantiation standard (in other words, whether the advertising has a tendency or capacity to be false or deceptive).

The FTC Act does not provide a private right of action for damage resulting from a false or deceptive comparative advertisement. For more information, see *FTC Statement of Policy Regarding Comparative Advertising*.

Almost all federal courts have recognized that Section 43(a) of the Lanham Act provides a remedy for false advertising. Courts have expanded the causes of action under Section 43(a) to include situations in which an advertiser makes false statements about its own products or services in a comparative advertisement.

As amended by the Trademark Law Revision Act of 1988, the Lanham Act also expressly recognizes a federal cause of action for false advertising about one's own or another's goods or services, as well as for product disparagement (*Pub. L. No. 100-667, 102 Stat. 3935* and see *Section 43(a) of the Lanham Act*).

It is now generally accepted by the courts that if an advertisement is literally or explicitly false, as opposed to misleading or implicitly false, the court may grant relief without considering the advertisement's impact on the buying public. Preliminary injunctive relief is the most common form of relief sought in comparative advertising cases.

Other remedies include:

- Permanent injunctive relief.
- Compensatory and punitive damages.
- Requirements for corrective advertising.

The NAD also makes recommendations on complaints of deceptive comparative advertising (see, *Complaints to the NAD*).

ADVERTISING CLAIMS AS CONTRACTUAL TERMS

While most advertisements are mere invitations to make an offer, there are situations in which advertisements can form a valid contract between the advertiser and the buyer. Therefore, advertisers must be careful with the wording of an advertisement.

An advertisement that is complete in itself and contains the words "first come first served" has been held to constitute a binding offer to the first comers (*Leftkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957)). Another case held that an automobile dealer made a binding offer when it advertised that anybody who bought an automobile model of a certain year would be entitled to exchange it against a new model (*Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. Ct. App. 1955)).

Depending on the jurisdiction, if the advertisement contains misrepresentations that are relied on by the consumer and are made with or without fraudulent intent, the promotional material may be considered part of the contract between the parties.

An advertisement that does not result in a direct contract may result in a legal obligation by operation of estoppel if the promisee, because of the offer, does anything that it is not bound to do or refrains from doing something it has a right to do in reasonable reliance on the promise.

OBSCENITY AND INDECENCY

The regulation of obscene or indecent material in advertisements is generally governed by the laws relating to the obscene material itself. While the definition of what is obscene can be flexible, advertisements that are found to be obscene lose First Amendment protection. When children are the target of an advertisement, the US Supreme Court has shown little tolerance for obscenity.

It is a violation of federal law to air obscene programming at any time. It is also a violation of federal law to air indecent programming (or profane language) during certain hours. The FCC may issue a warning, revoke a station's license or impose a monetary forfeiture if a station airs obscene or indecent material. In addition, a federal district court may impose fines or imprisonment, or both, for up to two years on those convicted of criminal violations of the law.

In making obscenity and indecency determinations, the FCC will analyze:

- What was actually aired.
- The meaning of what was aired.
- The context in which it was aired.

Congress and the courts have instructed the FCC only to enforce the indecency standard between the hours of 6 a.m. and 10 p.m., local time, when children are more likely to be viewers. This way the constitutionally-protected free speech rights of adults are balanced with the need to protect children from harmful content.

Beginning in 2006, due to ongoing litigation raising questions about the FCC's indecency standard, the FCC temporarily deferred enforcement action on most indecency cases while awaiting further direction from the courts. The FCC has since resumed processing new cases and initiating new investigations, where appropriate.

INDUSTRY-SPECIFIC REGULATION

A growing number of products and services are subject to specific legislation strictly regulating their advertising and marketing. Heavily regulated industries include alcoholic beverages, tobacco, financial services and consumer credit.

The FTC's various industry-specific advertising rules also cover:

- Labeling of consumer appliances' annual energy consumption.
- Disclosures of the power output of personal stereos.
- Prohibitions on the advertisement of retail food products where stock is not readily available during the ad's effective period.

Other FTC rules deal with aspects of advertising related to, for example, the funeral industry, home insulation, mail order merchandise, eyeglasses, contact lenses and television picture tube sizes.

ALCOHOLIC BEVERAGES

The Federal Alcohol Administration (FAA) Act sets standards for regulating the labeling and advertising of wine (containing at least 7% alcohol by volume), distilled spirits and malt beverages. (27 U.S.C. § 201) The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau (TTB) (created under the provisions of the Homeland Security Act and assuming the tax and trade functions formerly with the ATF) set regulations to:

- Prevent consumer deception and provide "adequate information" on the identity and quality of the product.
- Prohibit false or misleading statements, and provide information as to the alcohol content of the product.

The FAA Act does not require alcohol beverage advertisements to be approved before appearing in print or broadcast. However, the TTB offers industry members a free, voluntary pre-clearance service.

The Alcohol Beverage Labeling Act mandates that a government health warning statement appear on all alcohol beverages for sale or distribution in the US. Alcohol producers must apply for a Certification/Exemption of Label/Bottle Approval (COLA) and follow the labeling and advertising regulations. For more information on COLA, see *Certification/Exemption of Label/Bottle Approval*.

The TTB's advertising regulations address wine, distilled spirits and malt beverages separately. All alcohol regulations generally prohibit:

- Statements that are false or untrue.
- Statements that are inconsistent with approved product labels.
- False or misleading statements that are disparaging to a competitor's product.
- Health-related statements that are false or misleading.
- Misleading guarantees (money back guarantees are not prohibited).

The TTB mandates that advertisements for alcohol contain the following information:

- **Wine.** Responsible advertiser, class, type and distinctive designation.
- **Distilled spirits.** Responsible advertiser, class, type, alcohol content, percentage of neutral spirits and the name of the commodity (if applicable).
- **Malt beverages.** Responsible advertiser, class designation.

TOBACCO

The marketing of tobacco products and their use is controlled by:

- Federal regulation (see *Federal Regulation*).
- The Master Settlement Agreement (MSA) between states and certain manufacturers (see *Master Settlement Agreement*).
- Industry self-regulation (see *Industry Self-regulation*).

Federal Regulation

The FTC requires that labels informing consumers of the health hazards of tobacco be placed on all visible consumer packaging material for tobacco products.

The Family Smoking Prevention and Tobacco Control Act, commonly referred to as the Tobacco Control Act, became law in 2009. It gives the FDA the authority to regulate the manufacture, distribution and marketing of tobacco products to protect public health. It is unlawful to advertise cigarettes, little cigars and smokeless tobacco on any medium of electronic communication subject to the jurisdiction of the FCC.

Master Settlement Agreement

In 1998, 46 states, the District of Columbia and the US territories entered into the MSA with the four largest tobacco manufacturers in the US. Among other things, the MSA restricts how tobacco products may be promoted and advertised. It prohibits using cartoons and taking any action, directly or indirectly, to target youth in the advertising, promoting, packaging and labeling of tobacco products.

Industry Self-regulation

Many tobacco companies have adopted the voluntary Cigarette Advertising and Promotion Code (CAPC), which places certain restrictions on tobacco advertising. According to the CAPC, cigarette advertisements must not:

- Depict anyone who is or appears to be under the age of 25.
- Suggest that smoking is essential to social prominence, distinction, success or sexual attraction.
- Depict as a smoker anyone who is or has been well-known as an athlete.
- Feature the testimonials of athletes, celebrities or others who would have special appeal to persons under the age of 21.

FINANCIAL SERVICES AND CONSUMER CREDIT

FTC

While the FTC does not have any direct authority over bank advertisements, its determinations are highly relevant in considering the propriety of advertising for banks and savings associations. Courts generally give a great deal of deference to the FTC's findings when ruling.

Under the Truth in Lending Act, ads for consumer credit must include certain disclosures about the terms and conditions of credit. It specifically requires the disclosures to be "clear and conspicuous" so that reasonable consumers can read (or hear) and understand the information.

In 2011, the FTC issued a new rule banning deceptive mortgage advertisements. The rule lists 19 examples of prohibited deceptive claims, including misrepresentations about:

- The existence, nature or amount of fees or costs to the consumer associated with the mortgage.
- The terms, amounts, payments or other requirements relating to taxes or insurance associated with the mortgage.
- The variability of interest, payments or other terms of the mortgage.
- The type of mortgage offered.
- The source of an advertisement or other commercial communication.
- The consumer's ability or likelihood of obtaining a refinancing or modification of a mortgage or any of its terms.

The rule applies to all entities within the FTC's jurisdiction that advertise mortgages, including, among others:

- Mortgage lenders, brokers and servicers.
- Real estate agents and brokers.
- Advertising agencies.
- Home builders.
- Lead generators.
- Rate aggregators.

While the rule does not cover banks, thrifts or other federal credit unions, it does cover entities that are affiliated with banks, like parent or subsidiary companies. The FTC also has jurisdiction over non-bank entities that provide services to or on behalf of a bank. (See *The Consumer Financial Protection Bureau*.)

The Securities and Exchange Commission

The Securities and Exchange Commission (SEC) oversees conduct in the securities industry. It is particularly concerned with promoting the disclosure of important market-related information, maintaining fair dealing and protecting against fraud. Under Section 17 of the Securities Act, it is unlawful for any person, in the offer for sale of any security, by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, to:

- Employ any device, scheme or artifice to defraud.
- Obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.
- Engage in any transaction, practice or course of business that operates as a fraud or deceit on the buyer.

(15 U.S.C. § 77q.)

The Consumer Financial Protection Bureau

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which officially created the Consumer Financial Protection Bureau (CFPB) and set a structure in which the FTC and CFPB coordinate and cooperate to regulate deceptive marketing practices in the financial services industry.

RESTRICTIONS ON ADVERTISING TO CHILDREN

The FTC pays particular attention to ads aimed at children because children may be more vulnerable to certain kinds of deception. Advertising directed to children is evaluated from a child's point of view, not an adult's.

Every major television network has guidelines governing the content of and substantiation for commercials involving children's products.

CHILDREN'S ONLINE PRIVACY PROTECTION ACT

The FTC has addressed the issues surrounding the online collection of personal information from children by implementing the Children's Online Privacy Protection Act of 1998 (COPPA) (15 U.S.C. §§ 6501-6506). COPPA applies to operators of both websites and online services that are directed to or knowingly collect information online from children under the age of 13. The term "online service" broadly covers any service available over the internet or that connects to the internet or a wide-area network. Examples of online services include services that allow users to engage in social networking activities, purchase goods or services online or receive online advertisements.

Under COPPA, these operators must generally:

- Obtain parental consent before collecting, using or disclosing personal information obtained from children.
- Display or link to a notice informing parents about the site's collection, use and disclosure practices.
- Give parents the options to:
 - block future collection of information from their children; and
 - review information already provided by their children.

In July 2013, sweeping new regulations for marketing to children took effect in the form of an update to the COPPA rule. The revised rule imposes new duties on operators that already fall under COPPA, while also extending the scope of the rule to reach additional operators that previously fell outside the rule. The amendments:

- Modify the list of "personal information" that cannot be collected without parental notice and consent, clarifying that this includes geolocation information, photos and videos.
- Offer companies a streamlined, voluntary and transparent approval process for new ways of getting parental consent.
- Close a loophole that allowed kid-directed apps and websites to permit third parties to collect personal information from children through plug-ins without parental notice and consent.
- Extend coverage in some of those cases so that the third parties doing the additional collection also have to comply with COPPA.
- Require that covered website operators adopt reasonable procedures for data retention and deletion.
- Extend the rule to cover persistent identifiers that can recognize users over time and across different websites or online services, such as IP addresses and mobile device IDs.

CHILDREN'S ADVERTISING REVIEW UNIT

The Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU) has set out extremely influential self-regulatory guidelines for advertising to children. In particular, CARU

has issued the following guidelines addressing the online collection and use of data submitted by children under the age of 13:

- Tracking practices and the collection and use of information must be clearly disclosed, along with the means of correcting or removing the information.
- Prior verifiable parental consent must be obtained when personal information will be publicly posted or distributed to third parties.
- Verifiable parental consent may be obtained by using e-mail when personal information is obtained for a company's internal use and there is no disclosure of the information.
- A parent must be:
 - directly notified of the nature and intended uses of information collected and retained to respond more than once to a child's specific request, and
 - given sufficient access to allow for the removal or correction of the information.

For more information on CARU and the COPPA amendments, see *Practice Note, Online Advertising and Marketing: Children's Advertising Review Unit* (<http://us.practicallaw.com/4-500-4232#a809211>) and *Children's Online Privacy Protection Act* (<http://us.practicallaw.com/4-500-4232#a843846>).

PROTECTION AND USE OF INTELLECTUAL PROPERTY RIGHTS

Two primary concerns regarding the use of intellectual property rights (IPRs) in an advertising campaign are:

- Protection and ownership of copyrights and trademarks in material created by the campaign.
- Use of content involving IPRs owned by third parties, including in comparative advertising.

For a discussion of IPRs generally, see *Practice Notes Intellectual Property: Overview* (<http://us.practicallaw.com/8-383-4565>) and *Intellectual Property Rights: The Key Issues* (<http://us.practicallaw.com/2-500-4365>).

COPYRIGHTS

Copyrights provide protection to original literary and artistic works, and are protected under Title 17 of the US Code. An advertisement may be protectable by copyright if it is original and fixed in a tangible medium for more than some transitory period of time (17 U.S.C. § 102).

The US Copyright Office has stated that the following works do not qualify for copyright protection:

- Words and short phrases such as names, titles and slogans.
- Mere variations of typographic ornamentation, lettering or coloring.
- Familiar symbols or designs.
- Mere listing of ingredients or contents.

(37 C.F.R. § 202.1.)

Therefore, short advertising slogans are unlikely to be protected by copyright. However, trademark protection may be available (see *Trademarks*).

There is no copyright in a new advertising concept. However, copyright protection may exist in the form where a concept is permanently recorded. Ownership of the copyright in an advertisement depends on:

- The creator of the advertisement.
- The employment relationship between the creator and the advertisers.
- Any contract or assignment in place.

Agreement on ownership may prove complicated, as an advertisement may pass through many people in its development and may be drawn from existing ideas.

There has been a growing tendency for advertising campaigns to adopt an idea or concept similar to that of a competitor or third party, sometimes in a straightforward manner and other times as a parody or pastiche. While copyright laws do not protect ideas in the abstract, the danger of infringing copyright may arise if an advertisement borrows heavily from a previous campaign.

An advertising campaign may make use of a variety of materials. The copyright and other IPRs for those materials may be owned by third parties (for example, photographs obtained from a library or extracts from third-party publications). Companies must seek consents to use these materials and ensure that the license granting consent provides all the rights necessary for the campaign (ideally, with an option to extend it in the future if appropriate). An exclusive license should be negotiated if possible, although the owner of the IPR may want to restrict the terms of the license.

TRADEMARKS

A trademark is any word, phrase, symbol, design or a combination these items that identifies and distinguishes the source of goods or services of one party from those of another. Trademarks can include brand names or logos, as well as colors, sounds or even smells.

When considering whether an advertisement has infringed the trademark of another, courts evaluate whether the advertisement caused consumer confusion. The Lanham Act prohibits the use of "false designations of origin" in connection with goods, services or their containers that may cause confusion, a mistake or deception regarding:

- The affiliation, connection or association of the maker with another person.
- The origin, sponsorship or approval of the maker's goods, services or commercial activities.

(15 U.S.C. § 1125(a).)

COMPARATIVE ADVERTISING AND IPRS

While a comparative advertisement identifies a competitor or goods or services belonging to a competitor, the question arises as to the extent to which a competitor's trademark can be featured in the advertisement. In general, if comparative advertising is

truthful and does not cause consumer confusion, the use of a third party's trademark is arguably non-infringing. This rule (often called "nominative fair use") generally applies whether the use involves a word, slogan or image. However, any attempt to deliberately confuse the consumer by comparative use of another's trademark can be actionable.

The reproduction of a competitor's trademark or logo in an advertisement may also give rise to copyright or design issues. For example, one court found that an original presentation, even of common elements, may merit protection in much the same way that an original combination of words or notes leads to a protectable book or song. Another court found an advertisement protectable under copyright law because of the individual artistic choices of a particular montage style, camera angle, framing, hairstyle, jewelry, decor, make-up and background. However, as product names and slogans are normally not protectable under copyright law, use of another's trademark for comparative purposes will not usually trigger copyright issues.

ENDORSEMENTS AND THE USE OF PEOPLE IN ADVERTISEMENTS

Endorsements are a form of specialized advertising in which an advertiser uses an individual (typically a celebrity) or group to extol the virtues of a particular product or service in an attempt to add credibility to its claims about the product or service. The FTC has issued *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (Guides), intended to help advertisers comply with the FTC Act and minimize the risk of FTC enforcement actions.

In the Guides, the FTC advises that using unrepresentative testimonials may be misleading if they are not accompanied by information describing what can generally be expected from use of the product or service. The Guides also state that if there is a connection between the endorser and the marketer of a product that would affect how people evaluate the endorsement, it should be disclosed. The Guides, however, are not regulations. Therefore, no civil penalties are associated with the Guides. However, if advertisers do not follow these guidelines, the FTC may decide to investigate the practices for unfairness or deception.

The FTC revised the Guides in 2009 to bring them up-to-date with current marketing techniques, such as blogging and word-of-mouth advertising. Marketers using these techniques are subject to the same truthful advertising laws as other forms of advertising. For more information on the revised Guides, see *The FTC's Revised Endorsement Guides: What People Are Asking*.

ENDORSEMENTS

The Guides define an endorsement as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The definition of advertising message includes verbal statements, demonstrations or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization. (16 C.F.R. § 255.0(b).)

Endorsements can come from consumers, celebrities, experts, institutions and others.

The general rules for endorsements are that:

- They must reflect the honest opinions, findings, beliefs or experience of the endorser.
- They must not include representations that are deceptive or that cannot be substantiated.
- They must not be presented out of context or reworded to distort the endorser's opinion or experience with the product.
- When the advertisement represents that the endorser uses the endorsed product, the endorser must be a bona fide user of the product at the time it gives the endorsement.
- Any material connection between the endorser and the advertiser must be disclosed.

(16 C.F.R. § 255.1.)

USING A PERSON'S NAME OR IMAGE

An economic value and certain legal rights are attached to an individual's persona. The persona may be derived from a person's name, physical likeness or voice. Public figures may enforce their rights under trademark laws or by the right of publicity.

Celebrity Trademarks

Celebrities often seek to protect their images by registering their names and nicknames as trademarks. In the past, it was assumed that the risks of referencing a deceased person was less problematic, but in a developing trend, the estates of deceased celebrities have begun to claim proprietary rights in the celebrities' names and likenesses.

Right of Publicity

The right of publicity protects celebrities, politicians and others, both living and dead, from the misappropriation of their personas. This misappropriation is considered an intentional tort and may be actionable under state law either by statute or common law. The appropriate cause of action may be either:

- Violation of one's right of publicity.
- Misappropriation of a person's name and likeness.

The cause of action is derived from a combination of the right of privacy and the right of publicity. While often discussed together, the two rights should be treated separately. The privacy right safeguards a person from loss of human dignity due to unauthorized use of their name or identity in advertising. The right of publicity is the right to reap the benefits of commercial exploitation of one's own name or identity.

The privacy right is violated when an individual's identity is used for commercial purposes without the individual's consent, causing injury to the individual's dignity and resulting in mental distress. The right of publicity is violated when the individual can show an enforceable right in the likeness, which has been used in an identifiable manner by another, without consent, resulting in injury to the commercial value of that right. However, many states limit the cause of action by allowing exceptions for use that is newsworthy, incidental or *de minimis*.

Celebrities may also be able to prevent look-alike or sound-alike models from impersonating them in an advertisement.

Companies must be aware of the right of publicity as they develop advertising and promotional campaigns, products or other materials that feature anyone's identity and ensure that appropriate permission is obtained.

For more information on the right of publicity, see *Practice Note, Right of Publicity: Overview* (<http://us.practicallaw.com/2-505-8377>).

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