

**GEORGE MASON UNIVERSITY
SCHOOL OF LAW**

**ELECTRONIC COMMERCE AND THE LAW OF ADVERTISING
FALL 2000**

D. REED FREEMAN, JR.

COURSE SYLLABUS

SESSION I - First Half

INTRODUCTION – Overview of course content

We will begin the first session with an overview of the course. In the remainder of the first half of this session, we will discuss what does and does not constitute "advertising."

READING: Lewis Rose and D. Reed Freeman, Jr., Advertising Law Guide, Section 6.3.2.3 (CCH 2000).

SESSION I - Second Half

THE FEDERAL TRADE COMMISSION - Deception

In this session, we will discuss the FTC's consumer protection mission and the development of its advertising law policy. We will focus on the FTC's Deception Policy Statement and the cases the FTC has brought under it.

READING: FTC Deception Policy Statement
(<http://www.arentfox.com/quickguide/businesslines/advert/advertisinglaw/adlawlawsregs/trr/deceptionpol.html>)

Rose and Freeman, Sections 3.1-3.2

In the Matter of Cliffdale Associates, 103 F.T.C. 100 (1984).

In the Matter of Automotive Breakthrough Sciences, Inc.
(<http://www.ftc.gov/os/1998/9809/d09275fiord.htm>)

FTC Chairman Pitofsky Speech on Global E-Commerce Issues
(<http://www.ftc.gov/opa/2000/07/abarelease.htm>)

Jack E. Korns and Alan C. Roline, The Federal Trade Commission's Deception Policy In the Next Millennium: Evaluating the Subjective Impact of Cliffdale Associates, 74 N. Dak. L. Rev. 441 (1998).

SESSION II

THE FEDERAL TRADE COMMISSION - Unfairness Doctrine

In this session we will study the controversial doctrine of unfairness under § 5 of the FTC Act. We will focus on the FTC's Unfairness Policy Statement and the cases the FTC has brought under it.

READING: FTC Unfairness Policy Statement
(<http://www.arentfox.com/quickguide/businesslines/advert/advertisinglaw/adlawlawsregs/tr/unfairpol.html>)

Rose and Freeman, Sections 3.3-3.4

In the Matter of Orkin Exterminating Company, 849 F.2d 1354 (11th Cir. 1988).

In the Matter of Beck's North America,
<http://www.ftc.gov/os/1998/9808/9823092.cmp.htm>

David A. Rice, Consumer Unfairness at the FTC: Misadventures in Law and Economics, 52 Geo. Wash. L. Rev. 1 (1983).

Roscoe Sterek, Unfairness and Innovative Remedies, available at
<http://www.ftc.gov/speeches/starek/aaffin.htm>.

SESSION III

FEDERAL TRADE COMMISSION - Advertising Substantiation

In this session, we will explore advertisers' obligation to have a "reasonable basis" for their objective claims. We will focus on the FTC's Policy Statement on Advertising Substantiation and the cases the FTC has brought under it.

READING: Rose and Freeman, Section 3.4

FTC Policy Statement on Advertising Substantiation
(<http://www.arentfox.com/quickguide/businesslines/advert/advertisinglaw/adlawlawsregs/tr/adsubpol.html>)

In the Matter of Pfizer, Inc., 81 F.T.C. 23 (1972).

In the Matter of Kraft, Inc., 114 F.T.C. 40 (1991).

In the Matter of Stouffer Foods Corp., 118 F.T.C. 746 (1984).

Charles Shafer, Developing Rational Standards for an Advertising Substantiation Policy, 55 U. Cin L. Rev. 1 (1986)

SESSION IV

FTC TRADE REGULATION RULES AND GUIDES

In this session, we will survey the FTC's rules and guides governing advertising and marketing, with an emphasis on the rules and guides with general application.

READING: Rose and Freeman, Section 6.5

Application of Guides in Preventing Unlawful Practices, 16 C.F.R. Part 17.

Guides Against Deceptive Pricing, 16 C.F.R. Part 233.

Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

Use of Prenotification Negative Option Plans, 16 C.F.R. part 425.

FTC's "Dot Com Disclosures" Business Guidance Manual
(<http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/>).

SESSION V

FEDERAL TRADE COMMISSION – Investigations, Law Enforcement Actions and Liability

This session will focus on the Federal Trade Commission's authority to investigate individuals and commercial entities and to bring law enforcement actions before an Administrative Law Judge pursuant to the Administrative Procedures Act and in federal court pursuant to Section 13(b) of the Federal Trade Commission Act. We will also discuss liability under the FTC Act for commercial entities, individuals, advertising agencies, parents and subsidiaries, successors and assigns, companies and

individuals engaged in a "common enterprise," and individuals and commercial entities that provide the "means and instrumentalities" to violate the FTC Act.

READING: Rose and Freeman, Sections 3.6-3.7

FTC v. Windward Marketing (to be handed out in class).

FTC v. Wolf, (to be handed out in class).

FTC v. Winstead Hosiery, 258 U.S. 466 (1921).

FTC v. Magui Publishers, 1993 U.S. App. LEXIS 28684 (9th Cir. 1993).

United States v. Bayer Corp., available at
<http://www.ftc.gov/os/2000/01/sterlingcpcmp.htm>

Marshall Field & Co., Letter to John D. French (to be handed out in class).

Germaine Monteil Cosmetics, Letter to Owen M. Johnson (to be handed out in class).

Hospital Corp. of America, Letter to Kathryn Fenton (to be handed out in class).

Encyclopedia Britannica, Letter to Mark Wegener and Elroy Wolf (to be handed out in class).

SESSION VI

FEDERAL TRADE COMMISSION – Remedies

In this session we will look at the various remedies available to the FTC in false advertising cases, including injunctive relief, civil penalties, consumer redress, disgorgement of profits, corrective advertising and consumer education.

READING: Rose and Freeman, Section 3.8

FTC Statement Regarding Corrective Advertising

FTC v. U.S. Oil and Gas, Inc. (to be handed out in class)

FTC v. Amy Travel, Inc. (to be handed out in class)

In the Matter of Warner-Lambert Co. (to be handed out in class)

In the Matter of Novartis, Inc. (to be handed out in class)

In the Matter of Exxon, Inc. (to be handed out in class)

In the Matter of R.J. Reynolds Tobacco Co. (to be handed out in class)

In the Matter of Mazda Motor of America, Inc. (to be handed out in class)

In the Matter of Castrol, Inc. (to be handed out in class)

SESSION VII

THE LANHAM ACT – Background and elements of proof under § 43(a)

In this session, we will begin our study of the federal Lanham Act, under which companies may obtain relief for false advertising by their competitors. The focus of this session will be on the elements of proof of a false advertising claim, including recent trends regarding the meaning of "commercial speech and promotion."

READING: § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)

Rose and Freeman, Sections 6.1-6.3

The Coca Cola Co. v. Tropicana Prods, Inc., 690 F.2d 312, 316 (2d Cir. 1982).

Vidal Sassoon v. Bristol-Myers Co., 661 F.2d 272, 276 (2d Cir. 1981).

American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1980).

McNeilab v. American Home Prods. Corp., 501 F. Supp. 517, 521 (S.D.N.Y. 1980).

Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228, 1993-2 Trade Cas. (CCH) ¶ 70, 463 (3rd Cir. 1990).

Mobius Mgt. Sys. v. Fourth Dimension Software, Inc., 880 F. Supp. 1005, 1019 (S.D.N.Y. 1994).

Ortho Pharm. Co. v. Cosprophar, 32 F.3d 690, 694, 1994-2 Trade Cas. (CCH) ¶ 70, 459 (2d Cir. 1994).

SESSION VIII

THE LANHAM ACT – Establishment claims, disparagement, and liability

In this session, we will study the law regarding establishment claims (i.e., "tests prove," or "studies show") and commercial disparagement. We will also cover liability under the Lanham Act for individuals, advertisers and their agencies. Because Lanham Act cases often involve consumer perception research to prove liability, we will also focus on the law regarding the methodology and admissibility of such research.

READING: Rose and Freeman, Sections 6.4-6.6

Charles J. Walsh and Marc S. Klein, From Dog Food to Prescription Drug Advertising: Litigating False Establishment Claims Under the Lanham Act, 22 Seton Hall L. Rev. 389 (1992).

Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 63 (2d Cir. 1992).

The Gillette Corp. v. Norelco Cons. Prods. Co., 946 F. Supp. 115, 121, 1996-2 Trade Cas. (CCH) ¶ 71,657 (D. Mass. 1996).

U-Haul Int'l v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986).

Sheri Diamond, Reference Guide on Survey Research, Reference Guide on Scientific Evidence (West 1994).

Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978).

SESSION IX

REMEDIES UNDER THE LANHAM ACT AND DEFENSES TO BOTH FTC AND LANHAM ACT CLAIMS

In this session, we will study the types of remedies plaintiffs may seek under the Lanham Act, including injunctions, monetary damages, attorneys' fees, corrective advertising and recalls. We will also take a comprehensive look at defenses to FTC and Lanham Act false advertising cases, including First Amendment prior restraint issues, puffery, opinion, statute of limitations and mootness (common to both types of cases), as well as standing, laches and unclean hands (in Lanham Act cases only).

READING: Rose and Freeman, Sections 6.7-6.8

Alpo Dogfoods, Inc. v. Ralston-Purina Co., 913 F.2d 958, 964 (D.C. Cir 1990).

Telebrands, Inc. v. The Media Group, 1997 U.S. Dist. LEXIS 20474, 1998-1 Trade Cas. (CCH) & 72,042 (December 23, 1997).

Porous Media Corp. v. Pall Corp., 173 F.3d 1109 (8th Cir. 1999).

Playskool, Inc. v. Prod. Dev. Group, Inc., 699 F. Supp. 1056, 1058 (E.D.N.Y. 1988).

Central Hudson Gas & Elec. Corp. v. Svc. Comm., 447 U.S. 557, 563-64 (1980).

Pizza Hut, Inc. v. Papa John's Inc. 80 F. Supp. 2d 600 (N.D. Tex. 2000).

Conopco, Inc. v. Campbell Soup Co., 95 F.3d 187, 191 (2d Cir. 1996).

McNeilab, Inc. v. American Home Prods., Inc., 501 F. Supp. 517, 521 (S.D.N.Y. 1980).

SESSION X

STATE REGULATION OF ADVERTISING / ADVERTISING SELF-REGULATION

In the first half of this session, we will focus on state regulation of advertising, including state false advertising statutes, "baby FTC acts," and the Uniform Deceptive Trade Practices Act. In the second half, we will take a look at the Council of Better Business Bureaus' voluntary advertising self regulation program, including the BBB's Code of Advertising, BBB Online, and the CBBB's voluntary arbitration program, the National Advertising Division. We will also study network advertising standards and challenge procedures.

READING: Rose and Freeman, Sections 5 and 7

Uniform Deceptive Trade Practices Act

Better Business Bureau Code of Advertising
(<http://www.bbb.org/advertising/adcode.asp>)

Better Business Bureau's BBB Online
(<http://www.bbbonline.org/businesses/privacy/index.html>)

NAD Procedures

(<http://www.bbb.org/advertising/nadproc.asp>)

ABC, NBC, CBS and FOX Broadcast Standards (to be handed out in class)

MCI Worldcom, Telecommunications Services (NAD opinion) (to be handed out in class)

SESSION XI

SPECIAL ISSUES ASSOCIATED WITH ADVERTISING AND MARKETING ON THE INTERNET

As an entirely new medium, the Internet has raised new issues for regulators. This session will focus on issues including how to make disclosures on the Internet, the use of metatags, liability for linking to and for “framing” other sites, ISP liability for false claims and the use of unsolicited commercial e-mail, or “spam.”

READING: FTC’s “Dot Com Disclosures” Business Guidance Manual
<http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/>

Rose and Freeman, Section [TBA] (reprinting state laws regulating unsolicited commercial e-mail).

FTC Business Guidance Manual, Advertising and Marketing on the Internet: Rules of the Road.
<http://www.ftc.gov/bcp/online/pubs/buspubs/ruleroad.htm>

Eric J. Sinrad and Jeffrey W. Reyna, The Evolving Role of Trademark in Cyberspace, Journal of Internet Law (April 2000).

Stephen J. Davidson and Laurie J. Dechery, Trademark as Navigator: Trademark Use in Web Site Metatags and Advertising, Journal of Internet Law (November, 1999).

Brookfield Comm. v. West Coast Entertainment, 174 F. 3d 1036 (9th Cir. 1999).

Sheila M. Anthony, The Federal Trade Commission on Unsolicited Commercial E-Mail (Testimony Before the Senate Subcommittee on Communication of Senate Committee on Commerce, Science, and Transportation (June 17, 1998).

Eileen M. Harrington, The Federal Trade Commission on Unsolicited Commercial E-Mail (Testimony before the Senate Subcommittee on Telecommunications, Trade and Consumer Protection (November 9, 1999)).

SESSIONS XII and XIII

ADVERTISING ON THE INTERNET - The Right of Privacy

This session will focus on privacy issues associated with advertising and marketing on the Internet. We will study the law regarding the collection of information by means of “cookies,” sweepstakes, online profiling and identity theft, as well as the regulation of collection and use of children's personal information, financial information and health information.

READING: The Children's Online Privacy Protection Act and FTC Rule on Kids' Privacy
(<http://www.ftc.gov/os/1999/9910/64fr59888.pdf>)

The Gramm-Leach-Bliley Act and the Final FTC Rule on Financial Privacy
(<http://www.ftc.gov/os/2000/05/65fr33645.pdf>)

Current FTC/DOC/State Attorney General Speeches on Privacy Law.

<http://www.ftc.gov/speeches/pitofsky/rpfeb298.htm>

<http://www.ftc.gov/speeches/anthony/tstmyprivacy000525.htm>

<http://www.ftc.gov/speeches/swindle/ccia2000.htm>

<http://www.ftc.gov/speeches/swindle/westin.htm>

<http://www.ftc.gov/speeches/other/dvsantaclaraspeech.htm>

Complaints and decisions (if available) in cases now in litigation, or under investigation, such as DoubleClick, Yahoo, Intuit, Alexa Internet, Toys “R” Us and Toysmart (to be handed out in class).

FTC v. Geocities
<http://www.ftc.gov/privacy/index.html>

FTC v. ReverseAuction.com
<http://www.ftc.gov/privacy/index.html>

FTC v. ToySmart
<http://www.ftc.gov/privacy/index.html>

FTC v. Liberty Financial
<http://www.ftc.gov/privacy/index.html>

New York v. Chase Manhattan Bank (to be handed out in class)

EU Privacy Directive and Safe Harbor Program (to be handed out in class)
Online Profiling Materials
<http://www.ftc.gov/privacy/index.html>

<http://www.ag.state.mi.us/> (notices of intended action)

SESSION XIV

MISCELLANEOUS ADVERTISING ISSUES

In this session, we will focus on discreet issues in advertising law, including advertising to children, comparative advertising, sweepstakes and contests, country of origin of claims, bait and switch advertising and multi-level marketing.

READING: Council of Better Business Bureaus' Children's Advertising Review Unit
Guidelines for Advertising to Children
(<http://www.bbb.org/advertising/caruguid.asp>)

Children's TV Act of 1990 (to be handed out in class)

Network Standards regarding advertising to children (to be handed out in class)

FTC Guide Against Bait and Switch Advertising, 16 CFR Part 238

In the Matter of Avon, Inc. (to be handed out in class)

FTC Policy Statement Regarding Comparative Advertising
<http://www.ftc.gov/bcp/policystmt/ad-compare.htm>

EU Directive on Comparative Advertising (to be handed out in class)

International Comparative Advertising, (INTA 1997), pp. 7-12, 27-29, 59-65, 69-88
(to be handed out in class)

FTC Policy Statement Regarding Country of Origin of Claims
(<http://www.ftc.gov/os/1997/9712/epsmadeusa.htm>)

Better Business Bureau, Code of Online Business Practices
<http://www.bbbonline.org/businesses/code/index.htm>