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Advertising Q&A: US

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US-specific information concerning the key legal issues that need to be considered when designing an advertising campaign.

This Q&A provides country-specific commentary on *Practice note, Advertising: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

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Advertising regulation

1. How does national law regulate the advertising industry?

US law has several mechanisms by which it regulates the advertising industry:

- The Federal Trade Commission Act (FTCA) prohibits "unfair methods of competition in/or affecting commerce, and unfair or deceptive acts or practices in/or affecting commerce". Under the FTCA, an advertiser is required to have a reasonable basis for all objective product claims before the claims are made (*the prior substantiation doctrine*). The main focus of Federal Trade Commission (FTC) investigations concern the legitimacy of claims made by advertisements.
- The Food, Drug and Cosmetic Act (FDCA) prohibits the misbranding of any food, drug, device or cosmetic in interstate commerce.
- *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. Section 43 provides companies with a federal cause of action against their competitors for false advertising as well as for any "false designation of origin".
- *Self-regulation via the National Advertising Division (NAD) of the Council of Better Business Bureau*. NAD reviews national advertising for truthfulness and accuracy, and aims to foster public confidence in the credibility of advertising. Policy and procedures for NAD are established by the Advertising Self-Regulatory Council (ASRC).

2. What obligations or standards do national codes of advertising impose upon advertisers?

The FTCA

The prior substantiation doctrine under the FTCA requires an advertiser who makes objective product claims to have substantiation for those claims prior to their being made. If an advertisement states, whether expressly or by implication, that the claim made has a particular level of support (for example, laboratory tests or scientific studies), the advertiser must actually be in possession of the advertised level of substantiation.

The FDCA

Food. *Section 403 of the FDCA* and the corresponding *FDA regulations* require that any food labels trumpeting particular health benefits of a food must:

- Be truthful and not misleading.
- Only describe the value of the product with respect to a specific chronic condition.
- Be consistent with generally recognised medical and nutritional principles.
- Be based on and consistent with the conclusions set forth in an applicable scientific study and a consumer health summary that is accepted by the Food and Drug Administration (FDA).
- Include a reference to the applicable consumer health message summary.
- Meet certain *labelling requirements*.

For further information and guidance on promoting "*health claims*" and food labelling, refer to the FDA's "*Food Labelling Guide*", a nonbinding recommendation which represents the FDA's current thinking on the topic (last revised January 2013).

In May of 2016 the FDA finalised the new Nutrition Facts label for packaged foods. The new label will reflect new scientific information and will allow consumers to easily make informed decisions. Specific updates include:

- Increasing the type size for "calories", "servings per container" and "serving size".
- Providing an updated explanation of the meaning of percent Daily Value.
- Removal of "calories from fat".
- A requirement that "added sugars" be included on the label.
- Updated daily values for nutrients including sodium, dietary fibre and vitamin D.
- An updated list of nutrients that are required or permitted to be declared.

Additionally, packages that contain between one and two servings will be required to provide nutrition information as a single serving, and packages with more than one serving that could be consumed in one or more sittings will be required to provide dual column labels for "per serving" and "per package". Manufacturers will have at least until 26 July 2018 to comply with these requirements (see *US Food and Drug Administration, Changes to the Nutrition Facts Label*).

Prescription drugs. *Section 502 of the FDCA* provides the requirements for prescription drug labelling and advertising.

Prescription drug labelling. Section 502 and the *corresponding FDA regulations* require prescription drug labels to include, among other things, information regarding:

- Indications and usage.
- Dosage, administration, and directions for use.
- Warnings and precautions, adverse reactions, contraindications and drug interactions.

Prescription drug advertising. In the field of prescription drug advertisements, product claim ads are the only type of ads that name a drug and discuss its benefits and risks. Section 502(n) of the FDCA and the *related FDA regulations* require that all broadcast product claim advertisements disclose the drug's most important risks presented in the audio portion of the advertisement and either:

- All the risks listed in the drug's prescribing information.
- A variety of sources for viewers to find the prescribing information for the drug.

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

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.

(*US Food and Drug Administration, Basics of Drug Ads*.)

For comprehensive information and guidance on prescription drug labelling and advertising requirements, see the FDA's draft "*Guidance for Industry: Presenting Risk Information in Prescription Drug and Medical Promotion*", submitted for comment on 26 May 2009 (not yet finalised).

Dietary supplements. Regulating the promotion of dietary supplements is an issue that has received significant attention recently, due to the considerable increase in the number of dietary supplement products on the market. Dietary supplements are regulated by Chapter IV of the FDCA, governing "Food" (as opposed to Chapter IV of the FDCA, governing "Drugs and Devices"). Section 403(r) of the FDCA requires that a manufacturer of a dietary supplement making a nutritional deficiency, structure/function or general well-being claim have substantiation that the claim is truthful and not misleading. The FDA issued its "*Final Guidance for Industry: Substantiation for Dietary Supplement Claims Made Under Section 403(r)(6) of the [FDCA]*" in December 2008. This guidance represents the FDA's current thinking on the substantiation for dietary supplement claims made under Section 403(r)(6) of the Act. It does not create or confer any rights for or on any person, and does not operate to bind the FDA or the public.

In the Guidance, the FDA describes the amount, type and quality of evidence the FDA recommends a manufacturer must have to substantiate a claim. The FDA intends to apply a standard for the substantiation of dietary supplement claims that is consistent with the FTC standard of "competent and reliable scientific evidence" (in other words, tests, analyses, research, studies).

In assessing whether "the substantiation standard has been met with competent and reliable scientific evidence," the FDA's Guidance further recommends that companies consider the following:

- The meaning of the claim(s) being made.
- The relationship of the evidence to the claim.
- The quality of the evidence.
- The totality of the evidence.

The Lanham Act

Section 43(a) of the Lanham Act allows a false advertising claim to be brought when a false statement of fact is made by the advertiser about its own or another's product that actually deceives, or has a tendency to deceive, a substantial segment of the intended audience. The false statement must also be material, in that it is likely to influence the purchasing public, and must result in, or be likely to result in, injury to the plaintiff. The statement can be either express or implied.

3. What procedures exist for complaining against an advertisement? What sanctions can be imposed for infringements of advertising codes or laws?

The FTCA

When a complaint is made, either by the public or a corporation, that an advertisement violates the FTCA, the FTC will conduct an investigation. If the FTC believes a violation has occurred, it may attempt to obtain voluntary compliance by entering into a consent order with the company. A company that signs a consent order need not admit to the violation, but it must agree to stop the disputed practices outlined in the accompanying complaint. (For an example of FTC investigation and consent order procedure in action, refer to the *FTC's 2011 consent agreement with Beiersdorf*, executed in connection with an investigation of the company's allegedly false claims made in a skin cream advertising campaign.) If no consent agreement can be reached, the FTC may issue an administrative complaint. This will lead to *formal proceedings* being conducted before an administrative law judge. If a violation is found, a cease and desist order, or other appropriate relief, may be issued. Initial decisions by administrative law judges may be appealed to the full Commission. Final orders issued by the Commission may be appealed to the US Court of Appeals and, ultimately, to the US Supreme Court. If the Commission's position is upheld, the FTC, in certain circumstances, may seek consumer redress in court. If the company ever violates the order, the Commission may seek civil penalties or an injunction.

The Lanham Act

A claim of false advertising under section 43(a) of the Lanham Act is brought in a federal or state court. The burden of proof is on the party bringing the complaint. If the complainant prevails, it will be entitled to injunctive relief and/or monetary damages. Usually, injunctive relief is in the form of an order enjoining the distribution of the false advertising. The court may also enter an injunction mandating the defendant to undertake corrective advertising. A higher level of proof is required to obtain monetary damages than injunctive relief, with the result that monetary damages are rarely awarded. In order to receive monetary damages, the plaintiff must show both that the consumers were actually deceived by the defendant's false advertising and that there is a direct causal connection between the alleged false advertising and the injury of the plaintiff.

The Lanham Act states that anyone engaged in false advertising will be liable to "any person who believes that he or she is or is likely to be damaged by such" advertising. Courts have traditionally interpreted this narrowly, finding that only business entities have standing to sue under section 43(a). The US Supreme Court recently resolved a circuit split on the appropriate analytic framework for determining a party's standing to maintain an action for false advertising under the Lanham Act.

In 2014, the Supreme Court held in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (U.S. 2014), that to have standing under Section 1125(a), a plaintiff must both:

- Allege an injury to a commercial interest in reputation or sales.
- Show economic or reputational injury flowing directly from the defendant's deceptive advertising (proximate cause).

The Better Business Bureau

Complaints may also be brought to the attention of the *National Advertising Division (NAD) of the Council of Better Business Bureaus (NAD)*. The NAD was established by the advertising community as a self-regulatory programme to help sustain standards of truth and accuracy in national advertising. Industry organisations joined forces to design a process for investigating complaints about misleading advertising claims and determining whether such claims have been substantiated. To ensure impartiality, the programme was placed under the management of the Council of Better Business Bureaus. When a complaint is brought before NAD, it will evaluate the claims and issue a ruling. The ruling may be accepted or rejected by the parties. While NAD decisions are rarely rejected, the *National Advertising Review Board (NARB)* serves as the appeals body of the NAD. Policy and procedures for the NARB are established by the National Advertising Review Council (NARC).

Recent decisions by NAD include:

- A *recommendation* that Procter & Gamble Company discontinue claims that "4=1" and "Why buy 4?" for its Plug-In Air Fresheners, noting that consumers could take away a longevity of fragrance message as opposed to P&G's intended strength of fragrance message
- A *determination* that PLZ Aeroscience Corporation's claim of "World's Best Glass Cleaner," as used on the label of its "Sprayway" product constitutes puffery.

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

Controls on advertising methods

4. How does national law control product placement and editorial advertising?

With the advent of digital video recorders and other devices that grant consumers the ability to easily skip advertisements, paid-for, in-show product placements have generally been on the rise. The Nielson Company reported that across 12 broadcast and major cable networks in prime time, there were 5,381 major product placements in 2010, up 22% since 2006. Although product placement spending declined as a result of the struggling economy in 2009 by 2.8% (to USD3.61 billion), spending has steadily increased since rebounding in 2010. According to a PQ Media Report, US product placement revenues surged 12.8% to USD6.01 billion in 2014 and product placement spending continued to grow through 2015 on track to make six consecutive years of accelerated growth (see *PQ Media Update*).

The FTC

The only requirement relating to paid-for product placements under FTC guidelines is that such arrangements must be disclosed to the public.

This requirement may be satisfied through announcements or a listing at the end of a programme. In September 2003, the *Commercial Alert* organisation filed a request with the FTC, asking the Commission to require advertisers to disclose product placements, as they appear on screen, in a clear and conspicuous manner, with the word "ADVERTISEMENT." In response, the FTC Executive Director issued a letter on 10 February 2005 rejecting Commercial Alert's request to impose this notice requirement on advertisers, reasoning that "the existing statutory and regulatory framework" provides adequate opportunity to challenge deceptive advertising acts and practices.

The 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 programme during the credits.

Commercial Alert filed a similar petition with the FCC in 2003 requesting the same "conspicuous and concurrent disclosure" requirement. In June 2008, the FCC issued a "*Notice of Inquiry and Notice of Proposed Rulemaking*" proposing that new FCC rules mandate larger letter formatting for product placement disclosures at the conclusion of TV programmes, or a lengthened period of time, without going so far as to agree with Commercial Alert's position that product placements should be identified when they occur.

In early 2013 the General Accountability Office issued a report urging the FCC to revise standards for disclosing TV product sponsorships, whether for product placement, video news releases or political advertising. The FCC indicated it will consider the recommended actions and how to address the concerns discussed in the report (*GAO Report, January 2013: Requirements for Identifying Sponsored Programming Should Be Clarified*).

5. Does national law permit subliminal advertising?

Under FCC regulation, FCC-licensed television and radio stations are banned from knowingly broadcasting programming containing subliminal messages. There is no requirement that broadcasters screen content. Rather they are merely required to stop airing such advertisements upon becoming aware of their existence. The FCC predicates its ban on subliminal advertising on the grounds that such advertising is "inconsistent with a station's obligation to serve the public interest because [subliminal programming] is designed to be deceptive", as expressed in the FCC's *Public and broadcasting Manual*.

Subliminal advertising is also banned from advertisements relating to alcohol products as regulated by the *Alcohol and Tobacco Tax and Trade Bureau* (TTB).

6. How does national law regulate the use of billboards and other forms of outdoor advertising?

The Outdoor Advertising Association of America (OAAA) reported USD1.64 billion in revenue for the first quarter of 2017, a 0.3% increase compared to the previous year. This marks the industry's 7th consecutive year of growth. The OAAA also reported that for every dollar spent on out of home advertising an average of USD5.97 is generated in product sales, a higher return on investment over radio, print, and digital display advertising.

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

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

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

For example, some states, including Vermont, Hawaii, Maine, and Alaska, prohibit all billboards. The federal government also asserts influence over outdoor advertising and billboards by way of the *Highway Beautification Act 1965*. The Act is meant to prompt states to conform to certain aesthetic guidelines and to exert control over outdoor advertising in their state. The federal government will reduce by 10% the federal highway aid of those states that fail to comply with the guidelines while reimbursing the state for 75% of the payment the state makes to all sign and land owners who remove signs. Since 1970, 32 states have enacted legislation in response to the Act.

7. How does national law regulate the use of aerial advertising?

The content of aerial advertising must comply with all advertising regulations previously mentioned. In addition, *federal regulations* prohibit the operation of a certain category of aircrafts used for advertising purposes in certain locations such as over densely populated areas, in congested airways, or near busy airports, without a certificate of waiver from the *Federal Aviation Administration* (FAA). Much debate has been made over whether these federal laws pre-empt state and local ordinances, although it appears from relatively recent decisions that they have not. Additionally, any aeroplane designated as an aerial advertiser by the FAA is prohibited from carrying passengers.

Controls on advertising content

8. How does national law regulate price advertising and display?

Bait advertising is prohibited by the FTC. The FTC has defined bait advertising as "an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser."

Under section 238.3 of the FTC's "Guides Against Bait Advertising", the actions which the FTC will consider when determining whether an advertiser has engaged in a bait scheme include:

- 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 the fact of 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; and use.
- Use of a sales or compensation plan used to discourage or prevent employees from selling the advertised product.

9. How does national law regulate the use of false information in advertising?

Section 43(a) of the Lanham Act provides a private right of action against false advertising or any "false designation of origin" in connection with any goods or services. For a claim to be brought an advertiser must have made a false statement of fact about its own or another's product, which actually deceives, or has a tendency to deceive, a substantial segment of the intended audience. The false statement must also be material, in that it is likely to influence the purchasing public, and must result in, or be likely to result in, injury to the plaintiff. See *Question 1 to 2*.

It is important to note that the FTC and courts have imposed liability for false advertising claims on parties other than just sellers. Third parties, such as advertising agencies, website designers and catalogue marketers, may be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising, or know about the deceptive claims (*FTC: Advertising and Marketing on the Internet: Rules of the Road*).

10. How does national law regulate misleading advertising?

See *Question 9*.

11. How does national law regulate comparative advertising?

While the advertising industry engages in a great deal of self-regulation in the field of comparative advertising, national law also plays a part.

The FTC

According to the FTC's *Statement of Policy Regarding Comparative Advertising*, where comparative advertising is truthful and non-deceptive, and where the bases of comparison are clearly identified, the FTC supports the use of brand comparisons as a source of important information to consumers that assists them in making rational purchase decisions.

In its Statement of Policy, the FTC established a different approach to comparative advertising than the self-regulating bodies at the time. Specifically, the FTC criticised industry codes that prohibited the practice of disparagement or imposed a higher standard of substantiation applicable to comparative advertisers. The FTC's position is that disparaging advertising is

permissible so long as it is truthful and not deceptive, and that 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 FTCA provides no private right of action for damage resulting from a false or deceptive comparative advertisement.

The Lanham Act and federal courts

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

The Trademark Law Revision Act 1988 expressly recognised a federal cause of action for commercial disparagement which prohibits false advertising or promotion about one's own or another's goods or services.

The general standard for proving false advertising in a comparative advertising situation is that:

- The defendant must have made false statements of fact about its own products in the advertisements.
- The advertisements must be literally false, or, if not, must have actually deceived (or have a tendency to deceive) a not insubstantial segment of the audience to which they were directed.
- The deception must have been material in influencing purchasing decisions.
- The defendant must have caused its falsely advertised goods to enter interstate commerce.
- The plaintiff must have been injured through the advertisements either by loss of sales directly or detriment to the goodwill of its products in the eyes of the consumer.

It is now generally accepted by the courts that if an advertisement is literally or explicitly false, as opposed to misleading or impliedly false, the court may grant relief without reference to the advertisement's impact on the buying public. Preliminary injunctive relief is the most common form of relief sought in comparative advertising cases, although permanent injunctive relief has also been granted, as have substantial compensatory and punitive damages. There is usually a requirement for corrective advertising.

12. Can an advertisement create a contract between the advertiser and the buyer of the product advertised?

While most advertisements are merely an invitation to make an offer, there are situations where advertisements can form a valid contract between the advertiser and the buyer. 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 NW2d 689 (Sup. Ct. Minn.) (1957)*). One case held that when an automobile dealer advertised that anybody who bought an automobile model of a certain year would be entitled to exchange it against a new model, he was held to have made a binding offer (*Johnson v Capital City Ford Co., 85 So.2d 75 (La. App.1955)*).

Depending on the jurisdiction, if the advertisement contains misrepresentations made with or without fraudulent intent, that are relied on by the consumer, 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 contractual obligation by operation of estoppel if the promisee, as a consequence of the offer, does anything that they are not bound to do, or refrains from doing something they have a right to do, in reasonable reliance on the promise.

13. How does national law regulate the use of obscene or indecent material in advertisements?

The regulation of obscene or indecent material in advertisements is generally governed by the law relating to obscene material itself. While the definition of just what is obscene can be rather flexible, advertisements that are found to be obscene lose First Amendment protection. To be deemed obscene the particular material at issue must be specifically defined as obscene by state statute (see *Miller v. California, 413 U.S. 15 (1973)*). When children are the target of the advertisement the Supreme Court has shown little tolerance for obscenity as material may be deemed obscene for children, even if not for the general adult public, under contemporary community standards (see *Ginsberg v. New York, 390 U.S. 629 (1968)*). On the other hand, the government cannot reduce the adult population to accessing material that is only appropriate for children consistent with the First Amendment. Therefore, debate remains as to whether an advertisement viewable by all, such as outdoor billboards, that contains material obscene only for children may be restricted without violating the First Amendment.

In addition, in recent years Congress has tightened its regulation of the broadcasting industry. On 15 June 2006 President George W. Bush signed into law the *Broadcast Decency Enforcement Act*, which increased the penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent, and profane language. Under the law, the FCC is able to impose fines of USD325,000 for each violation by each station which violates decency

standards. This amounts to a tenfold increase in the penalty that the FCC can impose. Besides a fine, the FCC also has the authority to revoke a broadcast licence or deny a renewal application.

According to the US Supreme Court's First Amendment jurisprudence, the government cannot ban entirely explicit material that does not rise to the level of obscenity, even if considered indecent or profane. Under FCC *Rules and Regulations*, however, such material may be restricted to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience (for example, 6 am – 10 pm). In recent years, the FCC's indecency standard has been the subject of litigation between the FCC and broadcasters. In a 2012 decision the Supreme ruled that decency standards issued by the FCC were unconstitutionally vague, so that their application to television programs broadcasted by the stations violated the due process clause (*FCC v. Fox Television Stations, Inc., 132 S.Ct. 2307 (2012*).

Industry-specific regulation

14. Does national law legislate or regulate advertising in any specific industry sectors?

Alcohol, tobacco, and firearms

TTB regulations. Primary federal regulatory authority over alcoholic beverages advertising is vested in the Alcohol and Tobacco Tax and Trade Bureau (TTB), which is an office of the Department of Treasury. The TTB's *advertising regulations* address wine, distilled spirits and malt beverages separately. The TTB requires that advertisements for all three types of alcoholic beverages include the name and address of the responsible advertiser and the class to which the product belongs. Additionally, *wine advertisers*must state the *type of wine and its distinctive designation* if any. Advertisements for *distilled spirits* are required to provide the *alcoholic content*, the *percentage of neutral spirits*, and the *name of the commodity* from which they are distilled.

The TTB also prohibits the inclusion of certain statements in advertisements.

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 of a competitor's product.
- Health-related statements that are false or misleading.
- Misleading guarantees (money back guarantees are not prohibited).

There are also a number of additional restrictions placed on specific types of alcoholic beverages.

The FTC. The FTC requires that labels informing consumers of health hazards of tobacco be placed on all visible consumer packaging material of package containing tobacco products. The *Federal Cigarette and Smokeless Tobacco Acts* require the FTC to review and approve tobacco company plans for rotating and displaying the statutory health warnings on tobacco labels and in ads.

The FDA. The Family Smoking Prevention and Tobacco Control Act, commonly referred to as the Tobacco Control Act, became law in June 2009. It gives the FDA the authority to regulate the manufacture, distribution and marketing of tobacco products to protect public health.

In August 2012, the D.C. Circuit, in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), upheld an earlier district court ruling invalidating an FDA rule that would have required cigarette packages to bear one of nine graphic images depicting negative health consequences of smoking. However, the D.C. Circuit in 2014 overturned a critical component of the legal reasoning relied on by the *R.J. Reynolds* court, namely that governmental interests other than the correction of deception may be sufficient to support commercial disclosure requirements. See *Am. Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18 (D. C. Cir. 2014).

The Sixth Circuit has also issued a decision upholding the rule. The issue is likely to be the subject of further litigation (see *www.ca6.uscourts.gov/opinions.pdf/12a0076p-06.pdf*).

The financial services industry

The FTC. FTC determinations are highly relevant in considering the propriety of bank and savings association advertisements. Courts will generally give a great deal of deference to FTC findings when ruling. Enacted as Title IV of The Consumer Credit Protection Act, the Credit Repair Organisations Act targets the advertising and business practices of companies in the "credit-repair" business. Among other things, the Act requires specific disclosures as to the consumer's rights to obtain and dispute credit information, and to sue providers of credit repair services who infringe its provisions. In July 2011, the FTC issued a new rule banning deceptive mortgage advertisements. The new Rule lists 19 examples of prohibited deceptive claims. (See also below, *The Consumer Financial Protection Bureau*.)

In November 2012 the CFPB and FTC announced that they had issued warning letters to mortgage lenders and mortgage brokers advising them to "clean up potentially misleading advertisements, particularly those targeted toward veterans and older Americans." The CFPB also announced it had ongoing formal investigations into a number of companies. These actions stem from a joint "sweep," a review conducted by the CFPB and the FTC of about 800 randomly selected mortgage-related ads across the country (*CFPB: Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements*).

The SEC. The *Securities and Exchange Commission* (SEC) oversees conduct in the securities industry. Particularly, the SEC is concerned with promoting the disclosure of important market-related information, maintaining fair dealing, and protecting against fraud. Under *section 17* of the Securities Act of 1933, it is unlawful for any person, in the offer for sale of any security, to:

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

The Consumer Financial Protection Bureau. In the wake of the financial crisis, President Obama and the Department of Treasury proposed legislation to tighten the federal government's oversight of the financial services industry. Most notably, the bill proposed the creation of the *Consumer Financial Protection Bureau* (CFPB), which, among other things, would be "authorised to apply the duty of reasonableness to communications with or to the consumer, as appropriate, including marketing materials and solicitations." In 2010, Congress passed the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which officially creates the CFPB and establishes a structure whereby the FTC and CFPB co-ordinate and co-operate to regulate deceptive marketing practices in the financial services industry.

Other industries

The FTC has also formulated a myriad of rules dealing with specific issues of distinct fields. These include:

- Disclosure of the odds of winning on certain games of chance.
- Labelling of consumer appliances' annual energy consumption.
- Disclosures made concerning the power output of personal stereos.
- Prohibition of retail food marketing establishments from advertising the prices of products of which they do not have an adequate readily available stock during the effective period of the advertisement.

Various FTC rules also touch on aspects of advertising relating to (among others):

- The funeral industry.
- Home insulation.
- Mail order merchandise.
- Eye glasses and contacts.
- Fur products.
- Television picture tube sizes.

Restrictions on advertising to children

15. Does national law regulate advertisements directed at children?

The FTC has issued a variety of reports supporting restrictions on various forms of advertisements directed at children. In December 2009, for example, the Commission issued "*Marketing Violent Entertainment to Children*", its seventh report to Congress on the issue of the marketing of violent entertainment products by the motion picture, music recording, and electronic game industries groups to children. This series of reports relates findings from Commission research and study focusing on:

- Restricting target-marketing of mature-rated products to children.
- Clearly and prominently disclosing rating information.
- Restricting children's access to mature-related products at retail.

Until recently, attempts to extend national law to protect children from certain types of advertising have achieved little success over the years. The problem is complicated by First Amendment issues, as well as the rights of broadcasters and the legitimate interests of the state and others. However, each of the major television networks has guidelines governing the content of and substantiation for commercials involving children's products. Furthermore, the advertising industry has responded to the collection and use of data submitted by children when they visit a website by forming the *Children's Advertising Review Unit of the Council of Better Business Bureaus* (CARU). CARU has formulated *guidelines* of behaviour for advertisers on websites targeting children. The FTC has dealt with this issue by implementing the *Children's Online Privacy Protection Act 1998 (COPPA)*. COPPA applies to commercial websites directed to, or that knowingly collect information online, from children under the age of 13. These sites are generally required to obtain parental consent before collecting, using or disclosing personal information obtained from children. The Act also requires these sites to inform parents of their collection and distribution practices, display or link to a notice disclosing their collection and distribution practices, and give parents the option of blocking future collection of information from their children and reviewing information already provided by their children.

Sweeping new regulations on marketing to children took effect on 1 July 2013, in the form of an update to the COPPA Rule (*Federal Trade Commission: Children's Online Privacy Protection Rule ("COPPA")*). 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 apps and websites targeting children to enable 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 recognise users over time and across different websites or online services, such as IP addresses and mobile device IDs.

Although federal regulation has been scarce beyond COPPA, more and more industries have begun to self-regulate. For example, in 2005 PepsiCo imposed voluntary restrictions on its own advertisements to children in the US in response to the growing obesity epidemic. In April 2011, the FTC, along with Food and Drug Administration, Centres for Disease Control and Prevention and U.S. Department of Agriculture, proposed voluntary principles for use by industry as a guide for marketing food to children. The principles are designed to encourage stronger and more meaningful self-regulation.

Protection and use of intellectual property rights

16. How is copyright protected under national law? Are advertising slogans protected by copyright under national law?

Copyright is protected under the national law by *Title 17 of the United States Code*. The Copyright Office has stated "*[w]ords and short phrases* such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or colouring; mere listing of ingredients or contents" will not qualify for copyright protection. Therefore, short advertising slogans are generally not protected by copyright law. However, trade mark protection may be available, provided that the slogan or phrase indicates the source of the product or service.

17. How are trade marks protected under national law? Is there any form of protection for unregistered trade marks, for example, under unfair competition or passing off laws?

Trade marks are protected under *Title 15, Chapter 22 of the United States Code*. Courts will evaluate customer confusion when deciding whether an advertisement has infringed the trade mark of another. Consumer surveys are the strongest evidence of consumer confusion. Unregistered marks are protected under common law and under *section 43(a) of the Lanham Act* (*section 1125(a) USC*). The Lanham Act (*section 43(a)*) prohibits the use of "false designations of origin" in connection with goods, services or their containers that are "likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection or association of the [maker] with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities." If the plaintiff can establish federal jurisdiction over the claim, this section will provide federal protection of unregistered marks.

18. Can a trade mark registered in the name of a third party be used in comparative advertising? Where such use is permitted, will there be any copyright issues?

The general rule is that as long as comparative advertising is truthful and does not cause customer confusion, the use of a third party's trade mark will be treated as non-infringing. This rule, most notably recognised by the Ninth Circuit Court of Appeal as "nominative fair use" (*New Kids on the Block v. News Am. Pub., Inc., 971 F.2d 302 (9th Cir. 1992)*), applies whether the use involves a slogan, a photograph, or even a smell. Any attempt to deliberately confuse the consumer through comparative use of trade marks can be actionable.

In the field of advertising, the law of copyright is implicated, if at all, in circumstances dealing with the advertisement itself, for example:

- One court has 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, jewellery, decor, make-up and background (see *Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005)*).

- In 2009, the Seventh Circuit Court of Appeals held that, where a photographer was hired by the defendant to take pictures of its product for promotional materials without a work-for-hire contract, the photographer could allege copyright infringement against the defendant for using the pictures in promotional materials without the photographer's permission, even though the defendant held a copyright in the underlying product image (*Schrock v. Learning Curve Int'l. Inc., 586 F.3d 513 (7th Cir. 2009)*).

However, as product names and slogans are normally not protectable under copyright law, use of another's trade mark for comparative purposes generally will not trigger copyright issues.

Endorsements and the use of people in advertisements

19. What action lies for using an individual's name or image without consent?

An economic value is attached to a person's persona. The persona may be derived from a person's name, physical likeness, or voice. Misappropriation of a person's likeness is considered an intentional tort and is actionable under state law derived either from statute or common law. The appropriate cause of action may be referred to as a violation of one's "right of publicity" or "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. Although often discussed together, the two rights are actually separate. The privacy right safeguards a person from loss of human dignity due to unauthorised 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 their consent, causing injury to their dignity and resulting in mental distress. The right of publicity is protected in 38 states by common law *and in 22 states by statute*. 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.

In addition to the above cause of action, celebrities may be able to prevent look-alike or sound-alike models from impersonating them in an advertisement.

Many states limit the cause of action by allowing exceptions for use that are newsworthy, incidental or *de minimis*.

In the realm of endorsement advertising, the FTC in 2009 revised its *Guide Concerning the Use of Endorsements and Testimonials in Advertising*, covering marketing techniques such as TV, radio, print, blogging and word of mouth. Under this Guide, endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser. Further, the endorsement cannot convey a deceptive representation, and it may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. Advertisers may only use endorsements of experts or celebrities to the extent that the advertiser has good reason to believe that the endorser continues to subscribe to the views presented. If the advertisement represents that the endorser uses the product, the endorser must have been a *bona fide* user of the product at the time the endorsement was given. The FTC also requires all endorsements to disclose any "material connection" between the endorser and the advertiser.

The FTC has also provided FAQs and other guidance about endorsements, testimonials, and disclosure requirements in the social media context. In early 2017, the FTC sent over 90 warning letters to marketers and social media "influencers" reminding them that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products on social media.

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