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Advertising in the US: Overview

by Peter S. Sloane and Lori L. Cooper, Leason Ellis LLP

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A Q&A guide to advertising in the United States.

It considers the framework regulating the advertising industry; the rules and standards required for substantiating advertising claims and for making disclosures; whether freedom of speech and expression rights affect the regulation of advertising; the complaints procedure; regulations on advertising methods (such as product placement, outdoor advertising, and bait advertising); regulations on advertising content (including rules on false and misleading advertising); industry-specific regulations; restrictions on advertising to children; intellectual property right protections; and protections on the use of people in advertisements.

Regulatory Framework

1. What is the legal framework for regulating the advertising industry?

The advertising industry in the US is regulated by:

- Legislation and regulations.
- Common law.
- Self-regulation at the federal, state, and local levels.

Congress has established several agencies to regulate the advertising industry and authorized them to enforce those regulations, including:

- **The Federal Trade Commission (FTC)**, which is the primary federal consumer protection agency responsible for advertising regulation in the US. The FTC's authority originates from section 5 of the Federal Trade Commission Act (FTC Act), which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45). Section 12(a) of the FTC Act specifically makes it unlawful to disseminate any false or deceptive advertisement with a purpose to induce the public to buy food, drugs, devices, or cosmetics. Under the FTC Act, advertisements must be truthful and not misleading, and the advertiser must have evidence to back up its claims before disseminating them (for more on substantiation, see Question 3). The FTC promulgates rules (FTC Rule) which have the force of law (like the Made in USA Labeling Rule). It also issues guidance resources for specific advertising issues (like the use of endorsements) which do **not** have the force of law but provide insight into what practices the FTC considers to be deceptive when examining those advertising tactics.
- **The Food & Drug Administration (FDA)**, which enforces the Food, Drug and Cosmetic Act (FDCA). The FDCA prohibits the misbranding and governs the safety and labelling of any food, drug, device, or cosmetic in interstate commerce (see Question 3*)*. The FDA also oversees the advertising of prescription drugs and certain medical devices (like hearing aids) and the labelling of food and dietary supplements (sharing the FTC's standards for health claims).
- **The Federal Communications Commission (FCC)**, which is authorized by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Communications Act) (47 U.S.C. § 151) to oversee communications by radio, television, wire, satellite, and cable. The FCC resolves consumer complaints about the nature and timing of broadcast advertisements and administers rules about junk fax advertising and political programming. The FCC also enforces the Telephone Consumer Protection Act (TCPA) which places restrictions on telemarketing calls, texts, and faxes. For more information on the TCPA, see Practice Note, Telephone Consumer Protection Act (TCPA): Overview.

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Other federal laws are aimed at preventing false advertising and deceptive conduct that causes consumer confusion, such as section 43(a) of the Lanham Trademark Act (Lanham Act) (15 U.S.C. § 1125(a)). section 43(a) provides a private right of action to any person who believes that they are likely to be damaged by the use of any false description or representation in connection with any goods or services in commerce. section 43(a) provides companies with a federal cause of action against their competitors for false advertising as well as for any "false designation of origin" (see Question 6).

The states have unfair and deceptive trade practice laws which generally prohibit unfair and deceptive advertising. These laws are typically enforced by state attorneys general, but many have a private right of action as well.

BBB National Programs, Inc. (BBBNP) administers several self-regulatory programs for the advertising industry, including:

- **The National Advertising Division (NAD).** The NAD reviews national advertising to help maintain the advertising standard of truth and accuracy.
- **The Children's Advertising Review Unit (CARU).** CARU reviews national advertising directed to children for compliance with its self-regulatory children's advertising guidelines and existing advertising standards of truthfulness and substantiation. CARU also reviews the collection of personal information from children on the internet for compliance with its children's privacy guidelines.
- **The National Advertising Review Board (NARB).** The NARB hears appeals of NAD and CARU decisions.

For more information on advertising self-regulation in the US, see Question 6 and Practice Note, Advertising Self-Regulation in the US: Overview.

2. Are there additional laws, regulations, or codes governing online advertising?

The FTC vigorously applies the FTC Act to online and mobile advertising. Deceptive advertising on the web (including on social media platforms and in mobile applications) is treated the same as more traditional forms of deceptive advertising. The general principles of truthfulness and fairness also apply. The FTC has issued useful guidelines for online advertising in the form of endorsements, influencers, and reviews.

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) (15 U.S.C. §§ 7701 to 7713) is a US national law that regulates commercial emails (including marketing emails).

CAN-SPAM does the following:

- Prohibits false or misleading header information (an email's routing information, including the originating domain name and email address).
- Prohibits deceptive subject lines.
- Requires senders to give recipients a free, easy-to-use opt-out method.
- Requires that commercial email is identified as an advertisement and includes the sender's valid physical postal address.
- Requires warning labels be added to commercial email that contains sexually oriented material.

For more information on CAN-SPAM and email marketing, see Practice Note, CAN-SPAM Act Compliance and Email Marketing Campaign: CAN-SPAM Act Compliance Checklist.

The US does not have a national privacy law affecting online advertising except for the Children's Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501 to 6506). COPPA addresses the collection, use, and disclosure of personal information of children under age 13. COPPA requires commercial websites and online services directed to, or that knowingly collect information from, children under 13 to take measures to protect children's personal information, including the following:

- Providing notice to inform parents about their policies regarding their collection, use, and disclosure practices.
- With certain statutory exceptions, obtaining "verifiable parental consent" before collecting, using, or disclosing personal information from children.
- On request, providing parents of children who have given personal information with:
  - a description of the types of personal information collected;
  - an opportunity to prevent any further use or collection of information; and
  - reasonable means to obtain the specific information collected.
- Maintaining procedures to ensure the confidentiality, security, and integrity of the personal information collected.

The FTC implemented the COPPA Rule to enforce COPPA. In 2013, the FTC amended the COPPA Rule to clarify COPPA requirements such as:

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- Personal information that cannot be collected without parental notice and consent includes:
  - geolocation information;
  - photos; and
  - videos.
- Covered website operators must adopt reasonable procedures for data retention and deletion.
- Personal information includes persistent identifiers that can recognize users over time and across different websites or online services, such as IP addresses and mobile device IDs.

For more information regarding COPPA, see Practice Note, Children's Online Privacy: COPPA Compliance.

Various states have comprehensive privacy laws that affect the collection, use, and sharing of personal information in connection with online advertising, including:

- California.
- Virginia.
- Colorado.
- Connecticut.
- Utah.

All 50 states have data breach notification laws. For more information on state privacy laws, see Practice Note, Online Advertising and Marketing: State Privacy Laws.

Online behavioral advertising (OBA) is subject to the Digital Advertising Alliance's (DAA) self-regulatory principles which address several issues related to OBA, including:

- Transparency.
- Consumer control.
- Data security.

The DAA principles are enforced by the Digital Advertising Accountability Program administered by BBBNP and the Association of National Advertisers.

The Network Advertising Initiative (NAI) also has a self-regulatory code governing targeted online advertising. The NAI is a member of the DAA and an organization exclusively for third-party digital advertising technology companies that collect and use consumer information to deliver OBA and cross-application advertising and retargeting. NAI members must comply with the DAA principles and the NAI Code of Conduct. The NAI Code of Conduct places additional requirements on NAI members including prohibiting behavioural targeting of children under 16 without verifiable parental consent.

For more information on self-regulation of OBA, see Practice Note, Advertising Self-Regulation in the US: Overview: Online Advertising. For more information on online advertising and marketing generally, see Practice Note, Online Advertising and Marketing.

Regulation of Claims and Disclosure

Substantiating Advertising Claims

3. What are the rules or standards for substantiating advertising claims?

The FTC requires advertisers to have a reasonable basis for all objective product claims, whether express or implied, **before** making those claims (the prior substantiation doctrine). 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 (commonly known as the Pfizer factors) are considered:

- Type of claim.
- Type of product.
- Consequences of a false claim.
- Benefits of a truthful claim.
- Cost of substantiating the claim.
- Amount of substantiation that experts in the field believe is reasonable.

(FTC: FTC Policy Statement Regarding Advertising Substantiation.)

For more information on making and substantiating advertising claims, see Practice Notes, Substantiation of Advertising Claims and Advertising Claim Fundamentals.)

Some specific types of claims have additional substantiation requirements. For example:

- **Health claims.** Both the FTC and FDA require competent and reliable scientific evidence to support health claims. The FTC has increasingly required this substantiation to consist of human clinical trials, but it also may include:

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  - research;
  - studies; and
  - laboratory testing.

For more information on substantiating health claims, see Practice Note, Substantiation of Advertising Claims: Health Claims.

- **Environmental benefit claims (also known as green claims).** The FTC provides detailed guidance to companies on making compliant environmental benefit claims in its Guides for the Use of Environmental Marketing Claims (Green Guides) (16 C.F.R. §§ 260.1 to 260.17). The Green Guides provide guidance on using many specific environmental claims, such as biodegradable, recyclable, and non-toxic. To substantiate claims using these terms, companies should ensure their products and packaging meet the requirements of the definitions. The Green Guides also advise against using unqualified general environmental claims (like eco-friendly and earth smart) as they are difficult, if not impossible, to substantiate. Substantiation for green claims generally takes the form of technical data and studies. For more information on making and substantiating environmental benefit claims, see Practice Note, Green Marketing in the US.

Disclosures in Advertising

4. What are the rules or standards about making disclosures in advertising?

Sometimes a disclosure of qualifying information is necessary to prevent an advertisement from being deceptive or misleading. A disclosure, however, cannot be used to contradict the claim itself. Advertisers must present a disclosure clearly and conspicuously so that consumers can notice and understand it. This rule applies to both traditional media and non-traditional media, such as social media platforms and mobile applications. 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 the FTC does not specify 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 2013, the FTC issued Disclosures: How to Make Effective Disclosures in Digital Advertising (Digital Disclosure Guides) to address making clear and conspicuous disclosures in the digital environment. The Digital Disclosure Guides provide guidance on how to make compliant disclosures on websites, social media platforms, mobile apps, and other digital media, such as:

- Not to use hyperlinks when disclosures are an integral part of the claim.
- Refrain from running advertisements on devices or platforms where clear and conspicuous disclosures cannot be made.
- Repeat disclosures as needed, especially on lengthy websites or if consumers have many routes through a website.

The FTC has also provided additional guidance for disclosures required for endorsements on social media (see Question 14).

For a detailed discussion of the Digital Disclosure Guides, see Practice Notes, Online Advertising and Marketing and Advertising: Section 5 of the FTC Act and Advertising and Promotions in Social Media: Clear and Conspicuous Disclosures. The FTC has announced that it is reviewing this guide as part of its regular review process and plans to update it. Advertisers should watch for developments in this area.

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Freedom of Speech and Expression

5. Do freedom of speech and expression rights affect advertising?

Commercial speech (like advertising) is protected under the First Amendment but receives a lower degree of protection than non-commercial speech (like political speech). Regulations on commercial speech are permitted, but the US Supreme Court has imposed limits. The US Supreme Court developed a four-pronged test to measure the validity of restraints on commercial expression. Because the government can freely regulate fraudulent and illegal speech, a court must first determine whether the speech concerns a lawful activity and is not misleading. If the speech is lawful, the restriction must meet the other three prongs of the test to be constitutional. The restriction must:

- Further a substantial government interest.
- Directly further the substantial government interest.
- Be narrowly tailored to serve the government interest.

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

Complaints Procedure

6. What procedures exist for complaining against an advertisement? Is there a self-regulation dispute resolution system? What sanctions can be imposed for violations of advertising codes or laws?

FTC Act

Although most FTC advertising investigations are self-initiated, members of the public (individuals, companies, and organizations) can also send complaints to the FTC alleging that an advertisement is unfair or deceptive. If the FTC has reason to believe that a violation of the FTC Act has occurred, it may open an investigation and 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 in consent orders and court orders may 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; and
  - report periodically to FTC staff about the substantiation they have for claims in new advertisements.
- **Disgorgement, consumer redress, and other equitable monetary remedies.** Equitable monetary remedies range from thousands of dollars to millions of dollars, depending on the nature of the violation. 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 and distributors about deceptive claims in advertisements;
  - include specific disclosures in future advertisements; and
  - provide other information to consumers.
- **Civil penalties.** These penalties may be imposed:
  - for violation of a consent order on a per day per ad basis (typically this term is included in the consent order); or
  - if the claim involves the violation of an FTC Rule (like the Made in USA Rule).

The FTC has historically sought equitable monetary relief under section 13(b) of the FTC Act. In 2021, however, the Supreme Court held that although the FTC may seek injunctive relief under section 13(b), it does not have the right to pursue monetary remedies under section 13(b) (*AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (U.S. 2021)). Unless Congress amends section 13(b), the FTC must now consider alternate strategies to pursue

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redress and other equitable monetary relief, such as under section 19(a)(2) of the FTC Act.

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. For more information on the FTC's enforcement of advertising claims, see Practice Note, FTC Enforcement of Advertising Claims.

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 both:

- Be material, in that it is likely to influence the purchasing public.
- Result in, or be likely to result in, injury to the plaintiff.

The statement can be either express or implied.

A false advertising claim under section 43(a) of the Lanham Act may be brought in a federal or state court. The burden of proof is on the party bringing the complaint. A plaintiff may seek a preliminary injunction to stop the advertisement at issue from running while the case is pending.

If the plaintiff wins, it may be entitled to injunctive relief, monetary damages, or both. Usually, injunctive relief is in the form of an order enjoining the distribution of the false advertising. The court may also enter an injunction ordering the defendant to undertake corrective advertising. A higher level of proof is required to obtain monetary damages than injunctive relief, so monetary damages are rarely awarded. To receive monetary damages, the plaintiff must show both that:

- Consumers were actually deceived by the defendant's false advertising.
- There is a direct causal connection between the alleged false advertising and the injury to the plaintiff.

The Lanham Act states that anyone engaged in false advertising will be liable to anyone who believes that they are likely to be damaged by that advertising. In 2014, the Supreme Court held that to have standing under section 1125(a), a plaintiff must both:

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

(*Lexmark International, Inc. v. Static Control Components, Inc.*,134 S.Ct. 1377 (U.S. 2014).)

For more information on bringing a section 43(a) claim, see Practice Note, Lanham Act Section 43(a) Claims: False Advertising Claims.

NAD Challenges

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 can also initiate cases on its own. The NAD only reviews **national** advertisements for truth and accuracy. The advertising may be, for example:

- On broadcast or cable television.
- On the radio.
- In magazines or newspapers.
- On the internet or commercial online services.
- Provided direct to the home or office.

The NAD 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 four to six months for challenges submitted through its standard process. Complainants can expect advertising challenges to be resolved while the ad campaign at issue is still running. The NAD does not issue preliminary injunctions.

In April 2020, the NAD launched Fast-Track SWIFT (Single Well-defined Issue Fast Track), a process that allows companies to get a decision on certain types of single-issue claims within 20 business days. The NAD accepts three types of claims under this quicker process:

- Prominence or sufficiency of disclosures in influencer marketing, native advertising, and incentivized reviews. This type of claim may be addressed in an even quicker process under the Fast-Track SWIFT umbrella.
- Misleading pricing and sales claims.
- Misleading express claims that do not require complex substantiation.

The NAD also introduced the Complex Track in 2020 for a customizable experience to support more complicated cases with greater transparency and more predictable scheduling.

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NAD rulings may be accepted or rejected by the parties. Although NAD decisions are rarely rejected, the NARB serves as the appellate body of the NAD. For more information about filing an NAD challenge, see Practice Note, Challenging a Competitor's False Advertising Claim: NAD Challenges.

Television Network Challenges

Each major television network employs a process similar to the NAD, whereby a party may complain directly to the station running the advertisement in question. If successful, a complainant can get the advertisement pulled off the network. For more information about filing a network challenge, see Practice Note, Challenging a Competitor's False Advertising Claim: Network Challenges.

Prescription Drug Advertising Complaints

Complaints regarding prescription drug advertisements may be submitted to the Office of Prescription Drug Promotion (OPDP), a division of the FDA. The OPDP's ensures that prescription drug information is:

- Truthful.
- Balanced.
- Accurately communicated through surveillance, compliance, and education programs.

Healthcare providers may also submit complaints regarding drug promotions through the OPDP's Bad Ad Program.

Complaints to the FCC

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

Regulations on Advertising Methods

Product Placement

7. How is product placement regulated?

FTC

It is the FTC's opinion that product placement (or failing to disclose product placement) does not violate section 5 of the FTC Act. The FTC's stance is that product placements in traditional media like TV, radio, and films that are deceptive or misleading can be dealt with under existing laws. However, the FTC does require social media influencers and marketers to clearly and conspicuously disclose any material connection to a brand (see Question 14).

FCC

Section 317 of the Communications Act 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 (non-nominal) consideration. This provision, known as sponsorship identification rules, 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 do) disclose this information at the end of a program during the credits. Because the FCC requires adequate separation between programming content and advertising in children's programming, embedded advertising in television shows geared primarily to children under the age of 12 is not permitted.

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 it would consider the recommended actions and how to address the concerns discussed in the report but has not yet issued any changes in direct response. In 2021, the FCC issued a Report and Order amending the broadcast sponsorship identification rules to require disclosure of leased programming sponsored by foreign governmental entities (such as foreign governments, registered foreign agents, and foreign political parties).

Native Advertising

8. How is native advertising regulated?

The FTC has issued the following guidance on native advertising:

- Native Advertising: A Guide for Businesses (Native Advertising Guide).
- Enforcement Policy Statement on Deceptively Formatted Advertisements.

Although the guidance does not have the force of law, it reflects the FTC's thinking on how companies can avoid engaging in native advertising that is misleading

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or deceptive. The FTC highlights a few principles to help companies ensure their native advertising is not deceptive:

- **Be transparent.** An advertisement or promotional message should not suggest or imply to consumers that it is anything other than an ad. The net impression of an ad should not cause any confusion as to the source of the ad or that the ad is indeed an ad rather than non-advertising content.
- **Use disclosures.** Use a disclosure if it is necessary to ensure that consumers understand that the content is advertising.
- **Make necessary disclosures clear and conspicuous.** If a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.
- **Do not make misleading representations or omissions about an advertisement's true nature or source.** An advertisement should not imply that a party other than the sponsoring advertiser is the source of the advertising.

For more information on native advertising, see Practice Note, Native Advertising.

Subliminal Advertising

9. Is subliminal advertising permitted?

Although the FTC does not have any statement or regulation that specifically addresses subliminal advertising, subliminal advertising by its nature constitutes a deceptive practice under section 5 of the FTC Act.

Under FCC regulation, FCC-licensed television and radio stations are banned from knowingly broadcasting programming that contains subliminal messages. Although the FCC does not require broadcasters to screen content, broadcasters must stop airing those advertisements on becoming aware of them. The FCC bases 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" (FCC: The Public and Broadcasting manual).

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

Outdoor Advertising

10. How are the use of billboards and other forms of outdoor advertising regulated?

The outdoor advertising industry is largely self-regulated. The four main industry organizations 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 numerous 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 the Highway Beautification Act 1965 (HBA). The HBA is designed 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 (23 U.S.C. § 131(b)).
- Reimburse a state for up to 75% of the payment the state makes to all sign and landowners who remove non-conforming signs (23 U.S.C. § 131(g)).

Most states have enacted legislation in response to the HBA.

For more information on leasing billboards and other outdoor advertising, see Practice Note, Key Considerations in Billboard Leasing.

Bait Advertising

11. Is bait advertising regulated?

Bait advertising is prohibited by the FTC. The FTC defines it as an attractive offer to sell that is not sincere. The advertiser has no intent to make the sale, but instead plans to switch consumers to purchasing something else that is either more expensive or otherwise more beneficial to the advertiser. (16 CFR § 238.0.)

Under the FTC's Guides Against Bait Advertising, the FTC considers several factors when determining whether an advertiser has engaged in a bait scheme, including:

- 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.

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- A 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.

(16 C.F.R. § 238.3.)

Regulations on Advertising Content

False and Misleading Advertising

12. How is false and misleading advertising regulated?

False and misleading advertising is considered a deceptive practice under section 5 of the FTC Act. Only the FTC can enforce claims under the FTC Act.

Every state also has an unfair and deceptive trade practices law (sometimes referred to as "little FTC Acts") that prohibits false and misleading advertising. States have also issued regulations restricting certain types of advertising claims, such as the advertisement of comparative prices. Many of these state laws and regulations allow for a private right of action in addition to enforcement by the state attorneys general.

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 both:

- Is likely to influence the purchasing public.
- Must result in, or be likely to result in, injury to the plaintiff.

(See Question 1 and Question 6.)

The FTC and courts have imposed liability for false advertising claims on parties other than advertisers. Third parties (such as advertising agencies, website designers, retailers, 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.)

Comparative Advertising

13. How is comparative advertising regulated?

Although the advertising industry relies mostly on self-regulation for comparative advertising disputes through NAD challenges, national law also plays a part.

FTC

The FTC supports the use of brand comparisons as a source of important information to consumers that assists them in making rational purchase decisions where both:

- The comparative advertising is truthful and non-deceptive.
- The bases of comparison are clearly identified.

The FTC also applies this standard to comparative advertising that might be seen to be disparaging of a competitor. The FTC does not require a higher amount of substantiation for comparative advertising. It evaluates comparative advertising in the same manner as it evaluates all other advertising tactics, that is, whether the advertising has a tendency or capacity to be false or deceptive. (FTC: Statement of Policy Regarding Comparative Advertising: paragraph c.)

The FTC Act does not provide a private right of action for damage resulting from a false or deceptive comparative advertisement.

Lanham Act and Federal Courts

Almost all federal courts have recognized 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 of 1988 amended the Lanham Act and expressly recognized a federal cause of action for commercial disparagement that 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.

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- 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 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. However, courts have also granted permanent injunctive relief and substantial compensatory and punitive damages. There is usually a requirement for corrective advertising.

NAD

The NAD's evaluation of comparative claims generally conforms to FTC principles. Through its decisions, it has set out standards that it uses to evaluate comparative claims, including that an advertiser may make:

- Disparaging comparisons if the comparison is factually accurate and the distinction is meaningful to consumers.
- Comparisons of dissimilar products if the advertiser clearly identifies the object of the comparison and discloses all relevant material differences between the products.

For more information on comparative advertising, see Practice Note, Comparative Advertising Law in the US.

Other Issues

Comparative advertising can raise intellectual property issues, like whether an advertiser may use the competitor's trademark in its comparative ad. The general rule is that as long as the comparative ad is truthful and does not cause customer confusion, the use of a third party's trademark will be treated as non-infringing. This rule, most notably recognized 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.
- A smell.

Any attempt to deliberately confuse the consumer through comparative use of trademarks can be actionable.

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

Testimonials and Endorsements

14. What are the rules or standards for including testimonials or endorsements in advertising?

Under the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides), an endorsement:

- Must reflect the honest opinions, findings, beliefs, or experience of the endorser (16 C.F.R. § 255.1(a)).
- Cannot:
  - convey a deceptive representation; or
  - be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product.

(16 C.F.R. § 255.1(b.)

Advertisers may only use endorsements of experts or celebrities where 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. (16 C.F.R. § 255.1(c).)

The FTC requires all endorsements in social media sponsored by an advertiser to disclose the "material connection" between the endorser and the advertiser clearly and conspicuously. In addition to the Endorsement Guides, the FTC has provided FAQs and other guidance to both advertisers and influencers about disclosure requirements in the social media context.

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The FTC issued an updated version of the Endorsement Guides in June 2023. The focus of many of the substantive changes reflect the extent to which advertisers have turned increasingly to the use of social media and online product reviews to market their products and services. For example, the revisions:

- Expand the definition of "endorser" to include virtual influencers and fake endorsements or reviews.
- Classify the deletion of negative reviews or the decision not to publish negative reviews as a deceptive practice under section 5 of the FTC Act.
- Make the definition of clear and conspicuous more restrictive, requiring online disclosures to be unavoidable.

For more information about the Endorsement Guides and the additional guidance provided by the FTC on influencer marketing, see Practice Notes, Advertising and Promotions in Social Media: Endorsements and Testimonials and Social Media Influencer Marketing: Practical Tips for Managing Legal and Reputational Risks.

Contracts and Advertising

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

Most advertisements are merely an invitation to make an offer, but there are situations where advertisements can form a valid contract between the advertiser and the buyer. For example, 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)). Another case held that an automobile dealer made a binding offer when the dealer 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. App.1955)).

Depending on the jurisdiction, if the advertisement contains misrepresentations that are relied on by the consumer and made with or without fraudulent intent, the advertising materials 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 and in reasonable reliance on the promise either:

- Does anything that they are not bound to do.
- Refrains from doing something they have a right to do.

Industry-Specific Regulation

16. Is advertising in any specific industry sectors regulated?

Advertising related to several industries in the US are subject to additional regulations and, in some cases, self-regulatory codes and programs. As examples, this section discusses the following sectors:

- Alcohol.
- Tobacco.
- Financial services.
- Prescription drugs.

Alcohol

The primary federal regulatory authority over alcoholic beverages advertising is vested in the TTB, which is an office of the Department of Treasury. The Federal Alcohol Administration Act (FAA Act) also sets standards for regulating the labelling and advertising of wine, distilled spirits, and malt beverages (27 U.S.C. § 201). The FAA Act does not require alcoholic beverage advertisements to be approved before appearing in print or broadcast. However, the TTB offers industry members a free, voluntary pre-clearance service.

The TTB's advertising regulations address wine, distilled spirits, and malt beverages separately (see TTB: Advertising regulations). 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 must provide the type of distilled spirit, 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, such as:

- Statements that are inconsistent with approved product labels.
- False or misleading statements that are disparaging of a competitor's product.

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- Misleading guarantees (money back guarantees are not prohibited).

Many state laws and regulations set parameters around the advertising and marketing of alcoholic beverages. Each of the wine, distilled spirits, and malt beverages industries have also adopted the self-regulatory advertising codes.

For more information on advertising restrictions on alcoholic beverages, see Practice Note, Alcohol Beverage Marketing and Advertising.

Tobacco

FTC

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

FDA

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) gives the FDA the authority to regulate the manufacture, distribution, and marketing of tobacco products to protect public health. Electronic nicotine delivery systems (ENDS) and e-cigarette products are also covered by and subject to regulation under the Tobacco Control Act. All covered tobacco products must bear a nicotine addictiveness warning statement on product packages and advertisements. For more information on tobacco warning statements, see Practice Note, FDA Regulation of Tobacco Products: Warning Statements.

Master Settlement Agreement (MSA)

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. 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 labelling 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 Industry

FTC

Although not the primary agency responsible for regulating bank advertisements, FTC determinations are highly influential in considering the propriety of bank and savings association advertisements. Courts typically defer to FTC findings when ruling.

The FTC also regulates other aspects of the financial industry, like the advertising and business practices of companies in the "credit-repair" business under the Credit Repair Organizations Act. This Act requires specific disclosures as to consumers' rights to:

- Obtain and dispute credit information.
- Sue providers of credit repair services who infringe its provisions.

SEC

The Securities and Exchange Commission (SEC) oversees conduct in the securities industry and:

- Promotes the disclosure of important market-related information.
- Maintains fair dealing.
- Protects 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 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.

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- Engage in any transaction, practice or course of business that operates as a fraud or deceit on the buyer.

(15 U.S.C. § 77q.)

Consumer Financial Protection Bureau (CFPB)

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which officially created the CFPB and establishes a structure where the FTC and CFPB co-ordinate and co-operate to regulate deceptive marketing practices in the financial services industry (see Dodd-Frank Wall Street Reform and Consumer Protection Act). The FTC and CFPB also share enforcement responsibilities for deceptive claims regarding consumer mortgages.

The CFPB has primary rulemaking authority under the Truth in Lending Act which requires advertisements for consumer credit to include certain disclosures about the terms and conditions of credit. It requires the disclosures to be clear and conspicuous so that reasonable consumers can read (or hear) and understand the information.

Prescription Drugs

The FDA oversees prescription drug advertisements. These advertisements come in three main forms:

- Product claim advertisements, which name a drug and discuss its benefits and risks.
- Reminder advertisements, which give the name of a drug, but not the drug's benefits or risks.
- Help-seeking advertisements, which describe a disease or condition but do not recommend or suggest a specific drug treatment.

(FDA: Basics of Drug Ads.)

The FDA has passed regulations setting out the requirements for each type of prescription drug ad in all types of media, including print, broadcast, and direct to consumer. For example, broadcast product claim advertisements 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.

(FDA: Basics of Drug Ads.)

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

For comprehensive information and guidance on prescription drug labelling and advertising requirements, see FDA: Guidance for Industry: Presenting Risk Information in Prescription Drug and Medical Promotion, submitted for comment on 26 May 2009 (draft, not yet finalized) and Practice Note, Drug and Device Promotion: Overview.

Other Industries

Some FTC Rules deal with specific issues in distinct fields, including:

- Labelling of consumer appliances' annual energy consumption.
- Disclosures made about 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.

Other FTC Rules cover aspects of advertising relating to various industries, including:

- The funeral industry.
- Home insulation.
- Mail order merchandise.
- Eyeglasses and contacts.
- Fur products.

The cannabis industry is developing in the US and is primarily regulated by a patchwork of state laws. For more information, see Cannabis Toolkit.

Restrictions on Advertising to Children

17. Is advertising directed to children regulated?

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, the rights of broadcasters, and the legitimate interests of the state and others. The FCC does

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not permit product placement in children's television programming geared primarily to children under the age of 12 (see Question 7). COPPA regulates the online collection, use, and sharing of personal information from children under age 13 including through online advertising and marketing and mobile apps (see Question 2).

Other than those restrictions, the primary restrictions on advertising to children in the US are self-regulatory.

CARU

Administered by BBBNP, CARU is the primary body responsible for the self-regulation of national advertising to children and the collection of personal information from children online through online advertising, websites, and mobile apps. CARU has issued two sets of guidelines that it enforces:

- Guidelines that address advertising to children under 13 in any medium (Self-Regulatory Guidelines for Children's Advertising (CARU Advertising Guidelines)).
- Guidelines that address online data collection from children under 13 (Self-Regulatory Guidelines for Children's Online Privacy Protection (CARU Privacy Guidelines)).

The CARU Advertising Guidelines rely on core principles, including the following:

- Advertisers have special responsibilities when advertising to children or collecting data from children online. They should take into account the limited knowledge, experience, sophistication, and maturity of the audience to which the message is directed.
- Advertising should not stimulate children's unreasonable expectations about product quality or performance.
- Products and content inappropriate for children should not be advertised directly to them.

The CARU Advertising Guidelines provide standards for several areas related to children's advertising, including:

- In-app and in-game advertising and purchases.
- Endorsements and influencer marketing.
- Clear and conspicuous disclosures.

The CARU Privacy Guidelines align with COPPA, including requirements like:

- 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 email 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 the CARU guidelines, see Practice Note, Advertising Self-Regulation in the US: Overview: CARU.

Television Networks

Each of the major television networks also has guidelines governing the content of and substantiation for commercials involving children's products.

Intellectual Property Right Protection in Advertising

18. How are advertisements protected under intellectual property laws?

Copyright

Copyright is protected under federal law by the Copyright Act of 1976 (Copyright Act). An advertisement is 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). Copyright protection does not extend to a new advertising concept or idea only to the expression of that concept or idea.

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 coloring; mere listing of ingredients or contents" do not qualify for copyright protection (37 C.F.R. § 202.1). Therefore, short advertising slogans and product names are generally not protected by copyright law. However, trademark protection may be available if the slogan or phrase indicates the source of the product or service. Copyright protection may extend to

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a company or brand logo if it is considered to be an artistic work, but logos are more commonly protected under trademark law.

Copyright ownership vests with the creator of the work unless the work qualifies as a work for hire under the Copyright Act, in which case it is owned by an employer or a party who commissioned the work.

Ownership of the copyright in an advertisement therefore depends on:

- The creator of the advertisement.
- The contractual relationships between:
  - the creator and the advertiser; and
  - the creator and any freelancers it hires to work on the advertisement.
- Whether the copyright in the advertisement is properly assigned to the advertiser or owned by the advertiser as a work for hire.

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 other third party, sometimes in a straightforward manner and other times as a parody or pastiche. Although copyright laws do not protect ideas in the abstract, the danger of infringing a copyright may arise if an advertisement borrows heavily from a previous campaign.

For more information on US copyright law, see Practice Note, Copyright: Overview.

Trademarks

Trademarks are protected under federal law by the Lanham Act (15 U.S.C. §§ 1051 to 1127). Trademarks may include brand names, logos, and slogans used in commerce. Use of a slogan or tagline on only advertising materials may not be considered a use in commerce and qualify it for trademark protection. Courts evaluate consumer confusion when deciding whether an advertisement has infringed the trademark 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 (15 U.S.C. § 1125(a)). Section 43(a) prohibits the use of "false designations of origin" in connection with goods, services, or their packaging that are likely to cause confusion or to deception regarding:

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

If the plaintiff can establish federal jurisdiction over the claim, this section provides federal protection of unregistered marks.

For more information on US trademark law, see Practice Note, Trademark: Overview.

Other Protections

Certain aspects of advertising, for example, advertising methods and strategies, may also be eligible for protection under the patent and trade secret laws.

For more information on US intellectual property laws generally, see Practice Note, Intellectual Property: Overview.

Use of People in Advertisements

19. How is an individual protected from the use of their name, image, or likeness in advertising without their consent?

An economic value is attached to a person's persona. The persona may be derived from a person's name, physical likeness, voice, or other distinct attribution. 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 separate. 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 their consent, causing injury to their dignity and resulting in mental distress. The right of publicity is protected in 38 states by statute, common law, or both. 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.

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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*.

For more information on publicity and privacy rights, see Practice Notes, Right of Publicity: Overview and Right of Privacy: Overview.

Contributor Profiles

Peter S. Sloane, Partner

Leason Ellis LLP

T +1 914 821 9073

E *sloane@leasonellis.com*

W www.leasonellis.com

Areas of practice. All aspects of trademark and copyright law including unfair competition.

Lori L. Cooper, Associate

Leason Ellis LLP

T +1 914 821 3091

E *cooper@leasonellis.com*

W www.leasonellis.com

Areas of practice. All aspects of patent, trademark and copyright law including unfair competition.

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