

**GEORGE MASON UNIVERSITY
SCHOOL OF LAW**

**ELECTRONIC COMMERCE: REGULATION OF ADVERTISING
FALL 2001**

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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."

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: (Bolded items are required reading for all students; all other readings will be assigned to individual students.)

FTC Deception Policy Statement

<http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

FTC Speech: Boom in E-Commerce Has Created Fertile Ground For Fraud,

<http://www.ftc.gov/os/2001/05/internetfraudtmy.htm>

FTC Chairman Pitofsky Speech on Global E-Commerce Issues

(<http://www.ftc.gov/opa/2000/07/abarelease.htm>)

FTC Speech: Fraud Could Curb Growth of the Internet

<http://www.ftc.gov/os/2001/04/internetfraudstate.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).

FTC Speech: Advertising and Unfair Competition

<http://www.ftc.gov/speeches/anthony/aliaba2000.htm>

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.ftc.gov/bcp/policystmt/ad-unfair.htm>

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

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>

FTC Speech: Unfairness and Innovative Remedies

<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: FTC Policy Statement on Advertising Substantiation

<http://www.ftc.gov/bcp/guides/ad3subst.htm>

Timothy J. Muris, FTC at 75 (to be handed out in class).

Howard J. Beales, Steven Salop, and Richard Craswell, The Efficient Regulation of Consumer Information, THE JOURNAL OF LAW AND ECONOMICS, Vol XXIV, Issue 3 at 491 (December 1981).

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: 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.

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, Advertising Law Guide (CCH) ¶¶ 460-485, 520-545**
(All Advertising Law Guide readings will be handed out in class).

FTC v. Windward Marketing, 1996 U.S. Dist LEXIS 17114 (N.D. Ga. Sept 30, 1997).

FTC v. Wolf, 1996 U.S. Dist. LEXIS 1760 (S.D. Fla. Jan 30, 1996).

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

FTC v. J.K. Publishing, 99 F. Supp. 2d 1176 (C.D. Ca. 2000).

FTC v. Garvey, available at <http://www.ftc.gov/05/2000/09/garveyrichmondcmp.pdf>

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, ¶¶ 560-590

FTC Statement Regarding Corrective Advertising (to be handed out in class).

FTC v. U.S. Oil and Gas, Inc., 1987 U.S. Dist. LEXIS 16137 (S.D. Fla. July 10, 1987).

FTC v. Amy Travel, Inc., 875 F.2d 564 (7th Cir. 1989).

FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282 (D. Minn. 1985).

In the Matter of Warner-Lambert Co., 88 F.T.C. 503 (1971).

In the Matter of Novartis, Inc.

FTC Decision: <http://www.ftc.gov/os/1999/9905/novartisopin.pdf>

DC Circuit Decision: <http://www.ftc.gov/os/2000/08/novartis.htm>

In the Matter of Exxon, Inc.

FTC Complaint: <http://www.ftc.gov/os/1996/9609/d9281cmp.htm>

FTC Consent Agreement: <http://www.ftc.gov/os/1997/9706/exxona~1.htm>

In the Matter of R.J. Reynolds Tobacco Co.

FTC Complaint: <http://www.ftc.gov/os/1999/9908/c3892cmp.htm>

FTC Consent Agreement: <http://www.ftc.gov/os/1999/9908/c3892do.htm>

In the Matter of Mazda Motor of America, Inc.

FTC Complaint for Civil Penalties: www.ftc.gov/os/1999/9909/mazdacmp.htm

FTC Consent Agreement: <http://www.ftc.gov/os/1999/9909/mazdaconsent.htm>

In the Matter of Castrol, Inc.

FTC Complaint: <http://www.ftc.gov/os/1999/9909/burmahcastrolcomplaint.htm>

FTC Consent Agreement: www.ftc.gov/os/1999/9909/burmahcastrolconsent.htm

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: Rose and Freeman, ¶¶ 2000-2100 (to be handed out in class)

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).

B. Sanfield, Inc. v. Finlay Fine Jewelry Corp., 2001 U.S. App. LEXIS 15478 (7th Cir. July 10, 2001).

SmithKline Beecham Cons. Healthcare, L.P. v. Johnson – Merck Cons. Pharm. Co.,
2001 U.S. App. LEXIS 7061 (S.D. N.Y. June 1, 2001).

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, ¶¶ 2200-2210; 2350-2410.

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).

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

Fanelle v. LoJack Corp., 2001 U.S. Dist. LEXIS 17767 (E.D. Pa. Dec. 7, 2000),

EFCO Corp. v. Symons Corp., 2000 U.S. App. LEXIS 17235 (8th Cir. July 18, 2000).

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, ¶¶ 2450-2520**

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).

Pourous 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).

Transclean Corp. v. Bridgewood Svcs. Inc., 2001 U.S. Dist. LEXIS 4674.

Tile Kingdom, Inc. v. Morgan Tire and Auto, Inc., 2001 U.S. App. LEXIS 17224 (11th Cir. June 15, 2001).

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, ¶¶ 1010-1510 (skim); 3000-3250.

Better Business Bureau Code of Advertising

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

Better Business Bureau, Code of Online Business Practices

(<http://www.bbbonline.org/businesses/code/index.htm>)

Better Business Bureau's BBB Online

(<http://www.bbbonline.org/businesses/privacy/index.html>)

NAD Procedures

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

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

SESSION XI

INTELLECTUAL PROPERTY 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 Business Guidance Manual entitled "Dot Com Disclosures"

(<http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom>)

FTC Business Guidance Manual entitled “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).

Lardham v. Lewis Galoob Toys, Inc., 2000 U.S. App. LEXIS 23386 (E.D. KY Sept. 18, 2000).

Clark v. American Online, Inc., 2000 U.S. Dist. LEXIS 17368 (C.D. Cal. Dec. 4, 2000).

Hoffman v. Capital Cities/ABC, Inc., 2001 U.S. App. LEXIS 15085 (9th Cir. July 6, 2001).

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: Freeman and Nemiroff, Online Privacy Law (cite to article on PrivacyLaw Playbook.com)

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

FTC's Enforcement of COPPA Rule,
<http://www.ftc.gov/opa/2001/04/girlslife.htm>

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

In re Intuit Privacy Litigation, 2001 U.S. Dist. LEXIS 5828 (C.D. Cal. April 9, 2000).

In re DoubleClick, Inc., 2001 U.S. Dist. LEXIS 3498 (S.D.N.Y. March 29, 2001).

FTC Speech: Unsolicited Commercial Email,
<http://www.ftc.gov/os/2001/04/unsolcommemail.htm>

Online Profiling Materials
<http://www.ftc.gov/privacy/index.html>

Washington v. Heckel, Advertising Law Guide (CCH) ¶60,320 (Wa. June 7, 2001)

FTC Speech: The Case for Standardization of Privacy Policy Formats
(<http://www.ftc.gov/speeches/anthony/standardppf.htm>)

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: Advertising to Children

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

Comparative Advertising

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

First Amendment

United States Department Agriculture v. United Foods, Inc., No. 00-276 (U.S. June 25, 2001 (to be handed out in class).

FTC Speech: Marketing Violent Entertainment to Children,
<http://www.ftc.gov/os/2000/09/violencerpttest.htm>