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9

Other Sources of Advertising Law

It is not a coincidence that the federal false-advertsing statute is part of the federal trademark act. Trademark law is false advertising law if you squint at it the right way. In addition, consumers, government, and industry self-regulation all have truth-in-advertising missions. All of them modify the Lanham Act's rules in interesting ways.

A Trademark

Trademark law allows mark owners to fix the meanings of certain term. A trademark refers to its owner's goods or services; using it to refer to something else is false as a matter of law. In a sense, then, the causes of action for trademark infringement and for unfair competition are just species of false advertising. This section explores two ways in which trademark law incorporates false-advertising policies.

1 Deceptive and Deceptively Misdescriptive Marks

To the extent that consumers believe a mark is making claims about the characteristics of a product, trademark law not only will not protect it as a trademark, but will go out of its way to make sure that consumers are not misled. Consider the mark BPA-FREE. For plastic bottles that do not contain bisphenol A (a/k/a BPA), this is descriptive. But what about for bottles that *do* contain BPA? A cynical seller might argue that the mark is suggestive or arbitrary, since it no longer describes the goods. But this is a dangerous road to start down, because consumers will not only not perceive BPA-FREE as a trademark, but will aslo be misled into buying a product raising health concerns they want to avoid. That is, the fact that a mark makes false claims about a product ought to make it less likely to be protectable, not more. Arbitrary trademarks like APPLE for computers are acceptable only because no one really thinks the computers are made of apples.

Section 2(e)(1) of the Lanham Act, which denies protection to "merely descriptive" marks, also denies protection to "merely . . . deceptively misdescriptive" marks. A ***deceptively misdescriptive*** mark is to false descriptions as a descriptive mark is to true descriptions. To the extent that a mark is "merely" a description of the goods, section 2(e)(1)

makes it unregistrable whether the description is true or false. If it acquires secondary meaning, the section 2(e)(1) bar drops away and it can be registered once the primary significance of the mark to consumers is no longer the (true or false) description but the mark owner as a source.

The exclusion with real bite is the section 2(a) exclusion for ***deceptive*** marks. A trademark is deceptive when it is not just misdescriptive but actually likely to affect consumers' purchasing decisions. The standard test is

(1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?

(2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?

(3) If so, is the misdescription likely to affect the decision to purchase?[1]

1. *In re* Budge Mfg. Co., 857 F.2d 773 (Fed. Cir. 1988).

If the answer to the first question is "no," then the mark is either inherently dintinctive or it is truthful. If the answer to the first question is "yes" and the second question is "no," the mark is arbitrary (e.g. APPLE) because consumers do not perecive it as a description. If the answer to the first two questions is "yes" and the answer to the third question is "no," then the mark is deceptively misdescriptive, and it is registrable with secondary meaning. If the answer to all three questions is "yes," then the mark is deceptive and unregistrable.

Consider *In re Budge Mfg. Co.*, where the applicant, Budge, tried to register LOVEE LAMB for "automotive seat covers" made from synthetic materials.[2] The court stepped through the three-part test:

2. *Id.*

(1) Budge admits that its seat covers are not made from lamb or sheep products. Thus, the term LAMB is misdescriptive of its goods.

(2) Seat covers for various vehicles can be and are made from natural lambskin and sheepskin. Applicant itself makes automobile seat covers of natural sheepskin. Lambskin is defined, inter alia, as fine-grade sheep skin. The board's factual inference is reasonable that purchasers are likely to believe automobile seat covers denominated by the term LAMB or SHEEP are actually made from natural sheep or lamb skins.

(3) Evidence of record shows that natural sheepskin and lambskin is more expensive than simulated skins and that natural and synthetic skins have different characteristics. Thus, the misrepresentation is likely to affect the decision to purchase.[3]

3. *Id.*

It was irrelevant that Budge had been using the mark extensively. Section 2(a) is an absolute bar, regardless of secondary meaning.

Budge argued that it properly disclosed that its products were made of "simulated sheepskin" in its advertising. That might have been enough to defend it against a false advertisng suit, but the bar for trademark registration is higher. "Congress has said that the advantages of registration may not be extended to a mark which deceives the public. Thus, the mark standing alone must pass muster, for that is what

the applicant seeks to register, not extraneous explanatory statements."[4] Budge also tried to argue that no reasonable consumer woud expect to be able to buy genuine lambskin seat covers, because there were none on the market. There were, however, sheepskin seat covers, so the court reasoned that consumers would not find the idea of a lambskin seat cover so "incongruous" that they would automatically disbelieve that LAMB was making a claim about the goods' characteristics.

4. *Id.*

2 Certification Marks

The Lanham Act defines a "certification mark" as a mark "used [or intended to be used] by a person other than its owner . . . to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization."[5] The key point here is that a certification is used by people *other than the owner* on their goods and services.

5. Lanham Act § 45.

> A certification mark is a special creature created for a purpose uniquely different from that of an ordinary service mark or trademark That is, the purpose of a certification mark is to inform purchasers that the goods or services of a person possess certain characteristics or meet certain qualifications or standards established by another person. A certification mark does not indicate origin in a single commercial or proprietary source the way a trademark or service mark does. Rather, the same certification mark is used on the goods or services of many different producers.
>
> The message conveyed by a certification mark is that the goods or services have been examined, tested, inspected, or in some way checked by a person who is not their producer, using methods determined by the certifier/owner. The placing of the mark on goods, or its use in connection with services, thus constitutes a certification by someone other than the producer that the prescribed characteristics or qualifications of the certifier for those goods or services have been met.[6]

6. United States Patent and Trademark Office, Trademark Manual of Examining Procedure § 1306.01(b) (2021).

That is, a certification mark is *owned* like a trademark, but the mark itself designates *characteristics* of the goods, rather than designating source. This does not mean that a certification mark is descriptive; all of the usual trademark rules around distinctiveness apply. Rather, a certification mark must have a distinctive meaning to consumers, but the goodwill is directed into consumer knowledge that the goods have been certified, rather than that the goods come from a particular source.

The TMEP describes three kinds of certification marks:

> 1. *Geographic origin*. Certification marks may be used to certify that authorized users' goods or services originate in a specific geographic region (e.g., SUNSHINE

> TREE for citrus from Florida).
>
> 2. *Standards met with respect to quality, materials, or mode of manufacture*. Certification marks may be used to certify that authorized users' goods or services meet certain standards in relation to quality, materials, or mode of manufacture (e.g., approval by Underwriters Laboratories) (UL certifies, among other things, representative samplings of electrical equipment meeting certain safety standards).
>
> 3. *Work/labor performed by member or that worker meets certain standards*. Certification marks may also be used to certify that authorized users' work or labor on the products or services was performed by a member of a union or other organization, or that the performer meets certain standards.[7]

7. *Id.* § 1306.1.

We will discuss geographic certifications again when looking at geographic-indication law, and labor-standard certification marks overlap substantial with collective membership marks.

As an example, consider the FAIR TRADE certification. The standards applied by Fair Trade USA include minimum wages for all employees; housing standards and safety; nondiscrimination on the basis of race, gender, sexual orientation, disability, etc.; and much much more. The standards are quite detailed in some places. For example, the packing-material costs that an exporter (rather than the producer) must cover include "up to 3 labels per banana hand."

In theory, the owner of a certification mark is required to act even-handedly in certifying others' goods.[8] But in practice, the owner controls both the wholesale definition of the certification standards and their retail application in particular cases, and oversight is rare. Jeanne Fromer:

8. Indeed, due to the obvious conflict of interest, the owner is *prohibited* from applying the mark to its own goods. If you want to put the mark on your own goods, just get a trademark instead.

> What do a trendy kosher restaurant in SoHo, an independent movie about a serial killer, and a Swiss watchmaker have in common? Each has been excluded by a certifier from employing its legally protected certification mark in ways that seem to run counter to the certification mark's purposes of consumer protection and promotion of competition. Each of these businesses has either been disqualified by a certifier from getting a certification mark or been manipulated by a certifier into securing a certification mark: a kosher food certification withheld from the restaurant until it changed its name; an R movie rating withheld from the independent movie, whose producer claimed the rating was being given to far gorier—yet non-independent—movies; and a withheld geographical certification of SWISS MADE for the watchmaker located in Switzerland and much of whose watches' value – but not all – originates in Switzerland. The

inability of each of these businesses to be certified as is – without any clear certification standard or procedural regularity – can have adverse, and sometimes catastrophic, consequences for the businesses, their consumers, and competition writ large.

Because the law allows certification standards to be vague, high-level, and underdeveloped, a certifier can choose to exclude certain businesses inconsistently or arbitrarily, even when these businesses' goods or services would seem to qualify for the certification mark (particularly to consumers). Moreover, certifiers can wield their marks anticompetitively, even when a certification standard is clear and complete. They can do so through redefinition – something certification mark law currently allows without oversight – to ensure that certain businesses' goods or services will not qualify for the mark. Both of these forms of certification mark manipulation undermine the goals of certification marks: (1) to protect consumers by providing them with succinct information – via the marks – on goods' or services' characteristics and (2) to promote competition by ensuring that any businesses' goods or services sharing certain characteristics salient to consumers qualify for a mark certifying those characteristics.[9]

9. Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 Stan. L. Rev. 121 (2017).

B Consumer Suits

Consumers can sometimes bring actions for common-law fraud or under state unfair-competition laws that provide for consumer suits. But these causes of action tend to have more stringent elements than competitor suits.

In practice, a substantial obstacle to consumer suits is the difficulty of bringing them as a class action. Because each consumer's damages are small, it is usually uneconomical to sue on an indiviual basis: why spend $35,000 on legal fees to recover a $35 purchase price? But class actions come with their own hurdles. Consider *Perrine v. Sega of America, Inc., No. 13–cv–01962–JD*, a suit over the disappointing graphics in the video game "Aliens: Colonial Marines."[10] The game's pre-release trailer was promoted as containing " "actual gameplay" footage, but the graphics engine actually used in the game when it shipped was less powerful. Hallways that should have been darkly shaded and ominous were instead blocky and brightly lit. Shipping a game with bad graphics isn't actionable, but *lying* about the graphics in your game is; the "actual gameplay" label was allegedly false, as were various other statements in the game's advertising. (For example, Sega claimed the game had "advanced artificial intelligence programming," but the alien enemies in the game frequently got stuck on walls and corners.)

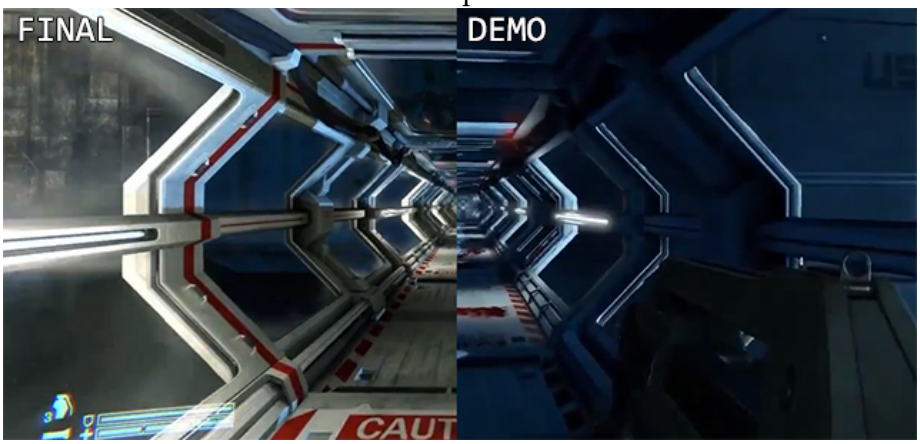
10. Perrine v. Sega of Am., Inc., No. 13–cv–01962–JD, 2015 WL 2227846 (N.D. Cal. May 12, 2015). It sold over a million copies, but received scathing reviews and has a Metacritic score of 45%.

But what is a proper class for a false advertising suit? "All persons in the United States who paid for a copy of the Aliens: Colonial Marines

video game either on or before February 12, 2013" lumps together people who saw the bogus footage and bought the game in reliance on it with people who didn't see the footage. But an attempt to limit the class to people who viewed the ads raised a different issue: how could the court *ascertain* who was the class? As the court explained:

> As the complaint acknowledges, this is not a case about a single misrepresentation. . . . It is undisputed in the record that many trailers and commercials were released [between the first showing of the trailer at the E3 conference in June 2011 and the game's release in February 2013], primarily via the Internet but also through television. It is further undisputed that several videos for ACM shown before the game's release contain footage from only the final retail version, rather than from the alleged non-retail version. When pressed at the hearing to identify which specific videos or trailers included the allegedly problematic E3 2011 video or portions of it, plaintiff's counsel answered that he could not "say with certainty which ones" and that he "just [didn't] have the information." Counsel added, ineffectually, that it does not "matter that each and every video didn't have a specific scene from the 2011 reenactment," because the E3 2011 video "was accessible through this time period" and remains so today. And Mr. Locke, the only named plaintiff moving for class certification and seeking appointment as a class representative, compounded the ascertainability problem by testifying in deposition that he could not "answer ... with any degree of certainty" a question regarding which videos he saw before he preordered his copy of the game.

The lead plaintiff's lawyers proposed to allow class members who had seen the deceptive footage to self-certify – a technique that is sometimes allowed – but the court felt that the problem here was unsurmountable.



C Government

Governments sometimes directly enforce false-advertising rules.

1 FTC Enforcement

Section 5 of the Federal Trade Commission Act[11] authorizes the FTC to prevent "unfair or deceptive acts or practices in or affecting commerce." In some respects, this authority parallels the tests applied to competitor suits under the Lanham Act. In other respects, it is broader. State law often also provides for public enforcement by state officials, typically state attorneys general.[12]

Consider *Federal Trade Commission v. Winsted Hosiery Co.*, from 1922.[13] The FTC sued the defendant for selling underwear containing as little as 10% wool in cartons labeled "Natural Wool." Under *American Washboard Co. v. Saginaw Mfg. Co.* and *Ely-Norris Safe Co. v. Mosler Safe Co.*, a competitor suit would have failed, under the reasoning that there was no proof that Winstead took sales away from any particular other underwear company. But the FTC does not face this threshold. It was entitled to bring suit on behalf of the consuming public at large and competitors in general:

> The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods.[14]

For a modern example of how the FTC enjoys procedural advantages that private plaintiffs do not, consider *Kraft, Inc. v. FTC*.[15] The defendant sold its part-cheese Kraft Singles as "processed cheese." To differentiate them from "imitation cheese" slices, which contain little or no cheese, Kraft advertised its Singles as having "five ounces of milk" per slice and emphasized their calcium content. But 30% of the calcium in the milk in Kraft Singles was lost during processing.

Kraft did not literally say that a Single had as much calcium as five ounces of milk, so the FTC was alleging falsity by implication, rather than literal falsity. A competitor bringing a Lanham Act claim on these facts would need extrinsic evidence, typically a consumer survey, to show that the ads did in fact convey this implied claim. Thus, Kraft argued that the FTC should be also required to present extrinsic evidence to show what claims the ads actually conveyed to a reasonable consumer. But as the court explained, the FTC can rely instead on its own institutional expertise at evaluating advertising:

> Courts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, *FTC v. Colgate-Palmolive Co.*[16] (FTC not required to conduct consumer surveys before determining that a commercial has a tendency to mislead), and we decline to do so as well. We

11. 15 U.S.C. § 45(2)

12. We will not discuss these "Baby FTC Acts" further here, other than to note their nickname.

13. Fed. Trade Comm'n v. Winsted Hosiery Co., 258 U.S. 483 (1922).

14. *Id.*

15. Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992).

Still from Kraft Singles ad

16. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

> hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.
>
> The Commission's expertise in deceptive advertising cases, Kraft's protestations notwithstanding, undoubtedly exceeds that of courts as a general matter. That false advertising cases constitute a small percentage of the FTC's overall workload does not negate the fact that significant resources are devoted to such cases in absolute terms, nor does it account for the institutional expertise the FTC gains through investigations, rulemakings, and consent orders.

Under ordinary administrative-law principles, courts do not simply take the FTC's word for it. Instead, they review the FTC's claims about what an ad conveys with substantial *deference*, accepting them if they are supported by "substantial evidence in the record." And here, they were:

> Although Kraft downplays the nexus in the ads between milk and calcium, the ads emphasize visually and verbally that five ounces of milk go into a slice of Kraft Singles; this image is linked to calcium content, strongly implying that the consumer gets the calcium found in five ounces of milk.
>
> Kraft asserts that the literal truth of the Class Picture ads – they are made from five ounces of milk and they do have a high concentration of calcium – makes it illogical to render a finding of consumer deception. The difficulty with this argument is that even literally true statements can have misleading implications. Here, the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing, which leaves consumers with a misleading impression about calcium content. The critical fact is not that reasonable consumers might believe that a ¾ ounce slice of cheese actually contains five ounces of milk, but that reasonable consumers might believe that a ¾ ounce slice actually contains the calcium in five ounces of milk.[17]

17. *Kraft*, 970 F.2d 311.

The FTC also polices for a wide variety of other deceptive advertising practices. One particularly important one, from an information-control perspective, is undisclosed ***endorsements***.[18] The "man on the street" in an ad should not be a paid actor; the "actual consumer" should not be the CEO's sister. If an endorser is being paid – in money or in free products – the FTC requires that this connection be disclosed in the ad. For example, in Letter from Federal Trade Commission to Microsoft Corp. & Starcom MediaVest Grp. (Aug. 26, 2015), the FTC investigated a promotion by a one of Microsoft's advertising agencies to pay video-game influencers to uplaod YouTube videos of themselves playing Xbox One launch titles, speaking favorably about the console and the games. The

18. *See generally* 16 C.F.R. pt. 255 ("Guides Concerning the Use of Endorsements and Testimonials in Advertising"); Federal Trade Commission, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013).

FTC's letter summarized:

> The videos were uploaded by the influencers to their individual YouTube channels, where they appeared to be independently produced by, and to reflect the personal views of, the influencers.
>
> [Microsoft] did not require the influencers to disclose in their videos that they were being compensated for producing and uploading the videos, and when the videos were uploaded, many (if not most) of the influencers failed to make any kind of disclosure.
>
> Section 5 of the FTC Act requires the disclosure of a material connection between an advertiser and an endorser when such a relationship is not apparent from the context of the communication that contains the endorsement. In this case,the payment of significant sums to video bloggers to post specific content promoting the Xbox One and Microsoft's game titles is a material connection that would not be reasonably expected by YouTube viewers. As the advertiser, Microsoft bears responsibility for the influencers' failure to disclose such material connections. Starcom, as Microsoft's agent and the advertising agency that managed the relationship . . . , also bears responsibility for the influencers' failure to disclose.[19]

19. Letter from Federal Trade Commission to Microsoft Corp. & Starcom MediaVest Grp. (Aug. 26, 2015).

Sponsored tweet by Justin Bieber with no disclosure.

In addition to disclosure, endorsements can also raise falsity and substantiation issues about the endorser's experience with the product – and endorsement claims without the endorser's permission can raise § 43(a) false-endorsement and right of publicity issues.

2 Regulation

FTC enforcement actions, like Lanham Act suits, deal with langauge on a retail basis: one case at a time, in particular contexts. But government regulations sometimes deal with langauge on a wholesale basis: authoritatively fixing the meaning of particular terms. For example, the Food, Drug, and Cosmetic Act (FDCA) forbids the "misbranding" of foods and drinks in interstate commerce, and misbranded foods can be seized and destroyed.[20]The FDA has the authority to promulgate regulations defining the information that can appear on food and drink labels, and it can use that authority to produce "standards of identity" that give a legally binding meaning to a term. For example, "maple syrup" is derived from the sap of the maple tree (genus *Acer*) and contains at least "66 percent by weight of soluble solids derived solely from such sap."[21] Selling a product labeled "maple syrup" that conains only 50% maple-sap solids is misbranding.

20. 21 U.S.C. §§ 331

21. 21 C.F.R. § 168.140(a)

There is an interesting duality here. On the one hand, the FDCA adopts a consumer-protection function by respecting existing meanings. Consumers expect "maple syrup" to be maple sap, not corn syrup with artificial maple flavoring. The FDA has decided, once and for all, that sellers must respect this expectation. On the other hand, by doing so, the FDA rules out the possibility of linguistic change. It now says that "maple syrup" means maple sap, regardless of whether people really expect it to. The issue is currently playing out in the debate over nut "milks." The FDA's current standard of identity defines "milk" as "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows."[22] Vegan-product producers argue that consumers know that almond milk doesn't come from cows and want the standard of identity relaxed; dairy producers argue that consumers are confused and want the standard of identity enforced more rigorously. Rebecca Tushnet expands on these controversies:

22. 21 C.F.R. § 131.110(a).

> Regulation-by-definition is common, and requires lawmakers to endorse one meaning at the expense of others. Consider moral and environmental claims such as "dolphin-free tuna": one possible definition of dolphin-free tuna is tuna caught in a net that didn't happen to kill any dolphins. If the net brings up a dolphin, you throw out the whole catch. This understanding of "dolphin-free tuna" doesn't address the fundamental objection that the method of catching the tuna routinely and predictably kills a lot of dolphins. However, it remains the case that the cans of tuna don't have any dolphins in them and did not even need to have dead dolphins picked out of them. Because of likely audience understanding, tuna caught this way is not "dolphin-free." In order to end semantic disputes, Congress passed a law defining dolphin-free tuna.[23]
>
> There has also been substantial debate over the proper definition of "organic," an official definition of which has

23. The Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d), which prevents tuna from being labeled "dolphin safe" if it was caught with driftnets or other fishing techniques that pose a serious risk to dolphins.

> now been adopted by the United States Department of Agriculture ("USDA").[24] Historically, organic foods faced market difficulties because of a proliferation of standards, which led to consumer suspicion that the organic label was meaningless.[25] Currently, products not meeting USDA standards, but meeting some other definition of "organic," cannot be labeled organic. Organic products must have at least 95 percent organic content, but the remainder can be non-organic if it is on an approved list of ingredients without reasonably available organic substitutes. That list is itself controversial, since interested parties dispute whether or not various ingredients are available in organic form. . . .[26]

24. Organic Production and Handling Requirements, 7 C.F.R. §§ 205.200–.299 (2007)

25. Arguably, this is the case with "natural" claims.

26. Rebecca Tushnet, *It Depends on What the Meaning of "False" is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loy. L.A.L. Rev. 227 (2007).

Another important pattern of government-controlled meaning is that certain terms *without* preexisting meanings are directly defined by law – the regulatory equivalent of certification mark. For example, the FCC certifies radio equipment, including the radios in computers and other wireless-enabled electronic devices. It requires testing to ensure that the device's radio emissions are within the limits mandated by the FCC.

> Certified transmitters also are required to have two labels attached: an FCC ID label and a compliance label. The FCC ID label identifies the FCC equipment authorization file that is associated with the transmitter, and serves as an indication to consumers that the transmitter has been authorized by the FCC. The compliance label indicates to consumers that the transmitter . . . may not cause, nor is it protected from, harmful interference.

Required FCC logo

The FCC's certification rules are mandatory, just like the FDA's labeling rules for foods and drinks. An equipment manufacturer *must* apply the FCC's symbol to its goods. But other government symbols are voluntary. The USDA *inspects* meat for safety; inspections are mandatory. It also *grades* meat for quality; grading is optional. USDA grades include Prime, Choice, Select, Standard, Commercial, Utility, Cutter, and Canner. And, of course, there are government-owned phrases and brands that only the government may use, like Woodsy Owl and his slogan, "Give a hoot, don't pollute."

USDA Choice grade mark

Another important issue is the extent to which the FDCA and similar laws preempt or leave room for competitor false-advertising suits. In *POM Wonderful LLC v. The Coca-Cola Co.*, the Supreme Court dealt with Minute Maid's "pomegranate-blueberry" juice that contained 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice. (The remaining 99.4% was apple and grape.) Under the FDA's regulations under the FDCA, a juice blend in which the named juices are not "predominant" must either give their percentages or indicate that they are present as a flavoring.[27] For example, if a "raspcranberry" blend contains 10% cranberry juice, 5% raspberry juice, and 85% grape juice, it could be labelled as "raspcranberry; raspberry and cranberry fla-

27. 21 C.F.R. § 102.33(a).

vored juice" but not as "raspcranberry juice." POM Wonderful, which sells pomegranate juice blends, sued for false advertising under section 43(a)(1)(B).

There is no private right of action under the FDCA, which gives the FDA nearly exclusive enforcement authority. But, the Court held, that did not mean that the FDCA was meant to preclude section 43(a) suits. Because competitors may have greater "perspective or expertise in assessing market dynamics" than the FDA, including "how consumers rely upon certain sales and marketing strategies," they are better positioned to "sue competitors to protect their interests on a case-by-case basis" and thus "provide incentives for manufacturers to behave well."[28] The FDA does not preapprove labels, nor does it bring enforcement actions against every mislabeled product. This leaves room for private false-advertising suits, including suits like the *Coca-Cola* where the falsity complained of is failure to conform to an FDA regulation of label language.[29]

28. POM Wonderful LLC v. The Coca-Cola Co., 134 S. Ct. 2228 (2014).

29. This is not the case for every regulatory regime; some *do* preempt Lanham Act suits. The point is that this is an important question, not that it comes out the same way in every case.

D Self-Regulation

The National Advertising Division of the Advertising Self-Regulatory Council runs an ADR system, based entirely on written filings and with decisions within 60 days.[30] Participation is voluntary, and the NAD takes no enforcement actions by itself. But if it finds that an ad is misleading and the advertiser refuses to discontinue the ad, the NAD will typically refer the matter to the FTC. To be sure, the FTC is under no obligation to act. But given the NAD's subject-matter expertise, a referral carries substantial weight. It indicates that *even the advertising industry* believes the ad is misleading, a finding guaranteed to raise eyebrows at the FTC. Knowing this, most advertisers who lose before the NAD tend to drop the ad and cut their losses.[31]

30. For more on the NAD, see Jeffrey S. Edelstein, *Self-Regulation of Advertising: An Alternative to Litigation and Government Action*,43 IDEA: J. L & Tech. 509 (2003).

31. For an example of about as severe a scolding as the NAD tends to give, see Mead Johnson Nutritionals (Enfamil LIPIL), Case No. 4822CIII (Feb. 12, 2009).

Another arm of the ASRC, the Children's Advertising Review Unit, operates a similar program under standards that are "deliberately subjective, going beyond the issues of truthfulness and accuracy to take into account the uniquely impressionable and vulnerable child audience." Consider *CARU Lego Racers Press Release*, which involved an add for the Lego Racers: Crash Collection line of playsets:

> Commercials for the playsets feature two children playing with LEGO pull-back motor racers. A voice-over states that the toys are "built to crash." When the cars hit each other, loud crashing noises are heard and a voice-over screams "CRASH" in a long, drawn-out manner while a bubble visual of the word "CRASH" appears on the screen in large, cartoon-like letters. The commercial features numerous loud crash scenes, with the cars hitting each other and various other objects. On impact, in addition to the sounds synchronized with the collision and the video and audio supers, special effects dramatize the cars breaking apart and pieces fly-

ing off in slow-motion.

Still from challenged Lego Racers ad

The problem was that the combination of visuals and sound effects might "mislead children into believing that the toys were equipped with sound-effects equipment" and "create unrealistic performance expectations that children would not be able to duplicate." For an adult audience, this would likely be non-actionable puffery, and even if it wasn't, an on-screen disclaimer would likely suffice. But CARU believes that children will take commercials literally unless they are obviously fantasy (e.g. unrealistically animated rather than live-action), and also that disclaimers will often be ineffective. Lego agreed to drop the ad.

E Problems

Scavenger Hunt Problem

Find as many of the following as you can in the wild:

- An advertisement containing non-actionable puffery
- A literally false advertisement
- An advertisement that is not literally false but is misleading
- An establishment claim
- A registered certification mark
- A deceptive trademark (not necessarily registered)
- A food label regulated by the FDA under the FDCA, together with a citation to the *specific* section in the Code of Federal Regulations that governs the label
- An endorsement on social media containing an advertising disclosure
- An endorsement on social media *not* containing an advertising disclosure, but which should have had one
- An advertisement directed at children that is misleading under the standards applied by CARU
- Anything else raising interesting truth-in-advertising issues

Post your findings to Canvas. Please post only examples you would be comfortable discussing in class.