

Luncheon Remarks
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PMA 29th Annual Promotion Marketing Law Conference
“Who’s In Control Now: Navigating Tumultuous Marketing Change”

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12:30 p.m.

Good afternoon. It's a pleasure to be here at PMA's 29th annual law conference.

Advertising and marketing certainly have come a long way since your 1st law conference in 1978. Since then, technology has transformed just about all forms of communication, including the ways in which you and your clients market and advertise to consumers. Indeed, so many of the goods and services that we now take for granted were the stuff of science fiction in 1978. We have evolved from eight-track tapes to Sony walkmen to portable CD players to iPods. We've gone from Betamax/VHS wars to Blu-Ray/HD-DVD wars. In 1978, you may have invited the kid next door over to play Atari; today, your kids may be playing their X-Box Live games with kids on the other side of the world. In 1978, we had never heard of CDs or DVDs or the Internet, let alone blogs, vlogs, podcasts, and wikis. And social networking was something adults did to get ahead in their careers and communities, as opposed to websites where children could post their innermost thoughts for the world to see.

Over the past three decades, the FTC, I'm pleased to say, has kept up with these technological changes. Let me share a few examples. In the 1980s, with improvements in long-distance technology and reduced costs of making long-distance calls, we saw an increase in telemarketing. Fraudsters are typically the first to exploit new and improved technologies; thus, we also saw a rise in telemarketing fraud. In response, the FTC created what is still a core consumer protection mission – the telemarketing fraud enforcement program. Over the past two decades, we have brought more than 350 cases challenging an array of telemarketing frauds.

Another shift in advertising and marketing occurred in the 1990s, with the rise of the Internet. Despite the tremendous benefits of the Internet, scammers turned to this new medium to defraud consumers. In response, the FTC launched an aggressive Internet fraud program, targeting offline scams that had migrated online, such as get-rich-quick schemes and miracle

cures. We also targeted fraudulent conduct that exploited the Internet itself, such as modem hijacking, page-jacking, and mousetrapping. And finally, we issued business guidance in the form of our “Dot Com Disclosures” guide that discussed how FTC rules and regulations applied to the online world. Our work to combat Internet fraud continues with our enforcement actions involving spam, spyware, and phishing.

We are in the midst of yet another paradigm shift in advertising. Last year, we held two days of hearings entitled “Protecting Consumers in the Next Tech-Ade” to learn more about the many technological developments that are changing the marketplace – and to assess their impact on consumers and our consumer protection agenda.¹ Today, I would like to discuss three new developments in advertising and marketing that we explored at these hearings: user-generated content, targeted marketing, and the increase – and changing nature of – advertising and marketing to children.

I. User-Generated Content

One theme we heard throughout the Tech-Ade hearings is that the next 10 years will be the decade of the empowered consumer. No longer a passive recipient of advertising and content, today’s consumer is a creator, an influencer, and a critic with access to a worldwide networked audience. Consumers are now content producers, and their content is the foundation of blogs, podcasts, video sharing sites, and social networking. User-generated content is central to multiplayer online games and virtual worlds and has even become a feature on the sites of many Fortune 500 companies.

The shift from the traditional advertiser-to-consumer marketing model, to the advertiser-

¹See <http://www.ftc.gov/techade>.

to-consumer-*to-consumer* marketing model presents powerful new opportunities for consumers as well as marketers and, not surprisingly, raises questions about the application of traditional advertising laws, such as the FTC Act. The fact is that traditional advertising laws *still* apply to product promotion in these new settings. And the FTC has been active in promoting this message in three ways.

First, the FTC has provided industry with specific guidance on one of these new marketing strategies – word-of-mouth marketing. Of course, word-of-mouth marketing by a satisfied, or a dissatisfied, consumer is one of the most compelling forms of marketing that exists. It is not new – we have always sought and provided product recommendations to our friends and family. Indeed, one popular ad from the 70s was premised on this word-of-mouth concept. The ad invited people to use a shampoo and urged them to tell two friends, and then they'll tell two friends, and so on and so on and so on. Well, of course, back then, we had no idea of how many friends we would be able to reach through blogs and social networking sites on the Internet. But the concept is the same, and so is the applicable law.

In 2006, the FTC staff issued an opinion letter on the 21st century version of word of mouth marketing – where a company pays individual consumers to promote its products.² The principles set out in that letter are really basic advertising 101: Consumers are likely to evaluate a

“consumer” endorsement differently if they believe it is independent as opposed to being sponsored in some way. Therefore, unless the relationship is clear from the context, a failure to disclose the relationship between the marketer and the consumer endorser is deceptive.

²See <http://www.ftc.gov/os/closings/staff/061211staffopiniononcommercialalert.pdf>.

Where a business crosses the line, the FTC will not hesitate to bring an enforcement action, as it did recently in a case involving *Jumpstart Technologies*. The Commission alleged that Jumpstart offered free movie tickets to consumers in exchange for the names and email addresses of five or more of their friends.³ Jumpstart then sent the friends commercial emails with the referring consumer's email address in the "from" line and a seemingly personal "subject line," such as, "Hey," or "Happy Valentine's Day," or "Movie time." The emails appeared to come from the referring consumer, circumvented spam filters, and were opened by consumers who thought the messages contained personal correspondence. Our complaint alleged that Jumpstart's deceptive practices violated the FTC Act and the CAN-SPAM Act, including by sending commercial e-mails with false or misleading "subject" and "from" lines. Under the settlement agreement, the defendant is required to pay a \$900,000 civil penalty for violating the CAN-SPAM Act, the largest penalty yet for illegal spam.

In addition to providing business guidance and enforcing laws, we also attempt to ensure that our rules and guides are up-to-date in light of changing technology and norms. It is in this context that the FTC is reviewing its Endorsements and Testimonial Guides, which set forth the principle that material connections between an advertiser and an endorser must be clearly disclosed. The Guides advise that an advertisement using a consumer endorsement will generally be interpreted to mean that the endorser's experience is representative of what consumers generally will achieve, which is sometimes called a "typicality" claim. If the advertiser does not have adequate substantiation that the endorser's experience is representative,

³*United States v. Jumpstart Technologies*, Civil Action No. C-06-2079 (MHP) (N.D.Calif. 2006), available at <http://www.ftc.gov/opa/2006/03/freeflixtix.shtm>.

the advertisement should contain a clear and conspicuous disclosure.

Although these Guides have been around for more than 27 years, it may be time to make a few changes (if for no other reason than to update archaic examples that refer to secretaries giving testimonials about their favorite typewriters). Last January, as part of its ongoing regulatory review of all its rules and guides, the Commission asked for public comment on the overall costs and benefits of the Endorsement and Testimonial Guides. The Federal Register notice presented the results of consumer research commissioned by the FTC, on the effect of the “results not typical” disclaimer currently permitted by the Guides. The survey authors concluded that this disclaimer is not well-understood by consumers.⁴

The Commission received nearly two dozen comments, most of which focused on the issues surrounding what kinds of disclosures are needed when an advertiser uses atypical testimonials – that is, testimonials that do not represent the generally expected product performance. So, what if the Guides were amended to remove the safe harbor for the “results not typical” disclaimer? At the risk of overgeneralizing, I think it is fair to say that the commenters made four main arguments against such a change in the Guides:

1. First, that testimonials can be “aspirational” – that is, they can motivate consumers to start living healthier lifestyles, and the inability to use such testimonials with a “results not typical” disclaimer would adversely affect both advertisers and consumers;
2. Second, that instead of revising the Guides, the FTC should continue bringing law enforcement actions to stop deceptive advertising using testimonials;
3. Third, that the consumer survey evidence does not provide a basis for such a change in

⁴See Press Release, “FTC Issues Request for Comment on Endorsement Guides,” January 16, 2007, available at <http://www.ftc.gov/opa/2007/01/fyi0707.shtm>.

the Guides; and

4. Fourth, that prohibiting advertisers from using atypical testimonials accompanied by a typicality disclaimer would raise Constitutional issues.

We are, of course, carefully considering all of these comments and I am certain that you will hear more from on this subject.

II. Targeted Marketing

The second marketplace shift I would like to discuss is targeted marketing, which again, is not an entirely new concept. If we look back at the 1970s, we saw ads targeted toward particular demographics. Secret deodorant's "strong enough for a man; made for a woman" ads made Secret a popular deodorant for women. Life cereal's "Ask Mikey" campaign showed kids that healthy cereals could taste good.

Well, in 2007, targeted advertising has an entirely different meaning. Increasingly, online marketing messages are being sent using technologies that allow for individualized targeting. Advertisers track consumers' online activities in order to develop a profile of their preferences. Once known, these preferences enable marketers to select message recipients, and to serve up potentially relevant advertisements.

Earlier this month, we held a town-hall meeting on behavioral advertising to learn more about these practices.⁵ We heard general agreement about certain concepts which should help direct our efforts as we go forward. First of all, behavioral advertising is a growing practice that is still fairly invisible to consumers. Second, although reasonable minds can differ as to whether the practice itself raises concerns, there appears to be a fair amount of agreement that greater

⁵See <http://www.ftc.gov/bcp/workshops/ehavioral>.

transparency and consumer control would be a good thing. Third, there are also concerns about what happens to the consumer data collected for advertising. Is it limited to use in advertising, or could it be used for some secondary purpose? Fourth, there are concerns about the security of the data collected. What if it falls into the wrong hands, especially if the data is sensitive or personally identifiable?

All stakeholders, including the FTC, are obviously thinking very seriously about the challenges here. Based on what we heard, we'd like to see an approach that is flexible, so as not to stifle innovation; gives consumers information and control, without placing unrealistic demands on their time and willingness to study and analyze long disclosures; prevents any harms arising from the collection and storage of the personal data collected; and creates accountability among businesses that are collecting and using the information.

Some of the ideas we heard at the town hall meeting were interesting and could be promising. They include a Do Not Track program, reforms to existing self-regulatory programs, and better consumer education. We are examining these and other ideas more closely. We encourage you to do so as well, and to continue to engage with us and suggest new ideas.

III. Children

The third trend I would like to discuss is the rise in children's advertising. Advertising to children is again, not a new phenomenon. The scope of children's advertising, however, has vastly increased in the past decades.

There are three primary concerns about this increase in advertising to children: privacy, health, and violent content. The FTC has responded to each of these concerns.

First, on the privacy front, young people are sharing a wide variety of information on social networking sites, including their name, address, and phone number. The good news is that

there's a law – the Children's Online Privacy Protection Act – that prohibits companies from collection information from children under 13 without parental consent. And the better news is that the FTC is aggressively enforcing this law, most recently, obtaining a \$1 million civil penalty against Xanga.com, a social networking site that collected information in violation of COPPA.⁶

On the health front, there is a belief that the rise in advertising and marketing of food to children is responsible for the obesity epidemic among young people. We at the FTC have no interest in debating how to allocate blame for rising levels of childhood obesity. The simple fact is that our kids are overweight and at risk and we have to do something about it. Parents, schools, government, health care professionals, food companies, and the media all have an obligation to fight this public health crisis, regardless of how we got here.

In 2005, the FTC, together with the Department of Health and Human Services, convened a public workshop on Marketing, Self-Regulation, and Childhood Obesity, bringing together some of the largest food manufacturers and entertainment companies, as well as academics, consumer advocates, pediatricians, and government officials.⁷ Out of the workshop came a series of recommendations for enhanced self-regulatory initiatives to promote nutritious foods. In July of this year the FTC and HHS convened a follow-up forum to review progress in implementing self-regulatory and educational initiatives,⁸ and we were pleased to showcase some significant developments in the two-year intervening period.

⁶*United States v. Xanga.com*, Civ. Action No. 06-CV-6853 SHS (S.D.N.Y. filed Sept. 7, 2006), available at <http://www.ftc.gov/opa/2006/09/xanga.shtm>.

⁷See <http://www.ftc.gov/bcp/workshops/foodmarketingtokids>.

⁸See <http://www.ftc.gov/bcp/workshops/childobesity/index.shtml>.

For example, nearly a year ago, the Council of Better Business Bureaus and the BBB's National Advertising Review Council announced the Children's Food and Beverage Advertising Initiative, a bold effort to change the profile of food advertising directed to children under 12 and to encourage healthier eating choices. To date, 12 major food companies have joined the Initiative.

Elaine Kolish, the Director of this Initiative, spoke yesterday and I'm sure she gave you all the details of this program. I have only one point to add: If you represent a food company that is not a program participant, I urge you to reconsider – and to sign up.

A third issue that has become a focus for the Commission in recent years is violence in entertainment products marketed to children. Since 2000, the FTC has responded to a series of requests from Congress to study the marketing of movies, music, and video games that are rated or labeled as containing content that may not be appropriate for children. To date, we have issued six reports. Our first report documented the widespread marketing of movies, music, and video games with violent content to children that was inconsistent with the product ratings or parental advisories. We also found that ads for such products frequently failed to contain rating and labeling information, and that children unaccompanied by an adult could purchase the products easily. The Commission recommended changes to and better oversight of industry self-regulatory programs.⁹

Our follow-up studies have reported improvement by all three industries in providing rating or labeling information in advertising. In addition, the video game and movie industries now have limits on advertising M-rated games and R-rated movies to children under 17. Our

⁹See Federal Trade Commission "Marketing Violent Entertainment to Children," September 2000, available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

follow-up “mystery shops” – where young teenagers are sent to attempt to buy movie tickets, video games, or explicit music CDs – also documented steady improvement in the enforcement of the movie rating system at theaters and the video game rating system at retail. There remains, however, substantial room for improvement, particularly by CD retailers. We continue to actively monitor this marketplace.¹⁰

Conclusion

I have discussed the FTC’s efforts to address some recent shifts in advertising and promotion marketing. But, as we can see, in some ways, the more things change, the more they stay the same. Con artists will continue to exploit new technologies. Businesses will have legitimate questions about how old laws apply to new technologies. And the FTC will remain engaged. Just as we did in the 1970s, when the PMA law conference was in its infancy, we will continue to enforce advertising laws, educate businesses and consumers, and study emerging trends so that we can help consumers and advertisers navigate tumultuous market changes.

Thank you.

¹⁰For copies of all FTC reports on media violence, see <http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm>.