Advertising

• Important questions:
  – 1. What is the extent of First Amendment protection for commercial speech?
  – 2. How did the protection evolve?
  – 3. How is deceptive advertising regulated and what is the role of the FTC?
  – 4. How can courts determine when gov’t can ban or regulate even truthful advertising?
  – 5. Who is responsible for illegal ads?
  – 6. When can media refuse advertising?

Commercial Speech Doctrine

1. What is the extent of First Amendment protection for commercial speech?
   A. History
      Valentine v. Chrestensen (1942)
   B. Evolution
   C. Protection
      Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976)
Freedom Forum Videotape

Hierarchy of Protected Expression

Advertising’s Lower Status

Level 1
Political and Social Expression

Level 2
Commercial and Sexual Expression

Level 3
Fighting Words, Obscenity, False Advertising

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Permissible Regulations

- Regulations that prohibit false or misleading advertisements are constitutional. So are laws that restrict the promotion of illegal products.
- Prior Restraints
- Truthful Advertising
Four-Part Test to Determine First Amendment Protection

- Central Hudson Gas & Electric Corp. v. Public Service Commission
- Four-Part Test
  1. Is it commercial speech?
  2. Legitimate governmental regulatory interest?
  3. Direct advancement of government regulatory interest?
  4. Is the ban narrowly drawn to advance legitimate state interest?

Unfair and Deceptive Ads

- No First Amendment protection for false or deceptive ads.
- Federal Trade Commission (FTC)
- FTC Powers:
  - Require advertisers to substantiate their claims.
  - Punish advertisers who engage in unfair competition and unfair or deceptive ads or practices.
Food & Drug Administration

Stated most simply, FDA’s mission is to promote and protect the public health by helping safe and effective products reach the market in a timely way, and monitoring products for continued safety after they are in use. Our work is a blending of law and science aimed at protecting consumers.

Enforces Fair Packaging and Labeling Act

- “Consumers rely on product labels to know what the product is and how to use it. FDA regulates what’s on these labels to ensure that they are truthful and that they provide useable information that helps consumers make healthy, safe decisions when using the product.
- In recent years we have redesigned the labeling for foods, over-the-counter medicines and dietary supplements, making them much more informative and easy to read.
- We also oversee the labeling for drugs and medical devices used by health professionals to ensure that the products have the information needed for proper use.”

Unfair Practice

- Definition:
  - If it causes substantial injury that is not outweighed by offsetting benefits to consumers or competitors who cannot reasonably avoid the injury.
Deceptive Ads

- **Definition:**
  - Ad is deceptive if it is likely to mislead a reasonable consumer with a material statement or omission

- **Express Falsehoods**

- **Implied Falsehoods**

Implied Falsehood

- Reasonable basis implication
- Proof implication
- Demonstration implication
- No qualification implication
- Ineffective qualification implication
- Significance implication
- Puffery implication
- Experts and celebrity endorsement implications

American Family Publishers Clearinghouse Ads
BUY ME THAT!

• Ads that deceive children
  – When determining whether ads aimed at children are deceptive, the ad is deceptive if a reasonable child would be misled.
  – based on the age and lack of experience of that target audience.

State and Federal Regulations

• All 50 states have legislation, like the FTC regulations, which prohibits unfair competition and unfair acts and allows citizens to sue.
• FTC complaints

Federal Remedies

• Trade Regulations
• Halting Advertising
• Requiring Statements
• The Lanham Act
The Lanham Act

* Competitor Remedies
* Prohibits a person’s “false or misleading representation of fact”

RICO

• Racketeering
• Racketeer Influenced and Corrupt Organizations Act.

Media’s Right to Refuse

• Media is free to choose what to broadcast or publish.
• Miami Herald v. Tornillo