

## CHAPTER 7

# Commercial Speech and the Regulation of Advertising

Marketers who wish to advertise their goods or services—and few marketers do not—find themselves faced with an extensive and often bewildering array of state and federal laws regulating their activities. Most of the regulation is designed to protect consumers from false or deceptive advertising, but it does so in widely divergent ways. Some of the laws arise under state common law; some under state or federal statutory law; and some under federal or state agency regulation. Some give the injured consumer the right to sue and recover redress; some give aggrieved competitors the right to sue; and others permit only the government to sue, with redress sometimes going to the government and sometimes to the consumer.

All such laws are constrained by the First Amendment to the U.S. Constitution, however, which protects free speech, including commercial speech. Thus, regulations affecting advertising practices reflect a tension between protecting the advertiser's right to free speech, on the one hand, and the consumer's right to not be misled or deceived, on the other. This chapter first discusses commercial free speech, then examines various forms of state and federal regulation of advertising practices.

### Commercial Free Speech

*Commercial speech* is expression that is related to the economic interests of the speaker and its audience. It is protected under the First Amendment to the U.S. Constitution, which provides in relevant part: “Congress shall make no law ... abridging the freedom of speech ....” The most common form of commercial speech, not surprisingly, is advertising. As Justice Stevens stated in one commercial speech case:

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on “commercial speech” for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.<sup>1</sup>

Not all speech is protected under the First Amendment, however, nor does all protected speech receive the same degree of protection. Some speech, such as obscenity, receives no protection at all. At the other end of the spectrum, political speech, which is considered essential to the functioning of a democracy, receives the greatest degree of First Amendment protection from government intrusion.

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<sup>1</sup>44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996).

Until the 1970s, the Supreme Court had ruled that commercial speech was not entitled to protection under the First Amendment. The Court then recognized that such speech is important for the functioning of a free market. In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>2</sup> the Supreme Court reversed its former stance. The Court explained: “[P]eople will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication to them rather than close them.”<sup>3</sup>

Today, commercial speech is afforded an intermediate level of First Amendment protection. The Supreme Court has determined that commercial speech is entitled to “‘a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”<sup>4</sup> Commercial free speech claims are typically evaluated under a four-part analysis articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>5</sup> in 1980. The *Central Hudson* test asks:

1. Is the speech protected by the First Amendment (i.e., does it concern lawful activity and is it not misleading)?
2. Is the asserted governmental interest in the regulation substantial?
3. Does the regulation directly advance the governmental interest asserted to a material degree?
4. Is the regulation no more extensive than necessary to serve that interest?

In subsequent cases, the Supreme Court has refined the *Central Hudson* test, establishing, for example, that to satisfy the third factor, the government bears the burden of showing that its regulation will advance its governmental interest “to a material degree.”<sup>6</sup> In addition, the Court has clarified that under the fourth factor, the government is not required to employ the least restrictive regulation possible to accomplish its goal, but that it must show a “reasonable ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”<sup>7</sup>

The Supreme Court’s current commercial speech doctrine is not completely settled. Several years ago, the Supreme Court seemed to be stepping back from First Amendment protection of commercial speech. The Supreme Court’s 1996 decision in *44 Liquormart, Inc. v. Rhode Island*,<sup>8</sup> however, revived the commercial speech doctrine. The *44 Liquormart* Court reversed a decision of the First Circuit, which had upheld a Rhode Island statute banning the advertising of retail liquor prices. The statute was challenged by in-state and out-of-state liquor vendors who wanted to advertise their prices in Rhode Island. The statute was defended by the State of Rhode Island and by local Rhode Island liquor stores who wished to maintain their prices. They argued that advertising liquor prices would lead to price wars and the lowering of prices, which would then lead to more sales and excessive drinking.

The Supreme Court held that the ban on price advertising was a violation of commercial free speech because it did not directly advance the state’s interest in the promotion

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<sup>2</sup>425 U.S. 748 (1976). This case involved the constitutionality of a Virginia statute that defined the advertising of prescription drug prices by licensed pharmacists as a form of unprofessional conduct.

<sup>3</sup>*Id.* at 770.

<sup>4</sup>*Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989) (citations omitted).

<sup>5</sup>447 U.S. 557 (1980).

<sup>6</sup>See *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

<sup>7</sup>See *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

<sup>8</sup>517 U.S. 484 (1996).

of temperance and because it was more extensive than necessary to serve that interest. (In short, the state statute failed the third and fourth prongs of the *Central Hudson* test.) Although the Court was unanimous in agreeing that the statute was unconstitutional, the Court could not agree on the reasoning supporting that decision. Ultimately, the Justices issued four separate opinions. Despite the Justices' inability to agree on the proper rationale for striking down the regulation at issue, *44 Liquormart* seems to indicate that the Court will examine the third prong of the *Central Hudson* test carefully and will likely strike down any absolute prohibition on commercial speech that is not closely tailored to protect consumers from false or deceptive information.

On the flip side of the coin, the Supreme Court has also held that regulations designed to compel parties to engage in commercial speech, such as regulations mandating financial contributions to industry advertising campaigns, also will be scrutinized carefully. Generally, the Court has upheld such schemes when the compelled speech is ancillary to a larger regulatory scheme, but not when it is the primary purpose of the scheme (see Case Illustration 7.1).

#### CASE ILLUSTRATION 7.1

### **VIDEO SOFTWARE DEALERS ASS'N v. SCHWARZENEGGER, 556 F.3D 950 (9TH CIR. 2009)**

**FACTS** The state of California passed a statute imposing restrictions and a labeling requirement on the sale or rental of “violent video games,” such as *Grand Theft Auto: Vice City*, *Postal 2*, and *Duke Nukem 3D*, to minors. The state legislature stated that it had a compelling interest in passing the statute: “preventing psychological or neurological harm to minors who play violent video games.”

The Video Software Dealers Association and the Entertainment Software Association challenged the statute, arguing that it violated their First Amendment rights. The trial court granted summary judgment to the Associations, and the state appealed.

**DECISION** On appeal, the Ninth Circuit held that: (1) the Act's ban on sales or rentals was an invalid content-based restriction on speech and (2) the Act's labeling requirement was invalid as it compelled false speech.

First, the court noted: “Existing case law indicates that minors are entitled to a significant measure of First Amendment protections, that content-based regulations are presumptively invalid and subject to strict scrutiny, and that if less restrictive means for achieving a state's compelling interest are available, they must be used.” Only in “relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to” minors.

Although the U.S. Supreme Court has recognized that “there is a compelling interest in protecting the

physical and psychological well-being of minors,” the state failed to prove that the harm it was concerned with was real and that the Act would alleviate that harm in a direct and material manner. The evidence presented by the state on this issue did not “establish[ ] or suggest[ ] a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable.”

Moreover, the state failed to show that less restrictive means of achieving its goal were not available. The state seemed more focused on the “most-effective” means of achieving its objective, rather than the “least-restrictive” means. Parental controls available on modern gaming systems could further the government's purpose in protecting minors, as would an enhanced educational program aimed at retailers and parents regarding the industry's own rating system. Thus, the statute was not “narrowly tailored.”

Second, the court found that the Act's labeling provision, which required that the front of the package of a “violent video game” be labeled with a four-square-inch label reading “18” was unconstitutional. Compelled speech is permissible if the “disclosure requirements are reasonably related to the State's interest in preventing deception of customers.” Here, though, the statute was compelling video game manufacturers to display the state's subjective opinion, not

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to disclose purely factual information. Because the court had already determined that the statute's provisions barring rental or purchase of games by minors was unconstitutional and because there is no state-mandated age threshold for purchasing or renting video games, the state-mandated label conveyed a

false statement that certain conduct (purchase or rental of the video by a minor) is illegal when it is not. As the court noted, "[T]he State has no legitimate reason to force retailers to affix false information on their products." Thus, the statute's labeling requirement was unconstitutional.

◀ See Discussion Cases 7.1, 7.2.

Because misleading speech is not protected by the First Amendment, the government may regulate and prohibit advertising that is false, deceptive, or misleading. The government may also prohibit the advertising of illegal activities and may impose time, manner, or place restrictions on advertising. As the following discussion indicates, both the federal and state governments are very active in the regulation of advertising.

## Common Law Causes of Action

Theoretically, a consumer who has been injured by false or deceptive advertising could rely upon common law contract or tort causes of action for relief. Realistically, the common law causes of action are less efficacious and thus less used than the statutory and regulatory causes of action. For example, a consumer who has been misled by false advertising could sue for *breach of contract*. The consumer might encounter difficulty in proving the existence of a contract, however, for, as discussed in Chapter 9, the courts generally view advertisements merely as invitations to negotiate, not as offers to enter into a contract on the terms stated in the advertisement.

Similarly, a consumer could sue for the tort of *fraudulent misrepresentation* (also known as *deceit* or *fraud*). To prove fraud, the plaintiff must show that the defendant intentionally misled the plaintiff by making a material misrepresentation upon which the plaintiff relied and that the plaintiff suffered injury as a result of that misrepresentation. The plaintiff must demonstrate that the defendant knew the misrepresentation was false, which can create difficult questions of proof. Furthermore, the misrepresentation must involve a statement of fact, not opinion, which can be a murky distinction in the advertising area.

In addition, the laws of *unfair competition* prevent false, deceptive, and unauthorized business practices, particularly in the areas of sales and advertising. Unfair competition law is an evolving and expanding field that encompasses a number of different theories used to control improper conduct in the marketplace. The most common of causes of action in this area are: (1) the right of publicity; (2) palming off (or passing off); (3) false advertising; and (4) disparagement. All of these causes of action originally started out as state common law torts. Today, the last three (but not the right of publicity) now have federal causes of action arising under the Lanham Act. Although a plaintiff is likely to state a claim under both state and federal law for these actions, federal law is generally regarded as the more important source of protection and relief in most instances.

The right of publicity is discussed next. The remaining three causes of action are discussed below in the context of the federal Lanham Act.

### Right of Publicity

The *right of publicity* "signifies the right of an individual, especially a public figure or celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for commercial

benefit.”<sup>9</sup> “Commercial,” in this context, is generally defined narrowly as being undertaken in the course of advertising or of promoting or selling a product or service, not simply of being part of a business venture or profit-motivated endeavor. Thus, the right of publicity generally does not prohibit the use of an individual’s name, picture, or likeness “in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”<sup>10</sup>

The right of publicity is somewhat akin to copyright law, but it differs from copyright law in a very key respect. To be copyrighted, works must exist in a tangible form; the right of publicity, on the other hand, protects the identity and/or persona of an individual and thus protects “intangible” as well as tangible forms of expression, such as a voice or live performance. Where copyright law and the right of publicity overlap, federal copyright law preempts state publicity right law. (Copyright law is discussed in Chapter 2.)

The right of publicity arises under state law and is relatively new, having been first articulated about 60 years ago.<sup>11</sup> About one-half of the states recognize the right of publicity as either a common law or statutory right.<sup>12</sup> In a few states, it arises under both common and statutory law (see Case Illustration 7.2).

#### CASE ILLUSTRATION 7.2

### **BURCK v. M MARS, INC., 571 F. SUPP. 2D 446 (S.D. N.Y. 2008)**

**FACTS** Plaintiff Robert Burck had performed as a “street entertainer” in New York City’s Times Square as The Naked Cowboy for over a decade. Burck performed wearing only a white cowboy hat, cowboy boots, and underwear, and carried a guitar strategically placed to give the illusion of nudity. He became a popular tourist attraction.

In April, 2007, defendants Mars, Incorporated (“Mars”), the maker of M&M candies, and Chute Gerdeman, Inc. (“Chute”), an advertising and design agency, began running an animated cartoon advertisement on two huge video billboards in Times Square. The ad starred a blue M&M dressed “exactly like The Naked Cowboy,” wearing only a white cowboy hat, cowboy boots, and underwear, and carrying a guitar.

Burck sued, alleging that Defendants had violated his “right to publicity” under New York law. New York does not have a common law right to publicity. However, Sections 50 and 51 of the state Civil Rights Act protect against use “for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person.”

**DECISION** The court noted that Defendants had not used Burck’s “portrait” or “picture.” They “did not use an actual photograph or picture of Burck himself, nor did they use a recognizable likeness or representation of him.” Moreover:

*The plain language of the Civil Rights Law makes it clear that the statutory right to privacy does not extend to fictitious characters adopted or created by celebrities .... The Naked Cowboy is not a living person, but a character Burck takes on when performing. The privacy statutes were not intended to protect a trademarked, costumed character publicly performed by a person.*

The court concluded: “[T]here was no attempt to create a portrait or picture of Burck himself. Rather, the purportedly infringing images were M&M characters wearing Burck’s signature outfit. The images were not portraits or pictures of Burck as The Naked Cowboy, but of M&Ms dressed as The Naked Cowboy.” Thus, the court dismissed Burck’s right of publicity claim.

<sup>9</sup>*Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

<sup>10</sup>Restatement (Third) of Unfair Competition § 47.

<sup>11</sup>See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>12</sup>J. T. McCarthy, *The Rights of Publicity and Privacy*, § 6.6 (2000).

How might a plaintiff's identity be appropriated? First, an unauthorized use of a name, likeness, or nickname for commercial purposes is not permitted. "Crazylegs Hirsh," for example, a famous football player and team manager, recovered against a cosmetics company that used the name "Crazylegs" to market and promote a shaving cream for women's legs.<sup>13</sup> Similarly, eight actors from the TV show *The Sopranos* settled a lawsuit with electronics retailer Best Buy for \$1.5 million. Best Buy ran a newspaper ad in 2002 featuring a publicity photograph from the show with text that read: "They got all the shows a guy wants, plus *The Sopranos*. What, you got a problem with that?" In 2009, actor and director Woody Allen settled a dispute with clothing retailer American Apparel for \$5 million for the unauthorized use of his image. The company had used a still photo of Allen, dressed as an Orthodox Jew, from the movie *Annie Hall*, on two billboards, displayed for one week in Los Angeles and New York.<sup>14</sup>

Second, the unauthorized use of phrases associated with the plaintiff is prohibited. Johnny Carson, for example, recovered against a defendant who rented out "Here's Johnny!" portable toilets and advertised itself as "The World's Foremost Comedian."<sup>15</sup>

Third, the unauthorized use of impersonators is prohibited. Bette Midler recovered against Ford Motor Co., who had hired a singer to imitate Midler's famous rendition of "Do You Want to Dance" after Midler had refused to perform in the commercial herself.<sup>16</sup> Tom Waits won a similar suit against Frito-Lay, Inc., and its ad agency for imitating Waits in a radio ad for Salsa Doritos.<sup>17</sup>

In about one-half of the states recognizing this legal right, the right of publicity ceases at death. In 2007, for example, a court ruled that under New York law, Marilyn Monroe's publicity rights in photographer Sam Shaw's iconic images of her with her skirt blowing up in the film *The Seven Year Itch* ceased at her death in 1962. Thus, the photographer's estate was not liable for permitting the images to be used on a T-shirt sold by the discount retailer Target in 2005.<sup>18</sup> In the remaining states, the right is considered an economic interest that passes to the heirs at the individual's death. In the states in which it does survive death, it lasts for either the same time as copyright protection extends (typically, the life of the author plus 70 years) or for a specific time period set by the state. In Indiana, for example, that time period is 100 years after death.<sup>19</sup> The typical remedies for violation of the right of publicity include *preliminary* and/or *permanent injunctions*, *monetary damages*, and, in extreme cases, *punitive damages*.

## Statutory and Regulatory Causes of Action

### State Statutes

Aggrieved consumers may sue under state statutory law for injury resulting from deceptive advertising. For example, if the advertising can be construed as creating an express warranty, an injured consumer may sue for breach of express warranty under the Uniform Commercial Code (UCC). (Warranty issues are discussed in Chapter 10.) In addition, several states have private attorney general laws that permit consumers to bring suits for deceptive trade practices. For example, a class action suit was brought under California law against Kenner Corporation. Kenner had claimed that its Easy Bake

<sup>13</sup>*Hirsch v. S. C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979).

<sup>14</sup>Palmeri, "American Apparel Settles with Woody Allen," *Business Week* (May 18, 2009).

<sup>15</sup>*Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104 (6th Cir. 1987).

<sup>16</sup>*Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

<sup>17</sup>*Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

<sup>18</sup>*Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F.Supp.2d 309 (S.D.N.Y. 2007).

<sup>19</sup>Ind. Code § 32-36-1-8.

Oven allowed children to bake treats in under 10 minutes. The plaintiffs claimed that the toy ovens actually took 29 to 34 minutes to bake the treats. The case was ultimately settled under a confidentiality agreement.<sup>20</sup>

Generally, however, the state statutes are seldom used. Instead, most false or deceptive advertising cases are brought under the federal Lanham Act or under regulation arising under the Federal Trade Commission (FTC) Act. The rest of this chapter focuses primarily on these federal causes of action.

## The Lanham Act

In addition to providing for the registration and protection of trademarks (discussed in Chapter 6), the federal Lanham Act<sup>21</sup> forbids false designations of origin and false or misleading descriptions or representations of fact.

The Lanham Act provides a cause of action to competitors (but not consumers) who are injured by false advertising. The purpose of the Lanham Act is to ensure truthfulness in advertising and to prohibit misrepresentations of quality regarding either the advertiser's products or the products of its competitor. Thus, the Act prohibits the use of any false "description or representation" in connection with any goods or services. Many of the causes of action provided by the Lanham Act are also actionable under state law, so often a plaintiff may sue under either or both.

**Passing Off** *Passing off*, also known as *palming off*, occurs when the defendant makes some sort of false representation that misleads consumers into thinking that the defendant's goods or services originate from, are sponsored by, or are affiliated with the plaintiff. Essentially, it is an attempt by the defendant to fool customers into thinking that the defendant's own goods or services are those of a competitor. *Reverse passing off* occurs when the defendant sells the plaintiff's product or service as the defendant's own (see Case Illustration 7.3).

Passing off can take a number of different forms. The defendant may make a direct false representation, such as telling customers that goods come from the plaintiff when they do not. Passing off can also involve an indirect false representation, such as the defendant showing the customer "samples" that are actually the plaintiff's goods and not its own. Passing off often involves the use of a trademark, trade name, or trade dress that is identical or confusingly similar to a mark, name, or trade dress of a competitor. A single act of the defendant can often be challenged both as passing off and as trademark infringement (discussed in Chapter 6).

Passing off is actionable under both common law and the federal Lanham Act. Remedies available under the common law for passing off include *injunctions* against further passing off and *damages* (measured by plaintiff's loss and/or defendant's profits). *Punitive damages* may also be available in egregious cases. Remedies for passing off under the Lanham Act are the same as the remedies for trademark infringement (discussed in Chapter 6): *preliminary* and/or *permanent injunctions* and *damages*, as well as the possible recovery of *treble damages* and *attorneys' fees*.

**False Advertising** State and federal laws provide several causes of action for *false advertising*. A plaintiff may sue under state common law for false advertising when a competitor misrepresents the nature or characteristics of her own goods to consumers by making untrue, unsupported, or deceptive claims. The plaintiff must be able to demonstrate, however, that the defendant's false advertising resulted in an actual loss of

<sup>20</sup>See Jeff Barge, *Advertising Legal Wars Heating Up: Lawsuits Filed Over Pitches for Long-lasting Antacid, Quick-Baking Toy Ovens*, 82 A.B.A. J. 32 (Apr. 1996).

<sup>21</sup>15 U.S.C. §§ 1051-1129.

## CASE ILLUSTRATION 7.3

**BY RITE DISTRIBUTING, INC. v. THE COCA-COLA CO.,  
577 F. SUPP. 530 (D. UTAH 1983)**

**FACTS** By-Rite Distributing, Inc., operated and sold self-service soft drink dispensing systems under the name “Carb-A-Drink.” By-Rite used the system in some of its own convenience stores and marketed the system to others. The Carb-A-Drink system consisted of a large unit of fountain dispensing equipment, equipped with 10–20 heads dispensing up to 40 flavors of soft drinks. The fountain heads bore the trademarks of the products being dispensed. A customer would obtain an empty two-liter bottle bearing the trademark “CARB-A-DRINK” and would fill the bottle at the dispensing station. The customer was encouraged to return to the store and refill the bottle or other package of his own at the fountain. Thus, customers could and did fill empty bottles containing the trademarks of one soft drink manufacturer with products manufactured by another company. By-Rite also marketed a six-pack carrying case so that customers could fill and take home a number of bottles at one time. The bottles (and their contents) could remain in the customers’ possession for three or more weeks and were often consumed by individuals other than those who purchased the products.

Several major soft drink producers, including The Coca-Cola Company, PepsiCo, Inc., Sunkist Soft Drinks, Inc., and Seven-Up USA, Inc., filed for a preliminary injunction, contending that By-Rite’s activities constituted reverse passing off in violation of the Lanham Act.

**DECISION** The federal trial court agreed, stating: “Although purchasers at a Carb-A-Drink fountain will believe that they are buying the ... defendants’ products because they can see the trademarks on the fountain heads, other users who later drink these beverages at home, at picnics or elsewhere, will see only the CARB-A-DRINK trademark on the bottle, and they may be led to believe that it is a CARB-A-DRINK product. To the extent that they are satisfied with the product, only CARB-A-DRINK will benefit.”

The court thus issued a preliminary injunction preventing By-Rite from selling in bottles soft drinks mixed from the defendant’s fountain syrups. By-Rite was permitted to sell the products in cups, however.

customers for the plaintiff, which is a difficult burden of proof to meet. If the plaintiff and the defendant are the only competitors in the market, the plaintiff may be able to meet this burden. If there are several competitors, however, the plaintiff may well find it impossible to prove that, in the absence of the defendant’s false advertising, customers would have bought from the plaintiff (as opposed to one of the other competitors).

To counter this difficult burden of proof, many states now have statutes prohibiting false advertising. The statutes vary considerably from state to state. Some allow state agencies to sue, some allow consumers to sue, and others allow competitors to sue. The 12 or so states that have adopted the Uniform Deceptive Trade Practices Act (UDTPA) allow any person “likely to be damaged” by the false advertising to sue for injunctive relief.

The federal Lanham Act provides a cause of action for false advertising that is considerably broader than the common law action for false advertising. Section 43(a) of the Act provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any ... false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.<sup>22</sup>

<sup>22</sup>15 U.S.C. § 1125(a)(1)(B).



To receive *injunctive relief* under Section 43(a), the plaintiff must show: (1) the defendant made a false or misleading statement of fact in advertising about its own product; (2) the statement actually deceived or had the capacity to deceive a substantial segment of the audience; (3) the deception was material (i.e., it was likely to influence consumers' purchasing decisions); (4) the defendant caused its goods to enter interstate commerce; and (5) the plaintiff was or is likely to be injured as a result. Note that to receive an injunction the plaintiff need not show actual injury—the potential for injury is sufficient (see Case Illustration 7.4).

To receive *monetary damages*, the plaintiff must prove that the advertisement was false, that consumers actually relied upon the false advertisement, and that the plaintiff's business incurred economic injury.

#### CASE ILLUSTRATION 7.4

### **THE PROCTER & GAMBLE CO. v. ULTREO, INC., 574 F. SUPP. 2D 339 (S.D. N.Y. 2008)**

**FACTS** The Procter and Gamble Company (“P&G”), the manufacturer of Oral B toothbrushes and dental care products, sued Ultreo, Inc., creator and manufacturer of the Ultreo toothbrush, alleging that Ultreo made false and misleading advertising claims in violation of federal and state law with respect to the ultrasound component of the Ultreo toothbrush. P&G sought a preliminary injunction enjoining Ultreo from disseminating any “advertising, marketing, or promotional statements, whether made expressly or by implication, that the ultrasound feature of its toothbrush has any effect upon plaque removal or teeth cleaning, or that its ultrasound feature is magic or in any way falsely describing the nature of ultrasound cycles.”

**DECISION** The court denied P&G’s motion for preliminary injunction because it had failed to show a likelihood of irreparable harm if the preliminary injunction were not granted.

The court stated the general rule: “A party seeking preliminary injunctive relief must establish: (1) either (a) a likelihood of success on the merits of its case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, and (2) a likelihood of irreparable harm if the requested relief is denied.” Moreover, “[a] preliminary injunction is an ‘extraordinary remedy’ that should not be routinely granted.”

There are limited instances in which irreparable harm is presumed: (1) when comparative advertising is literally false and mentions the plaintiff’s product by name; (2) when comparative advertising is literally false and makes it obvious to the viewing public that the

advertisement is targeted at the plaintiff even though the plaintiff is not mentioned by name; and (3) when the defendant’s false or misleading advertising claims create a danger to public health. None of these instances were present in this dispute, so P&G was not entitled to a presumption of irreparable harm.

Thus, P&G had to demonstrate that it would be irreparably harmed by Ultreo’s allegedly false and misleading advertising. The court stated:

*Because “[i]t is virtually impossible to prove that so much of one’s sales will be lost or that one’s goodwill will be damaged as a direct result of a competitor’s advertisement,” a plaintiff “need not ... point to an actual loss or diversion of sales” to satisfy this requirement. At the same time, “something more than a plaintiff’s mere subjective belief that [it] is injured or likely to be damaged is required before [it] will be entitled even to injunctive relief.” In general, “[t]he likelihood of injury and causation will not be presumed, but must be demonstrated in some manner.” Finally, “injunctive relief is not barred just because the possibility that the total pecuniary harm might be relatively slight.”*

P&G argued that introduction of the Ultreo toothbrush would cause P&G to lose sales. However, the court found that P&G had failed to draw a logical causal connection between Ultreo’s allegedly false advertising and P&G’s sales position. P&G failed to differentiate between sales lost to allegedly false advertising and sales lost “due to healthy market competition.” P&G could not complain of sales lost as a result of Ultreo’s lawful market entry.

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P&G also argued that the evidence indicated that a substantial percentage of consumers were being misled by the advertising, which provided P&G with a reasonable basis to believe that the false advertising would cause it injury. The court found that the consumer surveys that P&G relied upon were “deeply flawed.” For example, one survey failed to employ a control group, used “filter” questions that were actually leading questions, and improperly conflated survey responses. Thus, the court found the surveys failed to demonstrate irreparable harm to P&G resulting from Ultreo’s advertising.

Finally, the court also noted that although P&G first complained about Ultreo’s advertising in March, 2007, it

waited six months to file for a preliminary injunction. The court stated: “[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.” By contrast, “a short delay does not weigh against irreparable harm ‘where there is good reason for it, as when a plaintiff is not certain of the infringing activity or has taken additional time to examine the infringing product.’” While the six-month delay was not dispositive of P&G’s claims, the court noted that “P&G failed adequately to explain the reason for the delay....” Thus, P&G’s motion for preliminary injunction was denied.

Under the Lanham Act, the defendant’s statements need not be literally false. Rather, to establish a false advertising claim under the Lanham Act, the plaintiff must show either that (1) the advertisement is literally false as a factual matter, or (2) although literally true, the advertisement actually deceives or confuses consumers. Thus, representations that are literally true but because of innuendo, omission, or ambiguity may be deemed “implicitly false” subject the defendant to liability. Where representations are implicitly, rather than literally, false, the plaintiff is required to demonstrate that consumers were in fact misled by the representations. This is usually accomplished through consumer surveys or market studies (see Case Illustration 7.5).

↔ *See Discussion Case 7.3.*

#### CASE ILLUSTRATION 7.5

***S.C. JOHNSON & SON v. CLOROX CO.,*  
2000 U.S. DIST. LEXIS 3621 (S.D.N.Y. JAN. 7, 2000);  
*S.C. JOHNSON & SON v. CLOROX CO.,*  
2000 U.S. DIST. LEXIS 4977 (S.D. N.Y. APRIL 6, 2000)**

**FACTS** Clorox Co. ran 15- and 30-second television advertisements showing a water-filled Slide-Loc food storage bag manufactured by its competitor, S.C. Johnson & Sons, Inc., turned upside-down. The advertisements showed water leaking out of the bag at a rapid rate, with air bubbles forming in the bag. As stated by the trial court, “[T]he overall impression, that is, the overall depiction in the commercial itself is of a rapid and substantial leakage and flow of water out of the Slide-Loc bag. This is rendered even more graphic because there is a goldfish depicted in the bag which is shown to be in jeopardy because the water is running out at such a rate.”

S.C. Johnson & Co. filed suit, claiming that the advertisement was literally false and requesting an injunction prohibiting further airing of the advertisements.

**DECISION** The court found that when the Slide-Loc bags and Clorox’s own Glad bags were subjected to the same quality control tests, two-thirds of both types of the bags showed some leakage. However, the “great majority” of the leaks were small and very slow and occurred only when the bags were held upside-down. Because normal consumers do not use the bags to hold water, particularly upside-down, and because the commercial greatly exaggerated the leakage of Slide-Loc bags, the court found that aspect of the advertisements to be literally false. It enjoined Clorox Co. from running the advertisements.

Three months later, the parties were back before the same court. Clorox Co. had revised its advertisement and was airing a new 15-second commercial as well as

*(Continued)*

running a print ad in a popular women's magazine. The new commercial, like the original one, displayed a bag filled with water, containing a goldfish, and held upside-down. It did not, however, display a rate of leakage as fast as that shown in the original ad. The print ad had a single image of a Slide-Loc bag with a large drop of water about to fall away and the goldfish in danger of suffocating.

The court again found that both advertisements were literally false because they did not indicate that leakage occurs in only a certain percentage of such bags rather than all of them, and because nothing indicated the degree of risk of such leakage.

Thus, the court issued an injunction against both the new commercial and the print advertisement.

**Commercial Disparagement** *Commercial disparagement*, also known as *product disparagement*, is closely related to false advertising. It arises when the defendant makes false or deceptive representations about the quality of *plaintiff's* goods or services (as opposed to false or deceptive representations about the quality of *defendant's* own goods or services, which would be false advertising).

Commercial disparagement, like false advertising, can arise under state common law. The requirements vary from state to state, but, generally, the plaintiff is required to show (1) a false representation and (2) a specific economic loss (also known as “special damages”). General statements of comparison (“Product X is better than Product Y”) or *puffing* (i.e., obviously exaggerated claims about a product or service or vague generalizations, such as “Product X is the best”) do not constitute commercial disparagement. The special damages element requires the plaintiff to show that it suffered actual, specific harm as a result of the defendant's disparagement, such as lost business and revenue. Some jurisdictions also add a third element by requiring the plaintiff to show that the defendant intended to harm the plaintiff or at least acted with a reckless disregard for the effect of the disparagement on the plaintiff.

The UDTPA allows injunctive relief against false or misleading statements of fact that disparage the goods, services, or business of another, if the plaintiff shows that it is “likely to be damaged” by the statements.

Section 43(a) of the federal Lanham Act prohibits disparaging statements about a plaintiff's goods or services as well as false statements about the defendant's own goods or services. It is similar to the common law's cause of action for commercial disparagement. Section 43(a) does not require a showing of intent to harm, however, nor does it require proof of specific economic loss to support injunctive relief (though proof of actual economic harm is required for recovery of monetary damages).

## The Federal Trade Commission Act

The Federal Trade Commission (FTC) is responsible for enforcement of the FTC Act,<sup>23</sup> which is designed to promote competition and to protect the public from unfair and deceptive acts and practices in the marketing of goods and services. The FTC was created by Congress in 1914 to bolster the country's then weak antitrust laws. (The antitrust role of the FTC is discussed in Chapter 4.)

Section 5 of the FTC Act provides that one of the FTC's tasks is to prevent “unfair or deceptive acts or practices [and] unfair methods of competition”; this is where the FTC's ability to regulate advertising is found. Today, the FTC has primary responsibility for regulating deceptive advertising in the United States. Although the discussion in this chapter focuses primarily on advertising issues, it is important to note that the FTC's jurisdiction extends to all kinds of deceptive or unfair acts, including marketing and

<sup>23</sup>15 U.S.C. §§ 41-58.

promotional activities and sales practices in general, not just to advertising violations. These issues are discussed further in Chapter 8.

The FTC is an independent federal administrative agency. As such, it is not subject to political control as are executive branch agencies. The FTC is headed by five commissioners who are appointed by the President and confirmed by the Senate for staggered seven-year terms. The President also appoints one of the commissioners as chair of the FTC.

Much of the FTC's regulation of deceptive or unfair acts or practices focuses on deceptive advertising, including deceptive price and quality claims, false testimonials, and the use of mock-ups. The FTC has issued a number of guides and policy statements that clarify these rules for industry and the public,<sup>24</sup> such as a guide on the use of endorsements and testimonials. The FTC also promulgates policy statements on topics such as comparative advertising claims and substantiation for product claims. These guides and policy statements do not have the force of law, but they are very useful tools in helping businesses to understand what activities or practices are legal or illegal.

Although the FTC's authority to regulate extends only to advertising that promotes goods and services involved in interstate commerce, the courts define interstate commerce so broadly that the majority of goods or services fall within this category. Truly local advertising is regulated, if at all, at the state level. Most states do have laws, known as "Little FTC Acts," that regulate state advertising activities.

The FTC has jurisdiction over most ads for most products and services. Certain other government agencies can investigate advertising by certain specialized industries, such as airlines, banks, insurance companies, telephone and cable companies, and companies that sell securities and commodities. Additional special laws apply to ads for certain products or services, such as consumer leases, credit, 900 telephone numbers, and products sold through mail order or telephone sales. These issues are discussed further in Chapter 8.

The FTC Act does not give consumers or competitors the right to sue; rather, only the FTC may bring suit under the Act. FTC action can originate from an FTC-initiated investigation of business behavior or from an informal complaint made by a competitor or consumer. The FTC generally does not release the name of the complainant unless required to do so by law.

Because the FTC lacks the resources to respond to all complaints made, it investigates those that most directly implicate its mission of protecting consumers and fostering free competition. In particular, in making its enforcement decisions, the FTC tends to focus on national (as opposed to local) advertising, advertising that represents a pattern of deception (as opposed to an isolated dispute between a consumer and business or between two competitors), and cases that could affect consumer health or safety or result in widespread economic injury. The FTC's mandate is to act when it appears both that a company's advertising is deceptive *and* that FTC action is in the public interest. Thus, the FTC does not become involved in purely private disputes. While FTC investigations of an advertiser are confidential, FTC formal actions against an advertiser (such as filing a lawsuit or reaching settlement with the advertiser) are made public.

After investigating, the FTC staff submits a recommendation to the commission recommending that the case be closed, that the commission settle the case, or that the FTC issue a formal complaint against the respondent. If the case is settled, the parties enter into a *consent order* in which the FTC agrees not to pursue the case further in return for the business agreeing to refrain from engaging in specified acts. The business does not necessarily admit to having engaged in any illegal activities, however. Violation of a consent order is a civil infraction punishable by fines of up to \$11,000 per day.

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<sup>24</sup>These are available online at [www.ftc.gov](http://www.ftc.gov)

If a formal complaint is issued (and the FTC and the business do not agree on a settlement), the case is heard by an administrative law judge (ALJ) in an administrative hearing. The ALJ listens to evidence and arguments made by legal counsel for both the business and the FTC and issues an initial decision.

The decision of the ALJ becomes the decision of the full commission after 30 days unless the commission determines on its own to review it, or unless either party appeals to the commission. When the full commission reviews an ALJ decision, it may affirm the decision, modify it, or reverse it. If the commission affirms or modifies the decision, it issues an order against the business. Once the order is issued, the business has 60 days to appeal to the U.S. Court of Appeals. From there, either party may file for a writ of certiorari from the Supreme Court.

The penalties available under the FTC Act vary with the nature of the violation. The FTC or the courts can issue a *cease-and-desist order*, which requires the advertiser to stop running the deceptive or unfair ad or to stop engaging in the deceptive or unfair practice, to obtain substantiation for claims made in future ads, to report periodically to the FTC about that substantiation, and to pay a fine of \$11,000 per day per ad if the advertiser violates the law in the future.

Violations can also result in *civil penalties* that can range up to millions of dollars depending upon the nature of the violation. In some cases, advertisers have been required to provide *consumer redress* in the form of full or partial refunds to all consumers who bought the product.

The FTC can also require an advertiser to engage in *corrective advertising*. This usually takes the form of requiring the advertiser to air a new ad to correct the misinformation contained in the original ad, to notify purchasers about deceptive claims in ads, or to provide other information to consumers. The FTC has required corrective advertising in a number of consent orders<sup>25</sup> but has seldom ordered this remedy in litigated cases. (However, competitors do routinely seek, and often receive, corrective advertising in a number of other contexts, including under Section 43(a) of the Lanham Act.<sup>26</sup>)

In the 1970s, the FTC challenged Warner-Lambert Company's 40-year advertising campaign touting Listerine mouthwash as a cure for colds. The commission ordered the company to undertake \$10 million of corrective advertising (its average annual advertising budget at the time), stating that corrective advertising is appropriate when: (1) the advertisement is deceptive; (2) the advertisement played a substantial role in creating or reinforcing in the public's mind a false and material belief; and (3) the belief survives even once the deceptive advertisement ceases<sup>27</sup> (see Case Illustration 7.6).

Finally, in extreme instances, the FTC has actually *banned* individuals from future participation within an industry or has required individuals to post a *bond* before continuing business.

## General Principles of FTC Regulation of Business Acts and Practices

Generally, the law requires that advertising be: (1) truthful and not misleading; (2) substantiated (i.e., backed up by evidence); and (3) fair. In particular, the FTC can regulate

<sup>25</sup>See, e.g., *Egglund's Best, Inc.*, Docket No. C-3520 (Aug. 15, 1994); *Unocal Corp.*, 117 F.T.C. 500 (1994); *AHC Pharmaceuticals, Inc.*, 95 F.T.C. 528 (1980).

<sup>26</sup>See *Alpo PetFoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194 (D.D.C. 1989), *aff'd in pertinent part and vacated in part*, 913 F.2d 958 (D.C. Cir. 1990); *John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292 (E.D. Pa. 1976), *aff'd in pertinent part sub nom.*, *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1 (E.D. Pa. 1974).

<sup>27</sup>*Warner-Lambert Co. v. F.T.C.*, 86 F.T.C. 1398, 1499-1500 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977).

## CASE ILLUSTRATION 7.6

**NOVARTIS CORP. v. FTC, 223 F.3D 783 (D.C. CIR. 2000)**

**FACTS** Ciba-Geigy Corporation purchased the Doan's analgesic pain reliever brand in 1987. Ciba's consumer perception research indicated that its target market—back pain sufferers likely to use over-the-counter pain relievers—rated Doan's below its competitors in relieving back pain. From 1988 to 1996, first Ciba and then Novartis Corporation, its successor, engaged in a \$55 million ad campaign that stressed that Doan's had a special efficacy in relieving back pain. Ciba/Novartis had no substantiation for claiming the product was superior to other over-the-counter analgesics in relieving back pain.

**DECISION** After the FTC took action, the advertising agency entered into a consent order with the FTC regarding its role in the ad campaign, agreeing to have scientific evidence to support claims regarding the efficacy, safety, benefits, or performance of any over-the-counter analgesic it advertised. The charges against Novartis were heard in an administrative hearing before an ALJ, who found the company liable for deceptive advertising. However, the ALJ declined to order corrective advertising, finding that the third element of the *Warner-Lambert* test (i.e., that the belief survives

even once the deceptive advertising ceases) had not been met. In reaching this determination, the ALJ relied upon Novartis' evidence showing low 24- and 72-hour recall regarding the superiority claim and the fact that the ad campaign had been much shorter than the multi-decade Listerine campaign.

On appeal, the FTC ordered the company to carry the statement "Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain" on all packaging and advertising materials for one year, excluding radio and television ads of less than 15 seconds, until it had expended on corrective advertising an amount equal to the average spent annually during the eight years of the advertising campaign.

Novartis Corp. then appealed to the U.S. Court of Appeals, arguing that the advertisements were not "deceptive" because the claim made was not material. Novartis also argued that there was no evidence that consumers had actually relied upon the claims and that the FTC's action infringed on its First Amendment right to commercial speech. The Court of Appeals rejected all of Novartis' claims and upheld the FTC's findings.

business acts or practices that are either (1) unfair or (2) deceptive. A marketing practice can be unfair without being deceptive, and vice versa. Thus, separate rules apply to each of these areas.

**Unfairness** The FTC Act does not list unfair trade practices, as Congress was aware that such a list would necessarily be incomplete and would quickly become outdated. Instead, the Commission was given the task of identifying unfair trade practices, with the understanding that criteria for defining these would evolve and develop gradually.

The FTC's *Policy Statement on Unfairness*<sup>28</sup> explains the factors that the FTC now looks at in evaluating whether a business action is unfair. According to the *Policy Statement*, an advertisement or business practice is unfair: (1) if it causes or is likely to cause substantial consumer injury; (2) that a consumer could not reasonably avoid; and (3) the injury is not outweighed by any countervailing benefits to consumers or competition.

"Substantial injury" generally refers to monetary harm or unwarranted health and safety risks. Trivial, speculative, or merely emotional harms generally do not suffice to render an advertisement unfair. The *Policy Statement* specifically notes that certain practices may cause some consumer injury but that the injury may be offset by benefits to consumers. For example, an advertiser's failure to present technical data on the product may hamper a consumer's ability to choose but may also result in a reduced price. Such

<sup>28</sup>[www.ftc.gov/bcp/policystmt/ad-unfair.htm](http://www.ftc.gov/bcp/policystmt/ad-unfair.htm)

trade-offs are permissible provided that the net effect upon consumers is not injurious. Moreover, the FTC generally regards consumers as having free choice and expects that the marketplace will correct many unfair practices (i.e., consumers will simply refuse to buy from companies engaging in unfair practices). However, the FTC also recognizes that certain selling practices, such as withholding critical price or performance data, overt coercion, or undue influence over susceptible classes of purchasers (such as children or the terminally ill), may prevent the market from operating fairly and so may require agency intervention.

**Deception** Advertising is more likely to run afoul of the ban against deceptive practices than it is the rules addressing unfair business practices. Deceptive practices involve acts such as false oral or written representations, misleading price claims, sales of dangerous or systematically defective products or services without adequate disclosures, bait-and-switch tactics, and failure to meet warranty obligations.

Under the FTC's *Policy Statement on Deception*,<sup>29</sup> an advertisement or other type of business practice is *deceptive*: (1) if it contains a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances and (3) is "material" (i.e., is important to a consumer's decision to buy or use the product, such as representations about a product's performance, price, features, or effectiveness). Although this standard does not refer explicitly to an injury, the *Policy Statement* provides:

Injury to consumers can take many forms. Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.

The FTC can show that an advertisement is deceptive either by (1) proving its falsity or (2) showing that its proponent lacked a reasonable basis for asserting its truth. An advertiser can be liable even if it did not intend or did not know that its advertisement was deceptive.

To determine whether an advertisement is deceptive, the FTC begins by evaluating the ad from the perspective of the "reasonable consumer." As the FTC noted in an early case:

An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it "therefore" an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.<sup>30</sup>

If the representation or sales practice is targeted toward a specific audience, such as children, the elderly, or doctors, the FTC considers the effect of the representation or practice upon a reasonable member of that group. Note, however, that the standard is whether the practice is *likely* to mislead consumers; actual deception is not required. However, the FTC does not pursue advertising claims based upon subjective claims (e.g., taste, feel, appearance, or smell) or upon cases involving puffing.

<sup>29</sup>[www.ftc.gov/bcp/policystmt/ad-decept.htm](http://www.ftc.gov/bcp/policystmt/ad-decept.htm)

<sup>30</sup>*In re Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

The FTC evaluates the entire ad—words, phrases, and pictures—to determine what message it conveys to consumers. The FTC also examines whether the ad omits information in such a way as to deceive or mislead the consumer. The makers of Campbell soup, for example, advertised that “most” Campbell soups were low in fat and cholesterol (a truthful statement) and were thus useful in fighting heart disease. However, the advertisements failed to point out that the soups were high in sodium and that high-sodium diets may increase the risk of heart disease. The FTC ruled that the company’s failure to disclose the sodium content of the soups was deceptive. Campbell Soup Co. entered into a consent agreement in which it agreed to disclose the sodium content of any soup containing more than 500 milligrams of sodium per eight-ounce serving in any ad that directly or by implication mentioned heart disease in connection with the soup. Campbell also agreed not to make any direct or implied representation regarding soup and the reduction of the risk of heart disease unless it possessed, at the time of the representation, “competent and reliable scientific or medical evidence” to that effect.<sup>31</sup>

The FTC evaluates both “express” and “implied” claims, and the advertisers must have proof to substantiate both types of claims made in an ad. An *express* claim is a statement literally made within the ad. An *implied* claim is made indirectly or through inference. Thus, a claim that “XYZ Sunscreen prevents skin cancer” is an express claim that the sunscreen does indeed prevent skin cancer. A claim that “XYZ Sunscreen blocks the harmful sun rays that cause skin cancer” is an implied claim. A reasonable consumer could conclude from the latter statement that XYZ Sunscreen prevents skin cancer.

The advertiser must disclose whatever qualifying information is necessary to ensure that the express or implied claims are not misleading to the consumer. All such disclosures must be clear, conspicuous, and in the same language as that used principally in the advertisement. A *disclosure* or *disclaimer* does not rectify a false or deceptive claim.

The FTC considers certain types of representations presumptively “material,” including express claims, implied claims intentionally made by the seller, and claims or omissions involving health, safety, or other areas with which a reasonable consumer would be concerned, such as the efficacy or cost of the product or service, durability, performance, quality, or warranties. Thus, in scrutinizing advertising, the FTC pays the most attention to ads that make claims about health or safety (e.g., “XYZ Antibacterial Soap kills germs”) and ads that make claims that consumers would have difficulty evaluating for themselves (e.g., “XYZ Laundry Detergent is safe for septic systems”). The FTC is less concerned with ads that make subjective claims or claims that consumers can easily judge for themselves (e.g., “Everybody loves XYZ cereal”).

The FTC also scrutinizes carefully advertising that is aimed at children, because children are less-sophisticated consumers and are often more susceptible to deception. Advertising aimed at children is evaluated from a child’s, not an adult’s, perspective. The FTC works with the Children’s Advertising Review Unit (CARU) of the Council of Better Business Bureaus (CBBB)<sup>32</sup> on children’s advertising issues. CARU, created in 1974, is a private, self-regulatory group that promotes truthful, accurate, and socially responsible advertising that is sensitive to the needs of children. CARU monitors advertisements directed to children age 12 and under in broadcast and cable television, radio, children’s magazines, comic books, and online services.

The FTC Act also requires *substantiation* of advertising. A firm’s failure to possess and rely upon a reasonable basis for objective claims made in advertisements is itself an unfair or deceptive trade practice. The advertiser bears the burden of demonstrating an ad is true. (Contrast this to the Lanham Act where the consumer or competitor bears the

<sup>31</sup>In *re Campbell Soup Co.*, 1991 F.T.C. LEXIS 303 (Apr. 17, 1991).

<sup>32</sup>CARU’s website is [www.caru.org](http://www.caru.org)



burden of demonstrating that the ad is false.) The FTC regards advertising substantiation as very important and has issued a *Policy Statement Regarding Advertising Substantiation*.<sup>33</sup> The advertiser and its ad agency must have evidence to support any claims made *before* the advertisement is run. The amount of evidence required depends upon the claim or claims made, but, at a minimum, the advertiser must have the level of evidence that it says that it has. Thus, if a toothpaste ad states that “three out of four dentists recommend” a particular brand, the advertiser must have competent and reliable *scientific* evidence to support that claim.

#### ◀ See Discussion Case 7.4.

Advertising agencies, website designers, and catalog marketers, as well as advertisers themselves, may be held liable for deceptive ads. In considering whether a third party, such as an ad agency, should be held liable, the FTC looks at that party’s participation in the preparation of the deceptive ad and whether it knew or should have known that the ad included false or deceptive claims. Ad agencies and website designers have a legal duty to independently verify the information used to substantiate claims and may not rely upon the advertiser’s representation or assurance regarding claim substantiation.

### Specific Advertising Practices

The FTC has issued guidances on several types of advertising practices to assist advertisers in determining what is or is not permissible.

**Deceptive Pricing** The FTC has issued a *Guides Against Deceptive Pricing*.<sup>34</sup> The FTC defines *deceptive pricing* as any practice that tends to mislead or deceive consumers about the price that they are paying for goods or services. Deceptive pricing includes, for example, statements regarding the former or regular price of the merchandise that are false or two-for-one deals or offers of free merchandise coupled with a purchase where the advertiser has simply inflated the regular price of the merchandise bought to cover the costs of the supposedly “free” goods.

The *Deceptive Pricing Guides* provide some very specific rules regarding pricing strategies. For example, retail price comparisons (“Brand Y Printers, Price Elsewhere \$329, Our Price \$299”) are permissible provided that a number of the principal retail outlets in the area regularly sell Brand Y Printers for \$329. Where only a few outlets sell the printer for that price, however, and the majority sell the printer for less, the advertisement would contain deceptive pricing information. Similarly, it is permissible to advertise a discount from the manufacturer’s list or suggested retail price only if a substantial number of sales are made in the area at the list or suggested retail prices. If most goods are sold in the area at a lower price, the consumer would be likely to be misled by the advertisement promising a reduction.

*Bait-and-switch advertising* is also regulated by the FTC. According to the *FTC Guides Against Bait Advertising*,<sup>35</sup> bait-and-switch advertising occurs when the seller: (1) refuses to show, demonstrate, or sell the advertised item; (2) disparages the advertised product; (3) fails to have reasonable quantities of it on hand (unless the advertisement indicates the quantities are limited); (4) fails to take orders to deliver the item within a reasonable time; (5) shows a product that is defective or impractical for the use implied or stated in the advertisement; or (6) discourages salespersons from selling the item. In effect, the

<sup>33</sup>[www.ftc.gov/bcp/guides/ad3subst.htm](http://www.ftc.gov/bcp/guides/ad3subst.htm)

<sup>34</sup>[www.ftc.gov/bcp/guides/decptprc.htm](http://www.ftc.gov/bcp/guides/decptprc.htm)

<sup>35</sup>[www.ftc.gov/bcp/guides/baitads-gd.htm](http://www.ftc.gov/bcp/guides/baitads-gd.htm)

company has advertised a product but has no intention of actually selling the consumer that item. Rather, the company intends to sell the consumer a different product, usually at a higher price. The product advertised at the lower price serves as the “bait”; once the consumer is in the store, he or she is encouraged to “switch” to the higher-priced product. The FTC considers bait-and-switch advertising to be deceptive.

**Endorsements and Testimonials** The FTC has issued a document entitled *FTC Guides Concerning Use of Endorsements and Testimonials in Advertising*.<sup>36</sup> Advertisers commonly use actors, sports stars, and other prominent public figures to endorse or provide testimonials about their products. Such *endorsements* or *testimonials* are considered deceptive if the person involved does not in fact use or prefer the product. The advertiser can use the endorsement only as long as the endorser continues to use and prefer the product.

To give an “expert” opinion regarding a product or service, the endorser must indeed be sufficiently qualified to be regarded as an expert in the field. In addition, the expert must evaluate, examine, or test the product in the same manner that other experts in the field would normally use to substantiate the claims made in the advertisement.

If the advertisement contains an endorsement by what is represented to be an individual or group of “actual” consumers, actual consumers must be used or the advertisement must clearly and conspicuously disclose that the individuals depicted are actors, not actual consumers. In addition, the endorsement must reflect the *typical* experience of consumers who use the product, not the idiosyncratic experiences of one or a few consumers. The advertiser must disclose any payments made to the consumer for making the endorsement and generally must disclose any relationship between any endorser and the advertiser (such as an employee or family relationship) that might affect the weight or credibility of the endorsement.

**Mock-ups** It is deceptive to show an advertisement that purports to be an actual product demonstration but is in fact a *mock-up* or *simulation*. Any use of a mock-up should be revealed, unless the mock-up or prop is necessary because of the difficulty of showing the actual product in the advertisements. This is why advertisers can use props, such as substituting mashed potatoes for ice cream (which would otherwise quickly melt under photographic lights), provided that the prop is not being used as actual proof of a product claim (such as the rich texture of the ice cream).

Volvo Corporation learned the dangers of not revealing mock-ups the hard way. It showed a television ad that depicted an oversized “monster” pickup truck driving over a row of cars. All of the cars except the Volvo were crushed. Volvo did not disclose that the Volvo automobile used in the ad had been structurally strengthened with steel and wood, while the other cars had been structurally weakened. Volvo and its advertising agency each paid a \$150,000 fine to the FTC, though neither admitted to any wrongdoing. The consent order also prohibited further misrepresentations of the strength, structural integrity, or crashworthiness of any vehicle or of the safety of any occupant in a collision.<sup>37</sup>

The FTC also scrutinizes *product demonstrations* to make certain that they are truthful and not misleading. Advertisers should make certain that their product demonstrations accurately depict the product’s qualities and capabilities and do not exaggerate or misrepresent the product or a competing product in any manner. In particular, advertisers should be certain that photographic techniques do not misrepresent or distort the

<sup>36</sup>[www.ftc.gov/bcp/guides/endorse.htm](http://www.ftc.gov/bcp/guides/endorse.htm)

<sup>37</sup>“F.T.C. Accords on Volvo Ads,” *The New York Times*, Aug. 22, 1991, at D19.

product's characteristics or qualities. Campbell Soup Co., for example, was held liable when its advertisement depicted bowls of soup filled with chunky ingredients. Marbles had actually been placed at the bottoms of the bowls in order to raise the ingredients to the surface.<sup>38</sup>

**Comparative Advertising** The FTC has issued a *Statement of Policy Regarding Comparative Advertising*.<sup>39</sup> The FTC encourages the naming of or reference to competitors in advertising, even where the references are negative, provided that the statements are clear, truthful, and nondeceptive. Truthful and nondeceptive comparative advertising provides important information to consumers and can assist them in making informed, rational purchase choices. It can also lead to product innovation and improvement and to lower prices in the marketplace. For these reasons, the FTC generally opposes industry codes or standards that restrain comparative advertising or that require higher standards of substantiation for such advertising.

**Sweepstakes and Contests** Sweepstakes-type promotions that require the participants to make a purchase are illegal. Each state also regulates sweepstakes and contests. It is imperative, therefore, that promoters examine the laws of each state in which they intend to advertise such activities.

**EXHIBIT 7.1** Lanham Act v. FTC Act

	PURPOSE	WHO CAN BE A PLAINTIFF	WHO BEARS BURDEN OF PROOF	PRIMARY REMEDIES
<b>Lanham Act</b>	<ul style="list-style-type: none"> <li>• Forbids false designation of origin and false or misleading descriptions or representations of fact</li> <li>• Includes: <ul style="list-style-type: none"> <li>▪ passing off</li> <li>▪ false advertising</li> <li>▪ commercial disparagement</li> </ul> </li> </ul>	Competitors	Plaintiff must prove that ads are <i>literally false or</i> that there is an actual deception	<ul style="list-style-type: none"> <li>• Injunctive Relief</li> <li>• Monetary Damages</li> <li>• Costs and Attorneys' Fees in Exceptional Cases</li> </ul>
<b>FTC Act</b>	<ul style="list-style-type: none"> <li>• Prevents trade practices and acts that are: <ul style="list-style-type: none"> <li>▪ unfair <i>or</i></li> <li>▪ deceptive</li> </ul> </li> <li>• Includes: <ul style="list-style-type: none"> <li>▪ deceptive pricing</li> <li>▪ deceptive endorsements and testimonials</li> <li>▪ deceptive mock-ups</li> <li>▪ deceptive comparative advertising</li> </ul> </li> </ul>	FTC	FTC must show ad has <i>capacity</i> to deceive or mislead the public	<ul style="list-style-type: none"> <li>• Cease-and-Desist Order</li> <li>• Civil Penalties</li> <li>• Consumer Redress</li> <li>• Corrective Advertising</li> </ul>

<sup>38</sup>*In re Campbell Soup Co.*, 77 F.T.C. 664 (1970). See also *In re Mattel, Inc.*, 79 F.T.C. 667 (1971), *modified*, 104 F.T.C. 555 (1984) (toy car's speed exaggerated).

<sup>39</sup>[www.ftc.gov/bcp/policystmt/ad-compare.htm](http://www.ftc.gov/bcp/policystmt/ad-compare.htm)

State attorneys general have been particularly vigilant about sweepstakes abuses. For example, 39 states and the District of Columbia reached multimillion-dollar settlements with American Family Publishers (AFP). The states had alleged that AFP, in an effort to sell magazine subscriptions, had conducted misleading sweepstakes campaigns that had tricked many people into believing that they had won \$11 million. The states also alleged that dozens of elderly people had traveled to Tampa, Florida (the return address listed on the entry) to collect a prize that they had not in fact won. While AFP admitted to no wrongdoing, it agreed to stop telling people that they were “winners” or “finalists” unless in fact they actually were. In addition, future language stating that the individual “may already be a winner” must include in type not less than half that size the disclaimer “if you have the winning ticket.” Several of the settlements also created funds for consumer redress.<sup>40</sup>

## The National Advertising Division

The National Advertising Division (NAD)<sup>41</sup> of the CBBB offers a private court that both consumers and companies can use to resolve disputes. The advantages of using this private court rather than normal litigation are that the process can be kept private (whereas litigation is necessarily public); it often is much cheaper; and disputes can be resolved quickly (often within 60 days).

The NAD was created by the advertising community in 1971 as part of its effort to foster voluntary self-regulation, minimize government regulation, and increase public confidence in the credibility of advertising. It responds to complaints about national advertising brought by a variety of parties, including individual consumers, advertisers, the Better Business Bureau, and trade associations. The NAD also monitors national broadcast and cable television and print advertising and initiates its own complaints.

The NAD provides attorneys who review and evaluate claims substantiation and who investigate complaints about truth and accuracy in national advertising. The NAD may recommend that an advertiser voluntarily modify or discontinue false or inaccurate claims, but it does not impose penalties. NAD decisions are published on-line at its website. Unresolved controversies are referred to the National Advertising Review Board (NARB), a peer-review group composed of 70 advertising professionals and public interest members. The dispute is heard by a five-person panel of NARB members at a roundtable review. The panel either overturns or upholds the NAD’s decision. If the advertiser fails to comply with a NAD or NARB panel decision, the NAD may refer the file to the appropriate government agency and release information regarding the referral to the public and the press.

## Advertising on the Internet

Advertising on the Internet raises a number of special legal issues. Some of these, such as deep linking and banner advertisements, are discussed in Chapter 6 in the context of trademark law. The discussion in this chapter focuses on the FTC’s online advertising

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<sup>40</sup>See “American Family Publishers, Spokesmen Settle Sweepstakes Lawsuit,” *The Entertainment Litigation Reporter* (July 31, 1999); Lisa Renze-Rhodes, “Attorney General Declares State a Winner,” *The Indiana Lawyer* (June 9, 1999), at p. 12; “NY Reaches \$800,000 Settlement with American Family Publishers,” *Gaming Industry Litigation Reporter* (Sept. 1998), p. 10.

<sup>41</sup>NAD’s website can be found at [www.nadreview.org](http://www.nadreview.org)

guidelines and on privacy issues. Unsolicited commercial e-mail, or spam, is addressed in Chapter 8.

### On-line Advertising

The FTC has issued two documents addressing online advertising activities—*Dot Com Disclosures: Information about Online Advertising*<sup>42</sup> and *Advertising and Marketing on the Internet: Rules of the Road*.<sup>43</sup> Generally, online advertising is subject to the same rules that apply to advertising in other media. The FTC takes its role in regulating Internet advertising seriously and has brought numerous enforcement actions to stop advertising abuses online.

The same *disclosure* requirements that apply to traditional advertising media apply to online advertising. To ensure that disclosures are clear and conspicuous in online ads, however, the FTC's *Dot Com Disclosures* document tells advertisers to consider:

- the *placement* of the disclosure in the ad,
- the *proximity* of the disclosure to the relevant claim,
- the *prominence* of the disclosure,
- whether other parts of the ad *distract attention* from the disclosure,
- whether the ad is so long the disclosure should be *repeated*,
- whether audio disclosures are presented in *adequate volume and cadence*,
- whether visual disclosures appear for sufficient *duration*, and
- whether the language of the disclosure is *understandable* to the intended audience.

The online version of the *Dot Com Disclosures* document contains examples of mock ads illustrating these factors.

### Privacy Issues

The growth in electronic commerce has led to many concerns about *privacy* issues. Online marketers can gather large amounts of information about actual or possible customers through the Web and the Internet. Website owners can use “cookies”<sup>44</sup> to store user information for future retrieval on the individual hard drives of users visiting their sites. Internet service providers (ISPs) can track a user's navigation through the Web by capturing “click stream data” (i.e., electronic records of the user's activities).

Currently, there is no single federal law directly governing consumer privacy issues in the United States, although there is a patchwork of federal and state statutes and case law that provide protections in specific circumstances. So, for example, the FTC can use the FTC Act to respond to unfair or deceptive acts by enforcing companies' promises about how they collect, use, and protect personal information of consumers.

In addition to the FTC Act, other federal statutes address specific privacy issues. Concerns about the online privacy of children led Congress to adopt the *Children's Online Privacy Protection Act* (COPPA).<sup>45</sup> COPPA regulates the operators of websites directed to children under the age of 13. It limits the use of personal information gathered online

<sup>42</sup>This guide can be found at [www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf](http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf)

<sup>43</sup>This guide can be found at [www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus28.htm](http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus28.htm)

<sup>44</sup>A “cookie” is “a small data text file that is transferred from a Web server computer and sent back to the server computer whenever an HTML file request is made.” Michael D. Scott, *Internet Technology Law Desk Reference* 111 (1999).

<sup>45</sup>15 U.S.C. §§ 6501-6508.

from such children and requires “verifiable parental consent” before such personal information can be collected. The FTC enforces the provisions of COPPA. The FTC issued its *Financial Privacy Rule* to address privacy concerns arising out of consumers’ transactions with financial institutions.<sup>46</sup> The *Fair Credit Reporting Act* protects the privacy of information in consumer reports.<sup>47</sup>

The FTC promotes industry self-regulation in the privacy arena. Several trade associations have established privacy principles and guidelines for their members to follow in doing business on the Internet, including The Online Privacy Alliance,<sup>48</sup> The Direct Marketing Association,<sup>49</sup> and TRUSTe.<sup>50</sup> In addition, businesses can obtain “privacy seals” from various organizations, such as BBBOnLine, a subsidiary of the CBBB. These seals give customers assurance that a website is abiding by its posted privacy protection policy.

Generally, all businesses that collect data online should post a prominent privacy policy on their website addressing issues such as the identity of the data gatherer, the purposes of the data, how long and in what manner the data will be kept, and how individuals may access their data or correct inaccuracies in it.

The European Union and countries in the Pacific Rim (including Hong Kong and New Zealand) have been much more proactive than the United States in protecting personal information on the Internet. The *European Union Personal Data Directive*,<sup>51</sup> for example, became effective in October 1998. The Directive places limitations on the type of data that can be collected, the manner in which it can be collected, and the manner in which it may be used. It also grants certain rights, including access, to the provider of the information. The Directive also provides that the data can be transferred to another country only if the other country provides an “adequate level of protection” to the data. Because the United States does not currently meet this standard, the directive would have put U.S. businesses at a disadvantage. Thus, the U.S. Department of Commerce and the European Commission developed a “safe harbor” framework in 2000 that enables U.S. companies adhering to the framework to be certain that they provide “adequate” privacy protection.<sup>52</sup>

## International Advertising Law

Regulation of advertising, whether online or conventional, varies greatly from country to country. Comparative advertising, for example, is prohibited in Germany, and several Scandinavian countries prohibit advertising directed at children. It is essential that marketers consult with attorneys of the country or countries in which they plan to advertise before beginning any advertising efforts overseas. Internet advertisers, in particular, need to be sensitive to the different regulatory regimes to which their sites may be subject. Information on international advertising law often can be found online. For example, the European Commission’s Consumer Affairs website contains valuable information on EC advertising law.<sup>53</sup>

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<sup>46</sup>[www.ftc.gov/privacy/privacyinitiatives/financialrule.html](http://www.ftc.gov/privacy/privacyinitiatives/financialrule.html)

<sup>47</sup>[www.ftc.gov/privacy/privacyinitiatives/credit.html](http://www.ftc.gov/privacy/privacyinitiatives/credit.html)

<sup>48</sup>[www.privacyalliance.org](http://www.privacyalliance.org)

<sup>49</sup>[www.the-dma.org/index.php](http://www.the-dma.org/index.php)

<sup>50</sup>[www.truste.org](http://www.truste.org)

<sup>51</sup>Council Directive 95/46, 1995 O.J. (L 281) 31.

<sup>52</sup>See <http://www.export.gov/safeharbor/index.asp>

<sup>53</sup><http://ec.europa.eu/consumers/indexn.htm>

## DISCUSSION CASES

## 7.1 Commercial Speech

*Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)

OPINION: JUSTICE THOMAS Section 5(e)(2) of the Federal Alcohol Administration Act prohibits beer labels from displaying alcohol content. We granted certiorari in this case to review the Tenth Circuit's holding that the labeling ban violates the First Amendment because it fails to advance a governmental interest in a direct and material way. Because § 5(e)(2) is inconsistent with the protections granted to commercial speech by the First Amendment, we affirm.

## I

Respondent brews beer. In 1987, respondent applied to the Bureau of Alcohol, Tobacco and Firearms (BATF), an agency of the Department of the Treasury, for approval of proposed labels and advertisements that disclosed the alcohol content of its beer. BATF rejected the application on the ground that the Federal Alcohol Administration Act (FAAA or Act) prohibited disclosure of the alcohol content of beer on labels or in advertising. Respondent then filed suit in the District Court ... seeking a declaratory judgment that the relevant provisions of the Act violated the First Amendment; respondent also sought injunctive relief barring enforcement of these provisions. The Government took the position that the ban was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer.

The District Court granted the relief sought, but a panel of the Court of Appeals for the Tenth Circuit reversed and remanded. Applying the framework set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court of Appeals found that the Government's interest in suppressing alcoholic "strength wars" was "substantial." \* \* \* The court remanded for further proceedings to ascertain whether a "reasonable fit" existed between the ban and the goal of avoiding strength wars.

After further factfinding, the District Court upheld the ban on the disclosure of alcohol content in advertising but invalidated the ban as it applied to labels. \* \* \* On the case's second appeal, the Court of Appeals affirmed the District Court. After reviewing the record, the Court of Appeals concluded that the Government

had failed to demonstrate that the prohibition in any way prevented strength wars. The court found that there was no evidence of any relationship between the publication of factual information regarding alcohol content and competition on the basis of such content.

We granted certiorari to review the Tenth Circuit's decision that § 205(e)(2) violates the First Amendment. We conclude that the ban infringes respondent's freedom of speech, and we therefore affirm.

## II

## A

\* \* \* The [FAAA] establishes national rules governing the distribution, production, and importation of alcohol and established a Federal Alcohol Administration to implement these rules. Section 5(e)(2) of the Act prohibits any producer, importer, wholesaler, or bottler of alcoholic beverages from selling, shipping, or delivering in interstate or foreign commerce any malt beverages, distilled spirits, or wines in bottles

unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container ... as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume, the net contents of the package, and the manufacturer or bottler or importer of the product.*)

27 U.S.C. § 205(e)(2) (emphasis added). The Act defines "malt beverage [s]" in such a way as to include all beers and ales.

Implementing regulations promulgated by BATF ... prohibit the disclosure of alcohol content on beer labels. In addition to prohibiting numerical indications

of alcohol content, the labeling regulations proscribe descriptive terms that suggest high content, such as “strong,” “full strength,” “extra strength,” “high test,” “high proof,” “pre-war strength,” and “full oldtime alcoholic strength.” The prohibitions do not preclude labels from identifying a beer as “low alcohol,” “reduced alcohol,” “non-alcoholic,” or “alcohol-free.” By statute and by regulation, the labeling ban must give way if state law requires disclosure of alcohol content.

## B

Both parties agree that the information on beer labels constitutes commercial speech. Though we once took the position that the First Amendment does not protect commercial speech, we repudiated that position in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). There we noted that the free flow of commercial information is “indispensable to the proper allocation of resources in a free enterprise system” because it informs the numerous private decisions that drive the system. Indeed, we observed that a “particular consumer’s interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”

Still, *Virginia Board of Pharmacy* suggested that certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech. In later decisions we gradually articulated a test based on “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

We now apply *Central Hudson*’s test to § 205(e)(2).

## III

Both the lower courts and the parties agree that respondent seeks to disclose only truthful, verifiable,

and nonmisleading factual information about alcohol content on its beer labels. Thus, our analysis focuses on the substantiality of the interest behind § 205(e)(2) and on whether the labeling ban bears an acceptable fit with the Government’s goal. A careful consideration of these factors indicates that § 205(e)(2) violates the First Amendment’s protection of commercial speech.

## A

\*\*\* [T]he Government contends that § 205(e)(2) advances Congress’ goal of curbing “strength wars” by beer brewers who might seek to compete for customers on the basis of alcohol content. \*\*\*

\*\*\*

Rather than suppressing the free flow of factual information in the wine and spirits markets, the Government seeks to control competition on the basis of strength by monitoring distillers’ promotions and marketing. \*\*\* [T]he Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs. \*\*\* Both panels of The Court of Appeals that heard this case concluded that the goal of suppressing strength wars constituted a substantial interest, and we cannot say that their conclusion is erroneous.

\*\*\*

## B

The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the governmental interest and be no more extensive than necessary to serve that interest. \*\*\* The Tenth Circuit found that § 205(e)(2) failed to advance the interest in suppressing strength wars sufficiently to justify the ban. We agree.

Just two Terms ago, in *Edenfield v. Fane*, 507 U.S. 761 (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech “directly advances the governmental interest asserted.” In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government’s interest “in a direct and material way.” That burden “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on



commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” \* \* \*

The Government attempts to meet its burden by pointing to current developments in the consumer market. It claims that beer producers are already competing and advertising on the basis of alcohol strength in the “malt liquor” segment of the beer market. The Government attempts to show that this competition threatens to spread to the rest of the market by directing our attention to respondent’s motives in bringing this litigation. Respondent allegedly suffers from consumer misperceptions that its beers contain less alcohol than other brands. According to the Government, once respondent gains relief from § 205(e)(2), it will use its labels to overcome this handicap.

Under the Government’s theory, § 205(e)(2) suppresses the threat of such competition by preventing consumers from choosing beers on the basis of alcohol content. It is assuredly a matter of “common sense” that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait. \* \* \*

We conclude that § 205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the Government’s regulatory scheme. While the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising. Like § 205(e)(2), these restrictions prohibit statements of alcohol content in advertising, but, unlike § 205(e)(2), they apply only in States that affirmatively prohibit such advertisements. As only 18 States at best prohibit disclosure of content in advertisements, brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government’s true aim is to suppress strength wars.

Other provisions of the FAAA and its regulations similarly undermine § 205(e)(2)’s efforts to prevent strength wars. While § 205(e)(2) bans the disclosure of alcohol content on beer labels, it allows the exact opposite in the case of wines and spirits. Thus, distilled spirits may contain statements of alcohol content, and such disclosures are required for wines with more than 14 percent alcohol. If combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as

well as for the weakest ones. Further, the Government permits brewers to signal high alcohol content through use of the term “malt liquor.” Although the Secretary has proscribed the use of various colorful terms suggesting high alcohol levels, manufacturers still can distinguish a class of stronger malt beverages by identifying them as malt liquors. One would think that if the Government sought to suppress strength wars by prohibiting numerical disclosures of alcohol content, it also would preclude brewers from indicating higher alcohol beverages by using descriptive terms.

\* \* \*

Even if § 205(e)(2) did meet the *Edenfield* standard, it would still not survive First Amendment scrutiny because the Government’s regulation of speech is not sufficiently tailored to its goal. The Government argues that a sufficient “fit” exists here because the labeling ban applies to only one product characteristic and because the ban does not prohibit all disclosures of alcohol content—it applies only to those involving labeling and advertising. In response, respondent suggests several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war. We agree that the availability of these options, all of which could advance the Government’s asserted interest in a manner less intrusive to respondent’s First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary.

## IV

In sum, although the Government may have a substantial interest in suppressing strength wars in the beer market, the FAAA’s countervailing provisions prevent § 205(e)(2) from furthering that purpose in a direct and material fashion. The FAAA’s defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment’s protections for commercial speech. Because we find that § 205(e)(2) fails the *Central Hudson* test, we affirm the decision of the court below.

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### QUESTIONS FOR DISCUSSION FOR CASE 7.1

1. Which prongs of the *Central Hudson* test were at issue in this case?

2. Why do you think that Coors wanted to put the alcohol content on its beer labels? The Court noted that Coors was concerned with the public's opinion that its beer had a low alcohol content. Does this turn alcohol content into a marketing point? Would this run counter to the government's significant interest in avoiding a "strength war"?
3. What other ways could the government have advanced its interest in preventing strength wars? Does Section 205(e)(2) fail on its own merits or because it was part of an inconsistent scheme of government regulation?

## 7.2 Commercial Speech

### *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)

JUSTICE KENNEDY delivered the opinion of the Court.

Four Terms ago, in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), the Court rejected a First Amendment challenge to the constitutionality of a series of agricultural marketing orders that, as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising. In this case a federal statute mandates assessments on handlers of fresh mushrooms to fund advertising for the product. \* \* \*

The statute in question, enacted by Congress in 1990, is the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* The Act authorizes the Secretary of Agriculture to establish a Mushroom Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." It is undisputed, though, that most monies raised by the assessments are spent for generic advertising to promote mushroom sales.

Respondent United Foods, Inc., is a large agricultural enterprise based in Tennessee. It grows and distributes many crops and products, including fresh mushrooms. In 1996 respondent refused to pay its mandatory assessments under the Act. The forced subsidy for generic advertising, it contended, is a violation of the First Amendment. \* \* \*

\* \* \* The District Court, holding *Glickman* dispositive of the First Amendment challenge, granted the Government's motion for summary judgment.

The Court of Appeals for the Sixth Circuit held this case is not controlled by *Glickman* and reversed the District Court. We agree with the Court of Appeals and now affirm.

A quarter of a century ago, the Court held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."

We have used standards for determining the validity of speech regulations which accord less protection to commercial speech than to other expression. That approach, in turn, has been subject to some criticism. We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case. It should be noted, moreover, that the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test. The question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.

Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object. Our precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of

all First Amendment protection .... The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.

“The general rule is that the speaker and the audience, not the government, assess the value of the information presented.” There are some instances in which compelled subsidies for speech contradict that constitutional principle. Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

In the Government’s view the assessment in this case is permitted by *Glickman* because it is similar in important respects. It imposes no restraint on the freedom of an objecting party to communicate its own message; the program does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views. These points were noted in *Glickman* in the context of a different type of regulatory scheme and are not controlling of the outcome. The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

In *Glickman* we stressed from the very outset that the entire regulatory program must be considered in

resolving the case. In deciding that case we emphasized “the importance of the statutory context in which it arises.” The California tree fruits were marketed “pursuant to detailed marketing orders that had displaced many aspects of independent business activity.” Indeed, the marketing orders “displaced competition” to such an extent that they were “expressly exempted from the antitrust laws.” The market for the tree fruit regulated by the program was characterized by “collective action, rather than the aggregate consequences of independent competitive choices.” The producers of tree fruit who were compelled to contribute funds for use in cooperative advertising “did so as a part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme.” The opinion and the analysis of the Court proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

The features of the marketing scheme found important in *Glickman* are not present in the case now before us. As respondent notes, and as the Government does not contest, almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, there is no “heavy regulation through marketing orders” in the mushroom market. Mushroom producers are not forced to associate as a group which makes cooperative decisions. “The mushroom growing business ... is unregulated, except for the enforcement of a regional mushroom advertising program,” and “the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.”

It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.

The Government claims that, despite the lack of cooperative marketing, the *Abood* rule [*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)], protecting against compelled assessments for some speech is inapplicable. We did say in *Glickman* that *Abood* “recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one’s ‘freedom of belief.’” We take further instruction, however, from *Abood*’s statement that speech need not be characterized as political before it receives First Amendment protection. A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place. In *Abood*, the infringement upon First Amendment associational rights worked by a union shop arrangement was “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.” To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

A similar situation obtained in *Keller v. State Bar of Cal.*, [496 U.S. 1 (1990)]. A state-mandated, integrated bar sought to ensure that “all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts [were] called upon to pay a fair share of the cost.” Lawyers could be required to pay monies in support of activities that were germane to the reason justifying the compelled association in the first place, for example expenditures (including expenditures for speech) that related to “activities connected with disciplining members of the Bar or proposing ethical codes for the profession.” Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of monies to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity. The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.

The situation was much the same in *Glickman*. As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. The mandated cooperation was judged by Congress to be necessary to maintain a stable market. Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program. [T]he majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns.

The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, where the Government argued the compelled contributions for advertising were “part of a far broader regulatory system that does not principally concern speech,” there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. \* \* \* The only program the Government contends the compelled contributions serve is the very advertising scheme in question. \* \* \* The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

\* \* \*

For the reasons we have discussed, the judgment of the Court of Appeals is  
Affirmed.

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#### QUESTIONS FOR DISCUSSION FOR CASE 7.2

1. The Court states that *Glickman* is not controlling precedent for this case. How does the Court distinguish

*Glickman* from this case? What was different about the regulatory schemes that were involved in these two cases?

2. How could the government rewrite the regulatory scheme involving mushroom growers to make this forced subsidy constitutional?

### 7.3 Lanham Act—False Advertising

#### *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144 (2d Cir. 2007)

Defendant-Appellant DIRECTV, Inc. (“DIRECTV”) appeals from the ... opinion and order of the United States District Court for the Southern District of New York ..., preliminarily enjoining it from disseminating, in any market in which Plaintiff-Appellee Time Warner Cable, Inc. (“TWC”) provides cable service, certain television commercials and Internet advertisements found likely to violate the Lanham Act on literal falsity grounds.

This appeal requires us to clarify certain aspects of our false advertising doctrine. We make three clarifications in particular. First, we hold that an advertisement can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message. Second, we decide that the category of non-actionable “puffery” encompasses visual depictions that, while factually inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them in navigating the marketplace. Third, we conclude that the likelihood of irreparable harm may be presumed where the plaintiff demonstrates a likelihood of success in showing that the defendant’s comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even though the plaintiff is not identified by name. \* \* \*

#### Factual Background

##### A. The Parties

TWC and DIRECTV are major players in the multi-channel video service industry. TWC is the second-largest cable company in the United States, serving more than 13.4 million subscribers. Like all cable providers, TWC must operate through franchises let by

local government entities; it is currently the franchisee in the greater part of New York City. DIRECTV is one of the country’s largest satellite service providers, with more than 15.6 million customers nationwide. Because DIRECTV broadcasts directly via satellite, it is not subject to the same franchise limitations as cable companies. As a result, in the markets where TWC is the franchisee, DIRECTV and other satellite providers pose the greatest threat to its market share. \* \* \*

TWC offers both analog and digital television services to its customers. DIRECTV, on the other hand, delivers 100% of its programming digitally. Both companies, however, offer high-definition (“HD”) service on a limited number of their respective channels. Transmitted at a higher resolution than analog or traditional digital programming, HD provides the home viewer with theater-like picture quality on a wider screen. \* \* \* To view programming in HD format, customers of either provider must have an HD television set.

There is no dispute, at least on the present record, that the HD programming provided by TWC and DIRECTV is equivalent in picture quality. In terms of non-HD programming, digital service generally yields better picture quality than analog service, because a digital signal is more resistant to interference. That said, TWC’s analog cable service satisfies the technical specifications, e.g. signal level requirements and signal leakage limits, set by the Federal Communications Commission (“FCC”). \* \* \*

##### B. DirecTV’s “Source Matters” Campaign

In the fall of 2006, DIRECTV launched a multimedia advertising campaign based on the theme of “SOURCE MATTERS.” The concept of the campaign was to educate consumers that to obtain HD-standard picture

quality, it is not enough to buy an HD television set; consumers must also receive HD programming from the “source,” *i.e.*, the television service provider.

### 1. Jessica Simpson Commercial

As part of its new campaign, DIRECTV began running a television commercial in October 2006 featuring celebrity Jessica Simpson. In the commercial, Simpson, portraying her character of Daisy Duke from the movie *The Dukes of Hazzard*, says to some of her customers at the local diner:

**Simpson:** Y’all ready to order?

Hey, 253 straight days at the gym to get this body and you’re not gonna watch me on DIRECTV HD?

You’re just not gonna get the best picture out of some fancy big screen TV without DIRECTV.

It’s broadcast in 1080i. I totally don’t know what that means, but I want it.

\* \* \*

\* \* \* The Revised Simpson Commercial ... ends with [the] tag line: “For an HD picture that can’t be beat, get DIRECTV.”

### 2. William Shatner Commercial

DIRECTV debuted another commercial in October 2006, featuring actor William Shatner as Captain James T. Kirk, his character from the popular *Star Trek* television show and film series. The following conversation takes place on the Starship Enterprise:

**Mr. Chekov:** Should we raise our shields, Captain?

**Captain Kirk:** At ease, Mr. Chekov.

Again with the shields. I wish he’d just relax and enjoy the amazing picture clarity of the DIRECTV HD we just hooked up.

With what Starfleet just ponied up for this big screen TV, settling for cable would be illogical.

**Mr. Spock:** [Clearing throat.]

**Captain Kirk:** What, I can’t use that line?

\* \* \*

[The] Revised Shatner Commercial [ends] with the ... tag line, “For an HD picture that can’t be beat, get DIRECTV.”

### 3. Internet Advertisements

DIRECTV also waged its campaign in cyberspace, placing banner advertisements on various websites to promote the message that when it comes to picture quality, “source matters.” The banner ads have the same basic structure. They open by showing an image that is so highly pixelated that it is impossible to discern what is being depicted. On top of this indistinct image is superimposed the slogan, “SOURCE MATTERS.” After about a second, a vertical line splits the screen into two parts, one labeled “OTHER TV” and the other “DIRECTV.” On the OTHER TV side of the line, the picture is extremely pixelated and distorted, like the opening image. By contrast, the picture on the DIRECTV side is exceptionally sharp and clear. The DIRECTV screen reveals that what we have been looking at all along is an image of New York Giants quarterback Eli Manning; in another ad, it is a picture of two women snorkeling in tropical waters. The advertisements then invite browsers to “FIND OUT WHY DIRECTV’S picture beats cable” and to “LEARN MORE” about a special offer. In the original design, users who clicked on the “LEARN MORE” icon were automatically directed to the HDTV section of DIRECTV’s website.

In addition to the banner advertisements, DIRECTV created a demonstrative advertisement that it featured on its own website. Like the banner ads, the website demonstrative uses the split-screen technique to compare the picture quality of “DIRECTV” to that of “OTHER TV,” which the ad later identifies as representing “basic cable,” *i.e.*, analog cable. The DIRECTV side of the screen depicts, in high resolution, an image of football player Kevin Dyson making a touchdown at the Super Bowl. The portion of the image on the OTHER TV side is noticeably pixelated and blurry. This visual display is accompanied by the following text: “If you’re hooking up your high-definition TV to basic cable, you’re not getting the best picture on every channel. For unparalleled clarity, you need DIRECTV HD. You’ll enjoy 100% digital picture and sound on every channel and also get the most sports in HD—including all your favorite football games in high definition with NFL SUNDAY TICKET.”

### Procedural History

\* \* \*

## B. Preliminary Injunction Motion

[TWC filed motions for a preliminary injunction, challenging the Revised Simpson and Revised Shatner Commercials, and the Internet Advertisements.]

## C. The District Court's February 5, 2007 Opinion and Order

On February 5, 2007, the District Court issued a decision granting TWC's motion. The District Court determined that TWC had met its burden of showing that each of the challenged advertisements was likely to be proven literally false. \* \* \*

### Discussion

A party seeking preliminary injunctive relief must establish: (1) either (a) a likelihood of success on the merits of its case or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor, *and* (2) a likelihood of irreparable harm if the requested relief is denied. \* \* \*

## A. Likelihood of Success on the Merits

### 1. Television Commercials

\* \* \*

Two different theories of recovery are available to a plaintiff who brings a false advertising action under § 43(a) of the Lanham Act. First, the plaintiff can demonstrate that the challenged advertisement is literally false, *i.e.*, false on its face. When an advertisement is shown to be literally or facially false, consumer deception is presumed and “the court may grant relief without reference to the advertisement’s [actual] impact on the buying public.” “This is because plaintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe.”

Alternatively, a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers. “[P]laintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener [or viewer] that conflicts with reality”—a claim that “invites a comparison of the impression, rather than the statement, with the truth.” Therefore, whereas “plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, ... a district court *must* rely on extrinsic evidence [of

consumer deception or confusion] to support a finding of an implicitly false message.”<sup>3</sup>

Here, TWC chose to pursue only the first path of literal falsity, and the District Court granted the preliminary injunction against the television commercials on that basis. In this appeal, DIRECTV does not dispute that it would be a misrepresentation to claim that the picture quality of DIRECTV HD is superior to that of cable HD. Rather, it argues that neither commercial explicitly makes such a claim, and therefore cannot be literally false.

### a. Revised Simpson Commercial

DIRECTV's argument is easily dismissed with respect to the Revised Simpson Commercial. In the critical lines, Simpson tells audiences, “You're just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It's broadcast in 1080i.” These statements make the explicit assertion that it is impossible to obtain “the best picture”—*i.e.*, a “1080i”-resolution picture—from any source other than DIRECTV. This claim is flatly untrue; the uncontroverted factual record establishes that viewers can, in fact, get the same “best picture” by ordering HD programming from their cable service provider. We therefore affirm the District Court's determination that the Revised Simpson Commercial's contention “that a viewer cannot ‘get the best picture’ without DIRECTV is ... likely to be proven literally false.”

### b. Revised Shatner Commercial

The issue of whether the Revised Shatner Commercial is likely to be proven literally false requires more analysis. When interpreting the controversial statement, “With what Starfleet just ponied up for this big screen TV, settling for cable would be illogical,” the District Court looked not only at that particular text, but also at the surrounding context. In light of Shatner's opening comment extolling the “amazing picture quality of [] DIRECTV HD” and the announcer's closing remark highlighting the unbeatable “HD picture” provided by DIRECTV, the District Court found that the line in the middle—“settling for cable would be illogical”—clearly referred to cable's HD picture quality. Since it would only be “illogical” to “settle” for cable's HD picture if

<sup>3</sup>Under either theory, the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product. TWC has met this requirement, as it is undisputed that picture quality is an inherent and material characteristic of multichannel video service.

it was materially inferior to DIRECTV's HD picture, the District Court concluded that TWC was likely to establish that the statement was literally false.

\* \* \*

[We] now formally adopt what is known in other circuits as the "false by necessary implication" doctrine. Under this doctrine, a district court evaluating whether an advertisement is literally false "must analyze the message conveyed in full context," *i.e.*, it "must consider the advertisement in its entirety and not ... engage in disputatious dissection." If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required. However, "only an *unambiguous* message can be literally false." Therefore, if the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false. There may still be a "basis for a claim that the advertisement is misleading," but to resolve such a claim, the district court must look to consumer data to determine what "the person to whom the advertisement is addressed find[s] to be the message." In short, where the advertisement does not unambiguously make a claim, "the court's reaction is at best not determinative and at worst irrelevant."

Here, the District Court found that Shatner's assertion that "settling for cable would be illogical," considered in light of the advertisement as a whole, unambiguously made the false claim that cable's HD picture quality is inferior to that of DIRECTV's. We cannot say that this finding was clearly erroneous, especially given that in the immediately preceding line, Shatner praises the "amazing picture clarity of DIRECTV HD." We accordingly affirm the District Court's conclusion that TWC established a likelihood of success on its claim that the Revised Shatner Commercial is literally false.

## 2. Internet Advertisements

We have made clear that a district court must examine not only the words, but also the "visual images ... to assess whether [the advertisement] is literally false." It is uncontroverted that the images used in the Internet Advertisements to represent cable are inaccurate depictions of the picture quality provided by cable's digital or analog service. The Internet Advertisements are therefore explicitly and literally false.

DIRECTV does not contest this point. Rather, it asserts that the images are so grossly distorted and exaggerated that no reasonable buyer would take them to be accurate depictions "of how a consumer's television picture would look when connected to cable." Consequently, DIRECTV argues, the images are obviously just puffery, which cannot form the basis of a Lanham Act violation. \* \* \*

This Court has had little occasion to explore the concept of puffery in the false advertising context. In *Lipton v. Nature Co.*, 71 F.3d 464 (2d Cir. 1995), the one case where we discussed the subject in some depth, we characterized puffery as "[s]ubjective claims about products, which cannot be proven either true or false." We also cited to the Third Circuit's description of puffery ...: "Puffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language. 'Such sales talk, or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer .... The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.'" Applying this definition, we concluded that the defendant's contention that he had conducted "thorough" research was just puffery, which was not actionable under the Lanham Act.

\* \* \* Unlike words, images cannot be vague or broad. To the contrary, visual depictions of a product are generally "specific and measurable," and can therefore "be proven either true or false," as this case demonstrates. Yet, if a visual representation is so grossly exaggerated that no reasonable buyer would take it at face value, there is no danger of consumer deception and hence, no basis for a false advertising claim.

Other circuits have recognized that puffery can come in at least two different forms. The first form we identified in *Lipton*—"a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion." The second form of puffery, which we did not address in *Lipton*, is "an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying." We believe that this second conception of puffery is a better fit where, as here, the "statement" at issue is expressed not in words, but through images.

\* \* \*



Our review of the record persuades us that the District Court clearly erred in rejecting DIRECTV's puffery defense. The "OTHER TV" images in the Internet Advertisements are—to borrow the words of Ronald Boyer, TWC's Senior Network Engineer—"unwatchably blurry, distorted, and pixelated, and ... nothing like the images a customer would ordinarily see using Time Warner Cable's cable service." Boyer further explained that

the types of gross distortions shown in DIRECTV's Website Demonstrative and Banner Ads are not the type of disruptions that could naturally happen to an analog or non-HD digital cable picture. These advertisements depict the picture quality of cable television as a series of large colored square blocks, laid out in a grid like graph paper, which nearly entirely obscure the image. This is not the type of wavy or "snowy" picture that might occur from degradation of an unconverted analog cable picture, or the type of macro-blocking or "pixelization" that might occur from degradation of a digital cable picture. Rather, the patchwork of colored blocks that DIRECTV depicts in its advertisement appears to be the type of distortion that would result if someone took a low-resolution photograph and enlarged it too much or zoomed in too close. If DIRECTV intended the advertisement to depict a pixelization problem, this is a gross exaggeration of one.

As Boyer's declaration establishes, the Internet Advertisements' depictions of cable are not just inaccurate; they are not even remotely realistic. It is difficult to imagine that any consumer, whatever the level of sophistication, would actually be fooled by the Internet Advertisements into thinking that cable's picture quality is so poor that the image is "nearly entirely obscure[d]." As DIRECTV states in its brief, "even a person not acquainted with cable would realize TWC could not realistically supply an unwatchably blurry image and survive in the marketplace."

\* \* \*

For these reasons, we conclude that the District Court exceeded its permissible discretion in preliminarily enjoining DIRECTV from disseminating the Internet Advertisements.

## B. Irreparable Harm

A plaintiff seeking a preliminary injunction under the Lanham Act must persuade a court not only that it is likely to succeed on the merits, but also that it is likely to

suffer irreparable harm in the absence of immediate relief. Because "[i]t is virtually impossible to prove that so much of one's sales will be lost or that one's goodwill will be damaged as a direct result of a competitor's advertisement," we have resolved that a plaintiff "need not ... point to an actual loss or diversion of sales" to satisfy this requirement. At the same time, "something more than a plaintiff's mere subjective belief that [it] is injured or likely to be damaged is required before [it] will be entitled even to injunctive relief." The rule in this Circuit, therefore, is that a plaintiff "must submit proof which provides a reasonable basis" for believing that the false advertising will likely cause it injury.

In general, "[t]he likelihood of injury and causation will not be presumed, but must be demonstrated in some manner." We have held, however, that these elements may be presumed "where [the] plaintiff demonstrates a likelihood of success in showing literally false [the] defendant's comparative advertisement which mentions [the] plaintiff's product by name." We explained the reason for the presumption in *McNeilab, Inc. v. American Home Products Corp.*, 848 F.2d 34 (2d Cir. 1988). There, we observed that in the case of a "misleading, non-comparative commercial[] which tout[s] the benefits of the product advertised but ma[kes] no direct reference to any competitor's product," the injury "accrues equally to all competitors; none is more likely to suffer from the offending broadcasts than any other." Thus, "some indication of actual injury and causation" is necessary "to satisfy Lanham Act standing requirements and to ensure [the] plaintiff's injury [is] not speculative." By contrast, where the case presents a false comparative advertising claim, "the concerns ... regarding speculative injury do not arise." This is because a false "comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer." Accordingly, no proof of likely injury is necessary.

Although neither of the television commercials identifies TWC by name, the rationale for a presumption of irreparable harm applies with equal force to this case. The Revised Shatner Commercial explicitly disparages the picture quality of "cable." As the District Court found, TWC *is* "cable" in the areas where it is the franchisee. Thus, even though Shatner does not identify TWC by name, consumers in the markets covered by the preliminary injunction would undoubtedly understand his derogatory statement, "settling for cable would be illogical," as referring to TWC. Because the Revised Shatner Commercial "necessarily diminishes" TWC's value "in the minds of the consumer," the

District Court properly accorded TWC a presumption of irreparable harm.

The Revised Simpson Commercial ... does not explicitly refer to “cable.” However, the fact that the commercial does not name plaintiff’s product is not necessarily dispositive. [T]he application of the presumption is disfavored “where the products are not obviously in competition *or* where the defendant’s advertisements make no direct reference to any competitor’s products.” According to a survey in the record, approximately 90% of households have either cable or satellite service. Given the nearly binary structure of the television services market, it would be obvious to consumers that DIRECTV’s claims of superiority are aimed at diminishing the value of cable—which, as discussed above, is synonymous with TWC in the areas covered by the preliminary injunction. Therefore, although the Revised Simpson Commercial does not explicitly mention TWC or cable, it “necessarily diminishes” the value of TWC’s product. The District Court thus did not err in presuming that TWC has “a reasonable basis” for believing that the advertisement will likely cause it injury.

In sum, we conclude that the District Court did not exceed its allowable discretion in preliminarily enjoining the further dissemination of the Revised Simpson and Revised Shatner Commercials in any market where TWC is the franchisee. \* \* \*

## Conclusion

For the foregoing reasons, we AFFIRM the preliminary injunction in part [and] VACATE it in part ....

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### QUESTIONS FOR DISCUSSION FOR CASE 7.3

1. If you think a competitor has issued a false or misleading advertisement, what types of information do you need to gather to persuade a court to issue a preliminary injunction?
  2. Practically speaking, why would a competitor want to argue that an advertisement is literally false rather than implicitly false?
  3. What is the difference between puffery and misrepresentation?
  4. Could the FTC have brought an action against DIRECTV? If so, on what basis?
- 

## 7.4 Commercial Speech, FTC Act—Deceptive Advertising *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992)

Kraft, Inc. (“Kraft”) asks us to review an order of the Federal Trade Commission (“FTC” or “Commission”) finding that it violated §§ 5 and 12 of the Federal Trade Commission Act (“Act”). The FTC determined that Kraft, in an advertising campaign, had misrepresented information regarding the amount of calcium contained in Kraft Singles American Pasteurized Process Cheese Food (“Singles”) relative to the calcium content in five ounces of milk and in imitation cheese slices. The FTC ordered Kraft to cease and desist from making these misrepresentations and Kraft filed this petition for review. We enforce the Commission’s order.

### I

Three categories of cheese compete in the individually wrapped process slice market: process cheese food slices, imitation slices, and substitute slices. Process cheese food slices, also known as “dairy slices,” must contain at least 51% natural cheese by federal regulation. Imitation cheese slices, by contrast, contain little

or no natural cheese and consist primarily of water, vegetable oil, flavoring agents, and fortifying agents. \* \* \* Substitute slices fit somewhere in between; they fall short of the natural cheese content of process cheese food slices yet are nutritionally superior to imitation slices. Consistent with FTC usage, we refer to both imitation and substitute slices as “imitation” slices.

Kraft Singles are process cheese food slices. In the early 1980s, Kraft began losing market share to an increasing number of imitation slices that were advertised as both less expensive and equally nutritious as dairy slices like Singles. Kraft responded with a series of advertisements, collectively known as the “Five Ounces of Milk” campaign, designed to inform consumers that Kraft Singles cost more than imitation slices because they are made from five ounces of milk rather than less expensive ingredients. The ads also focused on the calcium content of Kraft Singles in an effort to capitalize on growing consumer interest in adequate calcium consumption.

The FTC filed a complaint against Kraft charging that this advertising campaign materially misrepresented the calcium content and relative calcium benefit of Kraft Singles. The FTC Act makes it unlawful to engage in unfair or deceptive commercial practices, or to induce consumers to purchase certain products through advertising that is misleading in a material respect. Thus, an advertisement is deceptive under the Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. \* \* \* In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers.

Two facts are critical to understanding the allegations against Kraft. First, although Kraft does use five ounces of milk in making each Kraft Single, roughly 30% of the calcium contained in the milk is lost during processing. Second, the vast majority of imitation slices sold in the United States contain 15% of the U.S. Recommended Daily Allowance (RDA) of calcium per ounce, roughly the same amount contained in Kraft Singles. Specifically then, the FTC complaint alleged that the challenged advertisements made two implied claims, neither of which was true: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the “milk equivalency” claim); and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the “imitation superiority” claim).

The two sets of ads at issue in this case, referred to as the “Skimp” ads and the “Class Picture” ads, ran nationally in print and broadcast media between 1985 and 1987. The Skimp ads were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to their milk and calcium content. The broadcast version of this ad on which the FTC focused contained the following audio copy:

**Lady (voice over):** I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy Kraft Singles. Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big Kraft means. Good thing I do.

**Singers:** Kraft Singles. More milk makes 'em ... more milk makes 'em good.

**Lady (voice over):** Skimp on her? No way.

The visual image corresponding to this copy shows, among other things, milk pouring into a glass until it reaches a mark on the glass denoted “five ounces.” The commercial also shows milk pouring into a glass which bears the phrase “5 oz. milk slice” and which gradually becomes part of the label on a package of Singles. In January 1986, Kraft revised this ad, changing “Kraft has five ounces per slice” to “Kraft is *made from* five ounces per slice,” and in March 1987, Kraft added the disclosure, “one 3/4 ounce slice has 70% of the calcium of five ounces of milk” as a subscript in the television commercial and as a footnote in the print ads.

The Class Picture ads also emphasized the milk and calcium content of Kraft Singles but, unlike the Skimp ads, did not make an express comparison to imitation slices. The version of this ad examined by the FTC depicts a group of school children having their class picture taken, and contains the following audio copy:

**Announcer (voice over):** Can you see what's missing in this picture?

Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why Kraft Singles are important. Kraft is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth!

**Photographer:** Say Cheese!

**Kids:** Cheese!

**Announcer (voice over):** Say Kraft Singles. 'Cause kids love Kraft Singles, right down to their bones.

The Class Picture ads also included the subscript disclaimer mentioned above.

After a lengthy trial, the Administrative Law Judge (ALJ) concluded that both the Skimp and Class Picture ads made the milk equivalency claim. \* \* \* Further, the ALJ concluded that both sets of ads falsely conveyed the imitation superiority claim .... According to the ALJ, both claims were material because they implicated important health concerns. He therefore ordered Kraft to cease and desist from making these claims about any of its individually wrapped slices of process cheese food, imitation cheese, or substitute cheese.

The FTC affirmed the ALJ's decision, with some modifications. As to the Skimp ads, the Commission found that four elements conveyed the milk equivalency

claim: (1) the use of the word “has” in the phrase “Kraft has five ounces per slice”; (2) repetition of the precise amount of milk in a Kraft Single (five ounces); (3) the use of the word “so” to link the reference to milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to a five-ounce mark, and the superimposition of that image onto a package of Singles. It also found two additional elements that conveyed the imitation superiority claim: (1) the express reference to imitation slices combined with the use of comparative language (“hardly any,” “but”); and (2) the image of a glass containing very little milk during the reference to imitation slices, followed by the image of a glass being filled to the five-ounce mark during the reference to Kraft Singles. The Commission based all of these findings on its own impression of the advertisements and found it unnecessary to resort to extrinsic evidence; it did note, however, that the available extrinsic evidence was consistent with its determinations.

The Commission then examined the Class Picture ads—once again, without resorting to extrinsic evidence—and found that they contained copy substantially similar to the copy in the Skimp ads that conveyed the impression of milk equivalency. It rejected, however, the ALJ’s finding that the Class Picture ads made an imitation superiority claim, determining that the ads neither expressly compared Singles to imitation slices, nor contained any visual images to prompt such a comparison, and that available extrinsic evidence did not support the ALJ’s finding.

The FTC next found that the claims were material to consumers. It concluded that the milk equivalency claim is a health-related claim that reasonable consumers would find important and that Kraft believed that the claim induced consumers to purchase Singles. The FTC presumed that the imitation superiority claim was material because it found that Kraft intended to make that claim. It also found that the materiality of that claim was demonstrated by evidence that the challenged ads led to increased sales despite a substantially higher price for Singles than for imitation slices.

Finally, the FTC modified the ALJ’s cease and desist order by extending its coverage from “individually wrapped slices of cheese, imitation cheese, and substitute cheese” to “any product that is a cheese, related cheese product, imitation cheese, or substitute cheese.” The Commission found that the serious, deliberate nature of the violation, combined with the transferability of the violations to other cheese products, justified a broader order. Kraft filed this petition to set-aside the

Commission’s order or, alternatively, to modify its scope.

\* \* \*

### III.

Kraft[’s] ... principal claim is that the FTC erred as a matter of law in not requiring extrinsic evidence of consumer deception. Without such evidence, Kraft claims (1) that the FTC had no objective basis for determining if its ads actually contained the implied claims alleged, and (2) that the FTC’s order chills constitutionally protected commercial speech. Alternatively, Kraft contends that substantial evidence does not support the FTC’s finding that the Class Picture ads contain the milk equivalency claim. Finally, Kraft maintains that even if it did make the alleged milk equivalency and imitation superiority claims, substantial evidence does not support the FTC’s finding that these claims were material to consumers. We address each contention in turn.

#### A.

##### 1.

In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence. The most convincing extrinsic evidence is a survey “of what consumers thought upon reading the advertisement in question,” but the Commission also relies on other forms of extrinsic evidence including consumer testimony, expert opinion, and copy tests of ads.

Kraft has no quarrel with this approach when it comes to determining whether an ad conveys *express* claims, but contends that the FTC should be required, as a matter of law, to rely on extrinsic evidence rather than its own subjective analysis in all cases involving allegedly *implied* claims.<sup>4</sup> The basis for this argument is

<sup>4</sup>Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way. To illustrate, consider the following. Suppose a certain automobile gets poor gas mileage, say, 10 miles per gallon. One advertisement boasts that it gets 30 miles per gallon while another identifies the car as the “Miser,” depicts it rolling through the countryside past one gas station after another, and proclaims that the car is inexpensive to operate. Both ads make deceptive claims: the first does so expressly, the second does so impliedly.

that implied claims, by definition, are not self-evident from the face of an ad. This, combined with the fact that consumer perceptions are shaped by a host of external variables—including their social and educational backgrounds, the environment in which they view the ad, and prior experiences with the product advertised—makes review of implied claims by a five-member commission inherently unreliable. The Commissioners, Kraft argues, are simply incapable of determining what implicit messages consumers are likely to perceive in an ad. Making matters worse, Kraft asserts that the Commissioners are predisposed to find implied claims because the claims have been identified in the complaint, rendering it virtually impossible for them to reflect the perceptions of unbiased consumers.

Kraft buttresses its argument by pointing to the use of extrinsic evidence in an analogous context: cases brought under § 43(a) of the Lanham Act. Courts hearing deceptive advertising claims under that Act, which provides a private right of action for deceptive advertising, generally require extrinsic proof that an advertisement conveys an implied claim. Were this a Lanham Act case, a reviewing court in all likelihood would have relied on extrinsic evidence of consumer perceptions. While this disparity is sometimes justified on grounds of advertising “expertise”—the FTC presumably possesses more of it than courts—Kraft maintains this justification is an illusory one in that the FTC has no special expertise in discerning consumer perceptions. Indeed, proof of the FTC’s inexpertise abounds: false advertising cases make up a small part of the Commission’s workload, most commissioners have little prior experience in advertising, and the average tenure of commissioners is very brief. That evidence aside, no amount of expertise in Kraft’s view can replace the myriad of external variables affecting consumer perceptions. Here, the Commission found implied claims based solely on its own intuitive reading of the ads (although it did reinforce that conclusion by examining the proffered extrinsic evidence). Had the Commission fully and properly relied on available extrinsic evidence, Kraft argues it would have conclusively found that consumers do not perceive the milk equivalency and imitation superiority claims in the ads.

While Kraft’s arguments may have some force as a matter of policy, they are unavailing as a matter of law. Courts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, and we decline to do so as well. We hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are

conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.

\* \* \*

## 2.

The crux of Kraft’s first amendment argument is that the FTC’s current subjective approach chills some truthful commercial speech. \* \* \* Society has a strong interest “in the free flow of commercial information” critical to a free market economy, and it is this interest the first amendment vindicates in protecting commercial speech. However, “[f]alse, deceptive, or misleading advertising” does not serve that interest and thus this category of commercial speech “remains subject to restraint.”

Kraft contends that by relying on its own subjective judgment that an ad, while literally true, implies a false message, the FTC chills nonmisleading, protected speech because advertisers are unable to predict whether the FTC will find a particular ad misleading. Advertisers can run sophisticated pre-dissemination consumer surveys and find no implied claims present, only to have the Commission determine in its own subjective view that consumers would perceive an implied claim. Indeed, Kraft maintains that is precisely what happened here. Even more troubling, Kraft maintains that the ads most vulnerable to this chilling effect are factual, comparative ads, like the Five Ounces of Milk campaign, of greatest benefit to consumers. The net result of the Commission’s subjective approach will be an influx of soft “feel good” ads designed to avoid unpredictable FTC decisions. The way to avoid this chilling effect, according to Kraft, is to require the Commission to rely on objective indicia of consumer perceptions in finding implied claims.

Kraft’s first amendment challenge is doomed by the Supreme Court’s holding in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) ....

[Z]auderer teaches that consumer surveys are not compelled by the first amendment when the alleged deception although implied, is conspicuous. In both *Zauderer* and here, an omitted piece of information—the definition of a key contractual term in *Zauderer*, the effect of processing on nutrient content here—led to potential consumer deception, and in both cases the ads were literally true, yet impliedly misleading. Kraft’s implied claims were reasonably clear from the face of the ads and not unpredictable to Kraft. \* \* \* Because we conclude that the Commission was not required to rely

on extrinsic evidence, we need not examine the extrinsic evidence proffered by Kraft that it says contravenes the Commission's findings. We note, however, that the Commission did thoroughly examine this evidence, albeit after the fact, and found that it did not refute the implied claim findings and that some of the evidence was based on unsound consumer testing methodologies.

Our holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception. Along those lines, the Commission would be well-advised to adopt a consistent position on consumer survey methodology—advertisers and the FTC, it appears, go round and round on this issue—so that any uncertainty is reduced to an absolute minimum.

### B.

Alternatively, Kraft argues that substantial evidence does not support the FTC's finding that the Class Picture ads convey a milk equivalency claim. \* \* \*

We find substantial evidence in the record to support the FTC's finding. Although Kraft downplays the nexus in the ads between milk and calcium, the ads emphasize visually and verbally that five ounces of milk go into a slice of Kraft Singles; this image is linked to calcium content, strongly implying that the consumer gets the calcium found in five ounces of milk. \* \* \*

Kraft asserts that the literal truth of the Class Picture ads—they *are* made from five ounces of milk and they *do* have a high concentration of calcium—makes it illogical to render a finding of consumer deception. The difficulty with this argument is that even literally true statements can have misleading implications. Here, the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing, which leaves consumers with a misleading impression about calcium content. The critical fact is not that reasonable consumers might believe that a 3/4 ounce slice of cheese actually contains five ounces of *milk*, but that reasonable consumers might believe that a 3/4 ounce slice actually contains the *calcium* in five ounces of milk.

### C.

Kraft next asserts that the milk equivalency and imitation superiority claims, even if made, are not material

to consumers. A claim is considered material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." The Commission is entitled to apply, within reason, a presumption of materiality, and it does so with three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. Absent one of these situations, the Commission examines the record and makes a finding of materiality or immateriality.

Here, the ALJ concluded that both claims were presumptively material because calcium is a significant health concern to consumers. The Commission upheld this conclusion, although it applied a presumption of materiality only to the imitation superiority claim. Kraft asserts the Commission's determination is not supported by substantial evidence. We disagree.

In determining that the milk equivalency claim was material to consumers, the FTC cited Kraft surveys showing that 71% of respondents rated calcium content an extremely or very important factor in their decision to buy Kraft Singles, and that 52% of female, and 40% of all respondents, reported significant personal concerns about adequate calcium consumption. The FTC further noted that the ads were targeted to female homemakers with children and that the 60 milligram difference between the calcium contained in five ounces of milk and that contained in a Kraft Single would make up for most of the RDA calcium deficiency shown in girls aged 9-11. Finally, the FTC found evidence in the record that Kraft designed the ads with the intent to capitalize on consumer calcium deficiency concerns.

Significantly, the FTC found further evidence of materiality in Kraft's conduct: despite repeated warnings, Kraft persisted in running the challenged ads. Before the ads even ran, ABC television raised a red flag when it asked Kraft to substantiate the milk and calcium claims in the ads. Kraft's ad agency also warned Kraft in a legal memorandum to substantiate the claims before running the ads. Moreover, in October 1985, a consumer group warned Kraft that it believed the Skimp ads were potentially deceptive. Nonetheless, a high-level Kraft executive recommended that the ad copy remain unaltered because the "Singles business is growing for the first time in four years due in large part to the copy." Finally, the FTC and the California Attorney General's Office independently notified the

company in early 1986 that investigations had been initiated to determine whether the ads conveyed the milk equivalency claims. Notwithstanding these warnings, Kraft continued to run the ads and even rejected proposed alternatives that would have allayed concerns over their deceptive nature. From this, the FTC inferred—we believe, reasonably—that Kraft thought the challenged milk equivalency claim induced consumers to purchase Singles and hence that the claim was material to consumers.

With regard to the imitation superiority claim, the Commission applied a presumption of materiality after finding evidence that Kraft intended the challenged ads to convey this message. \* \* \* It found this presumption buttressed by the fact that the challenged ad copy led to increased sales of Singles, even though they cost 40 percent more than imitation slices. Finally, the FTC determined that Kraft's consumer surveys were insufficient to rebut this inference and in particular criticized Kraft's survey methodology because it offered limited response options to consumers.

#### IV.

The Commission's cease and desist order prohibits Kraft from running the Skimp and Class Picture ads, as well as from advertising any calcium or nutritional claims not supported by reliable scientific evidence. This order extends not only to the product contained in the deceptive advertisements (Kraft Singles), but to all Kraft cheeses and cheese-related products, which include Cracker Barrel, Velveeta, and Philadelphia Brand Cream Cheese. Kraft contends this order is too broad and must be set-aside or modified because it (1) bans constitutionally protected commercial speech, and (2) is not rationally related to Kraft's violation of the Act.

#### A.

First amendment infirmities arise, according to Kraft, from the sweep of the order: by banning commercial speech that is only *potentially* misleading, the order chills some non-deceptive advertising deserving of constitutional protection. \* \* \*

\* \* \*

Kraft asserts that its advertisements are only potentially misleading ... because the milk equivalency and imitation superiority claims are true and verifiable, there is no evidence that these claims actually misled

consumers, and the advertising medium is not inherently conducive to deception. Alternative remedial measures were readily available to the Commission, such as modifications to the ads or prominent disclosures, and thus, Kraft contends, the order is broader than reasonably necessary to prevent deception. \* \* \*

We reject Kraft's argument. To begin with, the Commission determined that the ads were *actually* misleading, not *potentially* misleading, thus justifying a total ban on the challenged ads. Moreover, even if we were to assume the order bans some potentially misleading speech, it is only constitutionally defective if it is no "broader than reasonably necessary to prevent the [deception]." We conclude that it is sufficiently narrow to pass constitutional muster .... [T]he restriction at issue here is an administrative cease and desist order directed toward one company's cheese ads and predicated on a specific finding of past deceptive practices.

To reiterate, the FTC's order does two things: it prohibits the Skimp ads and the Class Picture ads (as *currently* designed) and it requires Kraft to base future nutrient and calcium claims on reliable scientific evidence. Kraft mischaracterizes the decision as a categorical ban on commercial speech when in fact it identifies with particularity two nutrient claims that the Commission found actually misleading and prohibits only those claims. It further places on Kraft the (minor) burden of supporting future nutrient claims with reliable data. This leaves Kraft free to use any advertisement it chooses, including the Skimp and Class Picture ads, so long as it either eliminates the elements specifically identified by the FTC as contributing to consumer deception or corrects this inaccurate impression by adding prominent, unambiguous disclosures. We note one additional consideration further alleviating first amendment concerns; Kraft, like any party to an FTC order, may seek an advisory opinion from the Commission as to whether any future advertisements comply with its order, and this procedure has been specifically cited by courts as one method of reducing advertiser uncertainty.

For these reasons, we hold that the specific prohibitions imposed on Kraft in the FTC's cease and desist order are not broader than reasonably necessary to prevent deception and hence not violative of the first amendment. \* \* \* The *subject* of Kraft's ads (i.e., the milk and calcium content of Singles) is obviously a perfectly legitimate subject of commercial advertising. It is only the *manner* of presentation that needs rectification. Kraft is free to continue advertising the milk

and calcium content in its cheese products, and it can avoid future violations by correcting the misleading elements identified in the FTC's decision. Kraft could, for example, redesign the Skimp and Class Picture ads so that calcium content is accurately presented (i.e., "each Kraft Single contains the calcium equivalent of 3.5 ounces of milk") or it could add prominent, unambiguous disclosures about calcium loss in processing, either of which would put it in full compliance with the order.

## B.

Alternatively, Kraft argues that the scope of the order is not "reasonably related" to Kraft's violation of the Act because it extends to products that were not the subject of the challenged advertisements. The FTC has discretion to issue multi-product orders, so-called "fencing-in" orders, that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future. Such an order must be sufficiently clear that it is comprehensible to the violator, and must be "reasonably related" to a violation of the Act. Kraft does not challenge the order's clarity or precision but only its reasonableness.

In determining whether a broad fencing-in order bears a "reasonable relationship" to a violation of the Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations. Here, the ALJ found that Kraft had not engaged in a long-term pattern of deceptive advertising, and that this was an isolated incident in response to significant competitive pressures on Kraft; hence, the ALJ opted for a narrow order. The FTC disagreed; it concluded that Kraft's violations were serious, deliberate, and easily transferable to other Kraft products, thus warranting a broad fencing-in order.

We find substantial evidence to support the scope of the order. The Commission based its finding of seriousness on the size (\$15 million annually) and duration (two and one-half years) of the ad campaign and on the difficulty most consumers would face in judging the truth or falsity of the implied calcium claims. Although Kraft disputes the Commission's \$15 million figure, arguing it covers many non-deceptive or unchallenged advertisements, that does not obviate the fact that this was an expensive, nationwide campaign with highly effective results. Moreover, the FTC properly found that it is unreasonable to expect most consumers to perform

the calculations necessary to compare the calcium content of Kraft Singles with five ounces of milk given the fact that the nutrient information on milk cartons is not based on a five-ounce serving.

As noted previously, the Commission also found that Kraft's conduct was deliberate because it persisted in running the challenged ad copy despite repeated warnings from outside sources that the copy might be implicitly misleading. Kraft challenges this finding, arguing it responded to these warnings by acting in good faith to modify the ads, and further that it commissioned a post-dissemination survey to determine whether the complaints had any merit. This survey found that only an insignificant percentage of respondents detected the alleged claims. We reject these contentions. The deceptive claims were apparent from the face of the ad, but even if they somehow eluded Kraft, the Commission reasonably concluded that the steady stream of warnings should have put Kraft on notice that its surveys were somehow inadequate or defective. Kraft made three modifications to the ads, but two of them were implemented at the very end of the campaign, more than two years after it had begun. This dilatory response provided a sufficient basis for the Commission's conclusion.

The Commission further found that the violations were readily transferable to other Kraft cheese products given the general similarity between Singles and other Kraft cheeses. \* \* \*

Finally, the FTC concluded that these factors outweighed Kraft's lack of prior violations. Kraft maintains that the Commission simply brushed aside its clean record even though prior violations are highly probative of propensity to commit future violations. This contention is also without merit because it is the circumstances of the violation as a whole, and not merely the presence or absence of any one of factor, that justifies a broad order. Hence, the FTC reasonably concluded that the seriousness, deliberateness, and transferability of the violations took precedence over the absence of any prior Kraft violations.

## V.

For the foregoing reasons, Kraft's petition to set-aside the order is DENIED and the Commission's order is ENFORCED.

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### QUESTIONS FOR DISCUSSION FOR CASE 7.4

1. How is extrinsic evidence used in deceptive advertising cases brought under the FTC Act? In



- deceptive advertising cases brought under the Lanham Act?
2. The packages containing cheese products have printed nutritional information that consumers can compare to other brands. Why does this not alleviate the FTC's concerns about consumers being misled by the advertisements?
  3. What was untrue about Kraft's revised advertisements? Why didn't a disclaimer on the bottom of the advertisement correct any deficiencies?
  4. What factors do you think prompt the FTC to act on allegedly deceptive advertising? How might a manager limit each factor's influence?

## DISCUSSION QUESTIONS

1. Hot Wax, Inc., produces and markets car waxes to carwashes through the country. Its formula for car wax incorporates carnauba waxes at a considerable cost. Turtle Wax, Inc., entered the carwash supply industry, but it uses neither carnauba nor beeswax in its car waxes. Instead, it uses mineral seal oils or wax emulsions that are considerably cheaper than traditional wax ingredients. As a result, Turtle Wax has become a leader in the car wax industry. Hot Wax filed suit against Turtle Wax, alleging that Turtle Wax engaged in false advertising in violation of Section 43(a) of the Lanham Act by promoting its products as "wax" when the products did not actually contain wax. Turtle Wax responded that Hot Wax's definition of "wax" was overly formalistic and introduced consumer surveys that indicated that consumers got exactly what they expected from a wax when they purchased Turtle Wax products—polish, shine, and protection. Hot Wax filed for summary judgment. Should the court grant summary judgment to Hot Wax? Why, or why not?
2. Miramax Films Corp. released a movie in the United States called *Scream*, which had been directed by Wes Craven, an internationally renowned director of horror movies. A year later, Columbia Pictures released *I Know What You Did Last Summer* in the United States. Shortly before the release, Miramax discovered that Columbia was marketing *Summer* as "From the Creator of *Scream*." The only link between *Scream* and *Summer* is the screenwriter Kevin Williamson. Williamson wrote an original screenplay for "*Scream*" and adapted a novel by another author for the screenplay of *Summer*. In the advertisements, Williamson's name appeared in the small-print "credit block" of *Summer*, but he was never named or otherwise identified as the "creator" to whom the advertisements refer.
 

Miramax filed suit against Columbia, alleging that Columbia was trying to profit from the popularity of *Scream* by inducing potential viewers of horror movies to see *Summer* in the false belief that it originated from the same source as *Scream*. Miramax seeks a preliminary injunction against further use of the advertising. Should the court grant the relief requested to Miramax? Why, or why not?
3. Abbott Laboratories makes and sells Ensure, a nutritional supplement beverage (NSB). Ensure has consistently held the greatest market share of all NSBs on the market. Gerber Products Co. reformulated a former product, Resource, into an NSB and launched an advertising campaign. The campaign asserted, among other things, that "America Prefers Resource Over Ensure" and "National Preference Winner Resource Beats Ensure." Abbot asserts that Gerber's claim is false because the tests that Gerber relied upon to support its claim were conducted as taste tests and not as tests indicating overall preference. Resource and Ensure are both used for medicinal or medical reasons and are substantially similar in nutritional value. Abbot filed suit under Section 43(a) of the Lanham Act, alleging that Gerber's advertising claims were literally false. Are they? Why, or why not?
4. Two Rivers, Wisconsin, enacted an extensive ordinance regulating the placement and nature of outdoor advertising. The preamble of the ordinance recognized "the need to protect the safety and welfare of the public; the need for well-maintained and attractive sign displays within the community; and the need for adequate business identification, advertising, and communication." Lavey is the president of the Lakeland Group, an advertising and public relations business. Lavey and the Lakeland Group have owned billboards for the last 15 years and have rented them to the public for the display of commercial and noncommercial messages. Two Rivers has frequently cited Lavey and the Lakeland Group for placing off-premises signs in areas where

the ordinance does not permit such signs. Lavey brought this action seeking a declaration that the ordinance violates his First Amendment rights. How should the court analyze this issue? What result should it reach?

5. The California Dental Association (CDA) is a voluntary nonprofit association of local dental societies to which about three-fourths of the dentists belong. The CDA lobbies and litigates in its members' interests and conducts marketing and public relations campaigns for their benefit. The dentists who belong to the CDA through the local associations agree to abide by a Code of Ethics (Code) that prohibits false and misleading advertising. The local associations enforce the code by denying membership to new dentists who refuse to withdraw or revise objectionable advertisements and by subjecting current members who violate the Code to censure, suspension, or expulsion from the CDA.

The FTC brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated Section 5 of the FTC Act. In particular, the FTC alleged that the CDA had unreasonably restricted price advertising, particularly about discounted fees, and advertising relating to the quality of dental services. Has the CDA violated the FTC Act? Why, or why not?

6. Sabal manufactured and sold of a line of over-the-counter topical hair loss products known as the "hair farming system." She claimed that these products work by cleaning out congested pores and allowing hair to escape that would otherwise be trapped beneath the scalp. Sabal entered into an exclusive marketing agreement with Mega Systems, Inc., to advertise her hair-farming products on a nationally broadcast radio infomercial. During the infomercial, she stated that her products "can deep clean underneath the surface of the scalp, and clean out all the debris that prevents the hair or blocks the hair from reaching the surface." She also stated: "I have a right to this theory, whether the medical community believes me or not, although they soon will because I'll be written up in most of the major medical journals around the world .... It's guaranteed to work on every human being .... And everyone should have their hair back in six months to a year, permanently, painlessly, and never have to purchase anything again." In addition to the infomercial, Sabal published similar claims on an Internet website and in a book she published.

The FTC charged her with deceptive advertising and fraudulent misrepresentation. How should the court rule on the FTC's motion for a preliminary injunction?

7. Novell, Inc., produces its NetWare networking software in two forms: original and upgrade. The upgrade version is substantially identical to the original in function; the primary difference is its lower price as the upgrade is available only to owners of previous versions of the software. Network Trade Center, Inc. (NTC) purchased older versions of the NetWare software in bulk at discounted prices, and ordered the cheaper upgrade of the newer software from authorized Novell distributors. (At no time was NTC an authorized distributor of Novell software.) NTC then advertised the "upgrade" as "New Retail" or as a "Special Novell Promotional Package" while showing pictures of the "original" NetWare box, and sold it to end users. Many end users expressed confusion to both NTC and Novell about the extent of the license they obtained: some thought that they had received the "original" retail version, and others thought that they could register the upgrade with Novell. Some became so frustrated that they returned their copies to NTC. Once Novell discovered NTC's practice, Novell ordered NTC to stop, but NTC continued to advertise the product. Novell has filed suit, alleging, among other claims, that NTC is in violation of the Lanham Act's prohibition against false advertising. Has NTC engaged in false advertising? Why, or why not?
8. Tommy Larsen, a Danish citizen, produces aesthetically pleasing functional objects, such as furniture. Larsen designed a compact disc holder called the "CD 25," which holds 25 CDs. At first, Larsen distributed his product only in Europe, but he soon began exporting the CD 25 to the United States. Soon thereafter, Larsen looked for a U.S. distributor for his product and entered into a limited distributorship with Terk Technologies Corp. Terk placed an order for 11,232 units at \$1 per piece. Although the distribution agreement was not exclusive, Larsen treated it as though it were, allowing all orders in the United States to be fulfilled by Terk.

Despite the success of the CD 25 in high-end retail stores, Terk did not place additional orders with Larsen, stating that demand did not warrant more units. In fact, however, Terk had placed an order with Allen Machine Products for 11,000 counterfeit units of the CD 25. Terk marketed these Allen-made CD 25s as the "TOMMY LARSEN" and "CD 25."

The counterfeit holders also had markings indicating that the design was Danish and the product was produced in Denmark. The counterfeits were actually produced in New York.

Larsen, suspicious about the lack of orders from Terk, examined several of the distributed products and discovered the counterfeiting. He sued Terk, arguing that Terk had engaged in passing-off in violation of the Lanham Act. Has Terk violated the Lanham Act? Why, or why not?

9. Synegy, Inc., produces Information Production and Distribution Systems, a software program that enables the user to integrate data from different sources. This software was targeted at companies in the pharmaceutical industry. Scott-Levin, Inc., compiles data for pharmaceutical companies that is used in computer programs such as those produced by Synegy. While working on a project for Bristol Meyers Squibb, Inc., Scott-Levin had disagreements with Synegy after Synegy changed file specifications without telling Scott-Levin and then blamed Scott-Levin for the conversion problems that ensued. In conversations with agents of Zeneca Pharmaceutical, Inc., a common customer of the two software companies, two Scott-Levin representatives discussed the problems they had working with Synegy in the past. Soon thereafter, Zeneca discontinued its relationship with Synegy. Zeneca claims that the discussions with the Scott-Levin representatives had no influence on that decision. In addition, during a client conference, Scott-Levin presented a slide show that contained the following slide: “simulate—to assume the outward qualities or appearance of, often with the intent to deceive.” Simulate, Inc., was Synegy’s name at the time of the client conference. Synegy sued Scott-Levin for commercial disparagement. Should Synegy prevail? Why, or why not?
  10. Telebrands Corp. produces infomercials for television and distributes the products advertised on the commercials in retail stores. Telebrands became the exclusive licensee of the “SAFETY CAN,” a can opener that cuts cans from the side and not from the top, thereby eliminating the sharp, jagged edge. On the packaging of the SAFETY CAN was the statement “AS SEEN ON TV” in bright red lettering. As a result of the \$3 million advertising campaign, Telebrands received over 300,000 direct response orders from consumers and over 1.9 million retail orders. Wilton Industries, Inc., then began selling a hand-held can opener that produces no sharp edges, known as the Betty Crocker “Safe Touch<sup>TM</sup>.”
- The packaging on the “Safe Touch<sup>TM</sup>” also contained the “AS SEEN ON TV” logo. According to Wilton, it planned on showing an infomercial on national television, but it never did. The only television advertising that occurred for the “Safe Touch<sup>TM</sup>” was small infomercials on cable preview channels in Chicago over a one-month time period. Telebrands alleged that the logo “AS SEEN ON TV” constitutes false advertising in violation of the Lanham Act. Telebrands asked the court to issue a preliminary injunction enjoining Wilton from using the logo. Should the court issue the preliminary injunction? Why, or why not?
11. Clorox Co. produces the top-selling brand of roach bait insecticide called Combat. United Industries is a smaller, relatively new entrant in the roach bait industry that sells the Maxattract brand of roach insecticide. To promote the Maxattract product, United produced and distributed a 15-second television commercial entitled “Side by Side.” The commercial opened with two boxes sitting on kitchen counter-tops—one was Maxattract and the other was the generic “Roach Bait” but was vaguely similar to packaging used in the Combat brand. A voice-over asked, “Can you guess which bait kills roaches in 24 hours?” The camera then panned to show two differing views of the kitchen. On the Maxattract side, the kitchen was neat and orderly; on the generic brand’s side, the room was dirty and disheveled, ostensibly as a result of the roach infestation. The words “Based on lab tests” appeared on the bottom of the screen, and another voice-over stated: “To kill roaches in 24 hours, it’s hot-shot Maxattract. Maxattract, it’s the no-wait roach bait.”
- Clorox asserted that this advertising campaign is not literally true and violates the Lanham Act’s prohibition against false advertising because scientific tests conclude that Maxattract (as well as all other roach bait products) can exterminate only those roaches that come into direct contact with the product during the 24-hour period. Clorox produced no evidence of consumer deception and therefore does not challenge the ad as being implicitly false or misleading. Clorox seeks a preliminary injunction enjoining United from using the ad in the future. Should the court issue the preliminary injunction? Why, or why not?
12. General Motors Corp. aired a commercial in which a voice was heard asking who held the record for being selected most frequently as most valuable player of the National Athletic Association’s basketball

tournament. On the screen appeared the words “Lew Alcindor,” former basketball star Kareem Abdul-Jabbar’s name before his conversion to Islam. The ad went on to list the most valuable features of the Olds 88 as a “Definite First Round Pick.” The current name, voice, signature, photograph, or likeness of Kareem Abdul-Jabbar did not appear in the ad. The trial court granted summary judgment to General Motors on Abdul-Jabbar’s right-of-publicity claim. Was the trial court’s decision correct? Why, or why not?

13. Dillard Department Stores ran a newspaper advertisement for a shirt known as a “henley.” The ad featured a photograph of a man wearing a henley shirt with the words “This is Don” in large print beside the picture and an arrow pointing toward the man’s head from the words. Underneath the words was the statement, “This is Don’s henley” with a second arrow pointing toward the shirt. The ad also contained the name of the retailer, general information about the sale price of the shirts, the name of the shirts’ manufacturer, the available sizes, and the following: “Sometimes Don tucks it in; other times he wears it loose—it looks great either way. Don loves his henley; you will too.”

Don Henley is a popular rock-and-roll musician. He founded The Eagles in the 1970s and in the 1980s and 1990s pursued a successful solo career. He has sued Dillard for violating his right of publicity. How should the court rule on his claim? Why?

14. The Virginia legislature passed two regulations that prohibited the use of certain words in advertisements for alcoholic beverages generally and advertisements within college student publications specifically.

The first regulation, which applied to all advertisements, prohibited references to mixed beverages,

except for the terms “Mixed Drinks,” “Mixed Beverages,” “Exotic Drinks,” “Polynesian Drinks,” “Cocktails,” “Cocktail Lounges,” “Liquor,” and “Spirits.” References to “Happy Hour” or similar terms were also prohibited.

The second regulation, which applied only to college student publications, limited advertising of beer, wine, and mixed beverages by restaurants in such publications to the use of the following words: “A.B.C. on-premises,” “beer,” “wine,” “mixed beverages,” “cocktails,” or “any combination of these words.” Reference to particular brands or prices was forbidden.

Educational Media at Virginia Tech, Inc., owns several print and broadcast media outlets, including a student-run newspaper at Virginia Tech. Almost 99 percent of its annual budget came from advertising revenue. It estimated that these regulations would cost it \$30,000 in lost advertising revenue each year. Educational Media challenged the two regulations on First Amendment grounds.

Should these regulations be held valid or invalid under the *Central Hudson* test?

15. Sandoz Pharmaceuticals Corp. brought suit, alleging that representations by Richardson-Vicks, Inc. (“Vicks”) regarding its product, Vicks Pediatric Formula 44, constituted false and deceptive advertising under Section 43(a) of the Lanham Act. Specifically, Sandoz challenged: (1) Vicks’ assertion that Pediatric 44 starts to work the instant it is swallowed, and (2) Vicks’ advertising claims that Pediatric 44 is superior to its competitors. Sandoz requested that the court issue a preliminary injunction against Vicks’ advertising claims. What legal rules should the court consider in evaluating this request?