

“A Beautiful Friendship”  
Commissioner Julie Brill  
Keynote Address before the  
Association of National Advertisers  
March 20, 2013

Last time we were together, we began our discussion on advertising, ICANN, and privacy to the strains of *Zou Bisou Bisou* and the image of Don Draper’s sultry young wife slinking around in the premier of the fifth season of *Mad Men*. This year, we will again talk about advertising, ICANN, and privacy. But I will let the *Mad Men* zoom off into the sunset in their Pontiac GTOs and Jaguars, and turn to our latest cultural fantasy to inspire my talk today. That’s right, we’re trading our fedoras, grey flannel suits and mini-dresses for white ties, morning coats and empire-waist gowns – and following the rest of America from uptown Manhattan to Downton Abbey.

I know some of you feel you relate better to Madison Avenue’s Don Draper than to Maggie Smith’s Dowager Countess of Grantham, but trust me, Violet Crawley has a lot to say about the issues facing both advertisers and the FTC. For example, in one scene, an offended underling asked the countess: “You want me to lie?” Her answer: “Lie is so unmusical a word.”

I often think about Violet Crowley’s quip as I look back over the FTC challenge to POM Wonderful’s advertisements for its pomegranate juice, supplements, and liquid extract.<sup>1</sup> Those ads were anything but unmusical; indeed, they sang with cleverness. For those who haven’t seen the POM ads, some of them featured an hourglass-shaped juice bottle – the spitting image of Violet Crowley’s buxom silhouette by the way – flying off dressed as a superhero out to curb prostate cancer or serving up the precious liquid in an IV drip.<sup>2</sup> Very creative, very catchy, and – most of all – very musical.

Unfortunately, we also found many of these ads to be false, misleading, and unsubstantiated. Following an administrative trial in 2011, the judge agreed with the FTC staff on 19 of the 43 challenged ads.<sup>3</sup> Both POM and the FTC staff appealed that ruling to the full FTC Commission.<sup>4</sup> The Commission found an even greater number of

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<sup>1</sup> In re POM Wonderful, LLC. FTC Docket No. 9344 (Sept. 27, 2010), *available at* <http://www.ftc.gov/os/adjpro/d9344/100927admincmplt.pdf> (Administrative complaint).

<sup>2</sup> *Id* at Exhibit C (3-4).

<sup>3</sup> In re POM Wonderful, LLC. FTC Docket no. 9344 (May 17, 2012), *available at* <http://www.ftc.gov/os/adjpro/d9344/120521pomdecision.pdf> (Initial Decision by Chief Administrative Law Judge D. Michael Chappell).

<sup>4</sup> In re POM Wonderful, LLC. FTC Docket no. 9344 (June 18, 2012), *available at* <http://www.ftc.gov/os/adjpro/d9344/120618ccappealbrief.pdf> (Complaint Counsel’s Appeal Brief); *and* In re POM Wonderful, LLC. FTC Docket no. 9344 (June 18, 2012), *available at* <http://www.ftc.gov/os/adjpro/d9344/120618respbriefonappealfromid.pdf> (Respondents Pom Wonderful LLC, Roll Global, Stewart A. Resnick, and Lynda Rae Resnick’s Brief on Appeal from the ALJ’s Initial Decision); *and* In re

problematic ads – we found 36 ads in total to contain false or deceptive claims that POM will prevent, treat, or reduce the risk of disease.<sup>5</sup> We ordered the POM defendants to cease all such false and deceptive claims.<sup>6</sup> In order to ensure that the respondents don't bypass the Commission order, as fencing in relief we required the POM defendants to have two well-designed, well-conducted, double-blind randomized controlled clinical trials to back-up any assertion that a food, drug, or dietary supplement is – and I quote – “effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease.”<sup>7</sup>

I know many of you are paying close attention to the POM case. The details of the particular ads in question are interesting, and may provide some important lessons regarding how we draw the lines between appropriate claims and inappropriate claims in the context of particular ads. And of course the broader lesson is that the FTC takes substantiation requirements seriously, in particular when they involve health claims.

But you in this room already know that; that is why you are here. Indeed, far from talking to you about POM to scold you, I am talking about POM, in part, so you understand that I come to these sorts of enforcement decisions – as Ronnie Milsap sang back in the 1980's – “hat(ing) the lies but lov(ing) the liar.”<sup>8</sup> As someone who has long been in the business of enforcing advertising law, I find myself both deeply concerned about POM's particular false and deceptive ads, and at the same time in deep admiration of the company's creativity. POM got its message across in just a few words and images. I respect the ingenuity it takes to market so effectively. In fact, I so greatly respect that talent – a talent so many of you in this room share – that I believe that POM is capable of putting together equally successful ads that stay well within the strictures of the law.

I'll go even further. American advertisers are second to none in your ability to understand and communicate with consumers. The FTC wants your tireless researchers to do the background work that instills confidence in those who hear your claims. We want your help to make sure consumers are not tricked or lied to about how their personal information is collected and used when they take in online, on-the-air, or on-paper marketing. We want your skillful wordsmiths to craft disclosures with the simplicity and power of Nike's “Just Do It.” We want your gifted designers to develop user-friendly systems through which consumers can comprehend who is collecting their personal data, how it is used, and what choices they have regarding such data collection and use.

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POM Wonderful, LLC. FTC Docket no. 9344 (June 18, 2012), *available at* <http://www.ftc.gov/os/adjpro/d9344/120618resptupperbriefonappeal.pdf> (Respondent Matthew Tupper's Brief on Appeal from the ALJ's Initial Decision).

<sup>5</sup> See Press release, FTC Commissioners Uphold Trial Judge Decision that POM Wonderful, LLC; Stewart and Lynda Resnick; Others Deceptively Advertised Pomegranate Products by Making Unsupported Health Claims (Jan. 16, 2013), *available at* <http://www.ftc.gov/opa/2013/01/pom.shtm>.

<sup>6</sup> In re POM Wonderful LLC, FTC Docket No. 9344 (Jan. 16, 2013), *available at* <http://www.ftc.gov/os/adjpro/d9344/130116pomorder.pdf> (Final Order).

<sup>7</sup> *Id* at 2.

<sup>8</sup> RONNIE MILSAP, *Hate the Lies Love the Liar*, on INSIDE (RCA Records 1982).

About now, I am sure, you are asking the same question a cautiously optimistic Lady Cora put to her mother-in-law, the dowager countess, in the just completed third *Downton Abby* season: “Are we to be friends then?” And I will answer as the countess did: “We are allies, my dear, which can be a good deal more effective.”

Nowhere is that more true than in the rapidly expanding mobile marketplace. Industry watchers say that, by the end of 2013, the number of internet-connected mobile devices will exceed the number of people on earth.<sup>9</sup> And the number of mobile users around the world will grow by 1 billion over the next five years.<sup>10</sup> Consumers are increasingly turning to mobile to manage many facets of our lives. With our smartphones in hand, we can locate our children. We can play games. We can do our banking and pay our bills. Whatever you’d want, there’s “an app for that.”

Our smart phones are the Swiss Army knives of the modern age: a powerful collection of services and functions in one handy package that slips right into our pocket. If it only had a corkscrew on the side, it would be perfect.

Who knows, even that might come standard on the iPhone 6.

And given their mutual fondness for a good vintage, that would be something both Don Draper and Violet Crawley would appreciate.

Unfortunately, what are not standard yet are adequate privacy and other necessary disclosures on mobile ads and apps.

Don’t get me wrong, I know the challenges you face working in the mobile space, with its myriad different players and limited real estate to make effective disclosures. But I have an app that tells me where I parked my car and puts another couple of quarters in the meter if I am running late. I have another app that collects all my travel tickets and reservations, notes them on my calendar, holds my digital tickets, and displays a full itinerary, with maps. (Some days I worry I will come home and find that my app has gone on vacation without me). Surely those of you who designed these apps – and millions of others that do far more complicated convolutions with one or two swipes of a finger – surely you can come up with disclosures that aren’t buried on hundreds of screens or written in language both too small and too arcane for anyone one but the most eagle-eyed attorney to comprehend.

Last month, the FTC released a mobile privacy disclosures report that laid out best practices for all players in the mobile ecosystem. The report will also inform the

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<sup>9</sup> CISCO WHITE PAPER, CISCO VISUAL NETWORKING INDEX: FORECASTING AND METHODOLOGY 2011 – 2016 (Feb. 6, 2013), available at [http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white\\_paper\\_c11-520862.pdf](http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf).

<sup>10</sup> NetworkWorld, “*Mobile Data growth accelerating worldwide, led by smartphone users*” (Feb. 7, 2013), available at <http://www.networkworld.com/news/2013/020713-cisco-data-report-266499.html>.

Department of Commerce-led effort to come up with a self-regulatory code of conduct. Though we crafted specific recommendations for the different players in the mobile ecosystem, the underlying principles for each are the same: use your creativity to provide consumers with accessible, understandable, and relevant disclosures about how their personal data will be handled, and recognize that providing such disclosures and other privacy protections should be a shared responsibility among all businesses operating in the mobile marketplace.

The importance of proper online and mobile disclosures also drove the agency to issue our revised guidance on dot com disclosures — another topic I know is of great interest to you.<sup>11</sup> We published the original guidance 13 years ago to help advertisers understand how the FTC would enforce the prohibition on deceptive and unfair practices in the then-new realm of online advertising.<sup>12</sup> But since then, we’ve seen the mass migration of online commerce to small screens in the mobile space and to social media. Clearly, our original concepts needed a little sprucing up.

So, after almost two years, a public workshop, and three public comment periods, we have a new dot com disclosure guidance, issued just last week – on my birthday I might add, so my copy was wrapped with a bow.<sup>13</sup> The main principles will not surprise anyone, because they are no different than the principles that underlie all our efforts to guard against deceptive advertising — and to protect market integrity and viability.<sup>14</sup> Consumer protection laws that apply to commercial activities in traditional media apply equally online, including in the mobile environment.<sup>15</sup> That means that when information is needed to prevent a claim from being misleading, the advertiser should, when practical, incorporate relevant limitations and qualifying information into the underlying claim, rather than having a separate disclosure.<sup>16</sup>

If a separate disclosure is absolutely necessary, it must be clear and conspicuous, often not an easy task in the mobile space where some ads are no larger than a thumbprint.<sup>17</sup> If a particular platform does not provide an opportunity to make clear and conspicuous disclosures, that platform should not be used to disseminate advertisements

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<sup>11</sup> .Com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 12, 2013), *available at* <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

<sup>12</sup> Dot Com Disclosures: Information about Online Advertising (May 3, 2000), *available at* <http://www.ftc.gov/os/2000/05/0005dotcomstaffreport.pdf>.

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Supra* note 11 at i.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* note 11 at i-iii.

that require such disclosures.<sup>18</sup> In other words, to quote my mother: if you can't do it right, don't do it at all.

The guidance also states that disclosures should be placed as close to the triggering claim as possible, and advertisements should be designed so that “scrolling” isn't necessary in order to find a disclosure.<sup>19</sup> We recommend making certain disclosures “unavoidable” – that is, placing them where the consumer has no choice but to see them.<sup>20</sup> And we discuss the circumstances under which disclosures through hyperlinks will work, and circumstances under which they may not work.<sup>21</sup>

The key, as always, is the net impression of the ad. The revised guidance notes that if a disclosure is not seen or understood by consumers, it will not change the ad's net impression, and won't prevent the ad from being misleading.<sup>22</sup> If an advertiser knows that a significant proportion of consumers are not noticing or understanding a disclosure necessary to prevent an ad from being deceptive, the advertiser should remedy that.<sup>23</sup>

I recommend our revised dot com disclosure guidance to all of you; it may not be riveting entertainment, but it is a good read. And, unlike the producers of *Downton Abbey*, we don't have to kill off any of the main characters to keep you coming back.

Actually, most *Downton* devotees, myself included, aren't there just to see which favorite family member bites the dust – or I guess which actor goes on to bigger things. We are there for the clothes, the manor trappings, and the multicourse gourmet meals. As the countess says, when asked if the best silver is appropriate for a business meal: “Nothing succeeds like excess.”

In most matters, I would have to agree. However, there is one area in which it is not clear that more is better, at least not yet – and that is the Internet Corporation for Assigned Names and Numbers, or ICANN.

As you will hear from Fadi Chehadé, the new ICANN CEO, ICANN's long promised expansion of top-level domains – those that come after the dot in a web address, such as *dot-com* or *dot-org* – is practically upon us. Next month, ICANN plans to begin to approve the first of nearly 2000 applications for new web addresses. I remain concerned, as I have been since ICANN first announced its plans, that the expansion could create opportunities for scammers to defraud consumers online, shrink law

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<sup>18</sup> *Supra* note 11 at iii.

<sup>19</sup> *Supra* note 11 at 8-10.

<sup>20</sup> *Supra* note 11 at 9.

<sup>21</sup> *Supra* note 11 at 10-14.

<sup>22</sup> *Supra* note 11 at 6-7.

<sup>23</sup> *Id.*

enforcement's ability to catch scam artists, and divert the resources of legitimate businesses into litigating and protecting their own good names.<sup>24</sup>

If a consumer surfing the web lands on a hypothetical "dot obstetrician," might she assume that all of the websites registered in this space are licensed health care providers? What if there is a "dot obstetrician" and a "dot obstetricians (with an "s")" – one limited to licensed doctors, the other not? How does she know which one to trust?

Without adequate safeguards, as the gTLDs expand, so will fraudsters' ability to trick consumers into handing over money and sensitive information. Each new gTLD could provide cover for scam artists to pretend to be your bank, your child's school, your favorite online store, or your doctor – complete with authentic looking forms and handy "pay now" buttons.

The FTC patrols cyberspace for this sort of online fraud, and to date we have brought more than 100 cases involving spam and spyware. In doing so, we often rely on Whois, the Internet record listing who owns domain names maintained by ICANN. But even ICANN recognizes that the system is flawed, often allowing bad actors to hide behind incomplete, inaccurate, or proxy information. In the FTC's investigations using Whois, we have run across websites registered to "Mickey Mouse," and "God."

I applaud Mr. Chehadé for taking actions to encourage operators of new web addresses to include additional safeguards to protect consumers from fraud or abuse. I believe that there are some high-risk areas – health, financial services, and domain names directed at children – that warrant special attention. The U.S. government agrees, and it issued a public statement encouraging applicants for new web addresses in these areas to put even more precautions in place.<sup>25</sup> I have personally discussed these issues with Mr. Chehadé, and I'm hopeful that he'll be able to effectively address our concerns and ensure that these additional safeguards are in place prior to the launch of the new gTLDs.

We are also very supportive of ICANN's efforts to make domain name registrars – the entities that sell website names to other businesses and individuals – more accountable. As ICANN continues its contractual negotiations with the registrars, we

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<sup>24</sup> Letter from the Fed Trade Comm'n to Dr. Stephen Crocker and Rod Beckstrom (Dec. 16, 2011), RE: CONSUMER PROTECTION CONCERNS REGARDING NEW GTLDS, *available at* <http://www.ftc.gov/os/closings/publicltrs/111216letter-to-icann.pdf>.

<sup>25</sup> See United States Government (USG) Input to Early Warning Process for New Generic Top-Level Domain Names (gTLDs) Via the Governmental Advisory Committee (GAC) (2012), *available at* [https://gacweb.icann.org/download/attachments/27\\_131927/Final%20USG%20Input%20into%20GAC%20Early%20Warning%20Process.pdf?version=1&modificationDate=1353453579000&api=v2](https://gacweb.icann.org/download/attachments/27_131927/Final%20USG%20Input%20into%20GAC%20Early%20Warning%20Process.pdf?version=1&modificationDate=1353453579000&api=v2) ("It is recommended that registry operators of strings geared toward vulnerable communities (e.g., children), that suggest third-party verification (e.g., professional services, charitable giving, financial services, security) or that could be confused with official governmental postal services, put additional safeguards in place").

hope they can reach an agreement that will require upfront Whois verification for the contact information of those buying a website name, before the website is launched.

If ICANN is successful in addressing these issues, it will prove itself an effective regulator of the domain name industry; law enforcement agencies will have a better chance at fighting online abuse; consumers will be able to contact businesses directly to resolve disputes; and businesses will have a way to pinpoint quickly who may be behind a site that is infringing their brands. In short, we all win. On this issue, we are clearly allies *and* friends.

To paraphrase a different – and more long-standing – classic: with respect to the advertising industry and the FTC, this should be the beginning of a beautiful friendship. We want the same thing: confident customers fueling a thriving and growing marketplace – online and off, mobile and stationary. And the only way we are going to get there is working together, bringing all our energy and creativity to helping consumers understand the facts behind the marketing and feel in control of their personal information.