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Jesse Scannapieco Principals of Advertising Professor Gopal 20 October 2012

Deception at its Finest Getting in shape without setting foot in the gym? That may be one of the best things to tell a consumer who is concerned with his or her body image. In America where obesity is on the rise and being unhealthy is a common dilemma, individuals are likely to purchase a product that promises cardiovascular health, weight loss, and a stronger/more toned body. For the producer though, that may be one of the worst statements to ever see an advertisement; especially if that advertisement, or even worse, series of advertisements have no clinical studies to back up the claims the advertisement is making. This is exactly what happened to Skechers, with their Shape-Ups- costing Skechers 40 million dollars after the FTC (Federal Trade Commission) proved that the advertisements were deceptive. Some of the Shape-Ups advertisements included an endorsement from Dr. Steven Gautreau, a licensed chiropractor, who recommended the sneakers but claimed it was based on a clinical study that he conducted. Not only was the study found to not produce the positive results exposed, but also, soon after a discovery was made that Dr. Steven Gautreau is married to a Skechers marketing executive- obviously the advertisements did not disclose this information (Weisbaum 7). Deceptive advertising, like most types of advertising, has positive and negative affects on consumers and producers alike. In most cases, as long as an advertisement does not cross the ' puffery' boundary, making it dishonest, the advertisement is welcomed into the industry; while in other cases, where deception arises, problems do occur. An advertisement cannot simply be proven false or deceptive; instead there are five things a complainant must verify. The first is whether or not a

false statement or fact has been made about the promoter's own or another company's goods, services, or profitable activity. Secondly, the statement produced must either deceive or have the potential to deceive an extensive portion of its audience. Thirdly, the false claims must be likely to affect the purchasing decisions of the audience. The fourth allegation is that the advertising itself involves goods or services in interstate commerce, and lastly the deception has either caused or is prone to cause injury to the accuser (" False Advertising" 1). To no surprise, the most heavily weighted factor is the advertisement's likelihood to harm a customer. The injury is typically attributed to money the consumer would lose through a purchase of a good or service, which logically would not have been made, had the advertisement not been misleading. False statements in advertisements are either those that are false on their face, or those that are subliminally false. Either way, the business that marketed their product misleadingly is going to end up in some kind of trouble. In 1911, one of the first attempts to create advertising industry standards was formed. This happened when an advertising trade journal called " Printer's Ink" suggested false advertising be classified as a felony. Forty-four states in the nation enacted laws based on the suggestion made in " Printer's Ink", making false advertising a misdemeanor. Because of how much trouble it is to prove ' beyond a reasonable doubt' an advertiser's fraudulence, these statutes are rarely used. Instead, states adopted the Uniform Deceptive Trade Practices Act of 1964. This act names a dozen different items that are not allowed in the advertising commerce. The only remedy that is available under the Uniform Deceptive Trade Practices Act is injunctive relief; this is a court order that

reprimands the guilty party for its actions. An extremely low number of states have adopted this act, and that remedy is a likely reason as to why they have not (" False Advertising" 2). Other states throughout the country have different laws against false advertising. Most of the laws require the courts to decipher state laws using federal standards provided by the Federal Trade Commission (" False Advertising" 3). Today, there are three main acts that represent false advertising- failure to disclose, flawed/insignificant research, and product disparagement. The regulations are outlined in the Lanham Act of 1946, which encompasses laws that control trademark rules within the United States. Failure to disclose is considered deceptive advertising under the Lanham Act if a statement is untrue as a result of the failure to disclose a material fact (False Advertising 4). This means that false advertising can come from misstatements and somewhat accurate statements that are misleading, since they are not disclosing something the consumer should in fact know. In *American Home Products Corp vs. Johnson & Johnson*, in 1987, a good example is shown of how the courts use their discretion in determining when a disclosure is unsatisfactory. In the case, Johnson & Johnson advertised a medicine by comparing its side effects to those of a similar American Home Products drug, what Johnson & Johnson left out, was some of the side effects of its own. Even though the Lanham Act does not require full disclosure of a product or service, the court held the defendant to a much higher standard and considered the advertisement misleading (" False Advertising" 4). In this case, the advertisement was considered misleading mostly because of the potential health risk posed towards consumers, as full disclosure is not mandatory, like stated

previously. Flawed and insignificant research relates to advertisements that are unsupported by accepted authority or research, also which are contradicted by predominant research. These are the types of advertisements that are false on their face. In *Alpo Pet Foods vs. Ralston Purina Company*, an example of making a claim with insignificant test results provides sufficient grounds for a deceptive advertising accusation. In the case, The Ralston Purina Company claimed that the dog food being sold was beneficial for canines with hip dysplasia; they demonstrated the claims with studies and tests. Alpo Pet Foods discovered the advertisement and brought a claim of false advertising against Purina. They said Purina's test results could not actually be supported by the claims that were made during the advertisement. After the court examined the advertisements and looked at the evidence presented, the court ruled that the methods used to conduct the experiments were not only insignificant, but also the tests were inadequate. Product disparagement is when a competitor's product is discredited. The 1988 amendment that was added to the Lanham Act makes false advertising to misrepresent another company's products or services prohibited (" False Advertising" 4). This was great news for competitive businesses- no longer could false advertisements be created misrepresenting a competitor. Comparative advertising is certainly apart of an advertiser's nature, and is sometimes the most effective way of marketing a product, but is not without risks. Comparative advertising is when the goods or services of a trader are compared to the goods or services of another. Comparative advertising can definitely help a company distinguish itself from its competition, and in most cases helps the

distinguished company in sales and revenue. Comparative advertising can be broken down into three different types, including non-comparative advertising, indirectly comparative advertising, and directly comparative advertising. Non-comparative advertising is when an advertisement does not refer to competition directly or indirectly. Indirect comparative advertising is when an advertisement does refer to a competing product in an indirect manner, and direct comparative advertising is when an advertisement refers to a competing product specifically or it is recognizably presented. Different countries allow both kinds of comparative advertising, while others allow one type or none at all. Advertisements for Carlsberg lager, which read 'probably the best lager in the world', cannot be used in Germany, but are allowed in different countries (Shuklah 1). Comparative advertising has positive affects on consumers for several different reasons. Comparative advertisements compare prices, quality, and value of leading competitors. This enhances awareness to the consumer. Product disparagement relates to comparative advertising, but is the negative way of doing it. When a product or service is disparaged, a false and harmful statement discrediting or detracting from another company's reputation has been created. Even though advertising is commercial speech and is protected in the United States Constitution, it is senseless to believe an advertiser has the liberty to disparage the product or service of a competitor. Product disparagement is inconsiderate to competition and can make a company look just as bad as the one they are referring to through negative advertising. Ultimately, advertisers want consumers and potential customers to trust their products, but first they must gain consumer trust through advertising their products and services

honestly. Therefore, many advertisers take precaution when advertising their products and services, to assure that they are not deceptive by any means. Before an advertiser releases an advertisement a reasonable basis for making a statement about product performance should be created, if not, the advertiser runs the risk of investigation by the FTC. If a food or beverage company is going to make a claim about their product, especially a claim focused on carbohydrates or calories, the company better have nutritional research completed. The same goes for advertisements in the auto industry, the positive details and statistics listed about the automobile being presented must be supported by research, if not, investigations will occur. The FTC has different remedies for deception and unfair advertising; the most common sources of complaints about deceptive or unfair advertisements are from competitors, the public, and from the FTC's own observers. Once an advertisement is proven deceptive, the first step in the regulation process is to release a consent decree. The FTC solely notifies the advertiser of the deceptive advertisement and asks for the company to sign a consent decree that makes the advertiser agree to stop dishonest practices. To avoid bad publicity, most advertisers will sign the decree (Moriarty 87). It is important to know that an agency is liable for deceptive advertising along with the advertiser, as the agency should know whether or not one of their created advertisements is false or deceptive. There are several courses of action the FTC follows when needed. If an advertiser will not agree to sign the consent decree, and the FTC decides that the deception is significant, a cease-and-desist order is issued. This is similar to a court trial, with a judge administering the case. If the judge agrees with the

FTC, the judge then issues an order making the advertiser stop their unlawful practices. The FTC can also require corrective advertising, in such cases the advertiser must send out messages to consumers correcting the previously noted claims. The purpose of corrective advertising is to make sure that the deceptive advertising will not occur again. Lastly, there is consumer redress; it comes from the FTC Improvement Act of 1975. Consumer redress is allowed when an individual or a firm engages in misleading practices. In such cases, a judge can order cancelation or reformation of contracts, refund of money, return of property, payment of damages, and/or public notification (Moriarty 88). Regulating deception by the FTC is without a doubt a path worth going down, if the government were to allow deceptive advertising, problems would certainly accumulate. It would also be unfair for individuals who would be negatively affected, mentally and physically. When creating an advertisement, companies should remember that deceptive advertisements are not recalled as often as ones that are honest in nature. This means that an individual is more likely to recall truthful advertisements than they are to remember misleading ones. Studies have shown that expanded claims and modest claims lead to significantly higher levels of false beliefs. Examples of this in advertisements are factors like lack of side effects, low priced items, and speed or relief. Therefore, a company with expanded and misleading claims is not only not going to be recalled by the consumer, but if it were to be recalled false beliefs about the product or service would already exist due to the way the product was marketed. The result of a study that tested what types of advertisements consumers remember most demonstrated that "truth seems foremost in the minds of the consumers". The frequency at

which true claims were remembered was higher than the frequency of recall of false claims (Nagar 12). An explanation for the truth of this study is that consumers who have used similar products are more likely to remember the claims that they know for a fact to be the truth. Not only did the study prove that deceptive advertising is not worth it in the long run (for an advertiser), it also helped prove to companies why they shouldn't use misleading advertisements in the first place. With the way consumerism is today, with such advanced technology, advertising has become an everyday norm. An individual cannot help but look at advertisements; reading through a newspaper, looking up the latest fashion trends in a magazine, watching a favorite television show, listening to a radio station, or taking a stroll through New York, New York are just a few of the simple ways advertisements are pushed into the brains of consumers. Advertising has become the basic means of receiving information about a product or service for the human race. The fact that consumers rely on advertisements for information proves that deceptive advertising should by no means be allowed in today's society. Deceptive advertising can happen in a ton of different market types, but is mostly dangerous with the auto industry, food industry, and the dietary industry. Commercials for dietary supplements are constantly making up lies through deceptive advertising about how quick and easy it is to lose weight with their product. Convincing a consumer to buy a product can be a very simple task, and it is daunting to picture a consumer buying a product, and then getting hooked on a product, which they believe is doing them well, when in reality it is harming him or herself. An example of this is cigarette advertisements from the 1950's; one advertisement from Viceroy's stated

that since they filter the smoke, they are good for your teeth, and are therefore recommended by your dentist (" Big Tobacco Pays The Price" 1). With no clinical studies done, this advertisement was deceptive, and clearly harmful to consumers who were unaware of the negative effects cigarettes are now known to cause. Not only can deceptive advertising be harmful, but also it is morally wrong because companies that practice it are violating moral principals- such as the Golden Rule and Kant's categorical imperative. Kant believed humans occupied a ' special place' in creation, and he thought morality could be summed up in one ultimate commandment of reason, from which all obligations and duties originate (" Categorical Imperative" 1). For consumer's health, consumer trust, and company reputation, deceptive advertising is the wrong way to go about marketing a product. It is a dirty technique of making profits and the FTC regulating it is a positive benefit to society in the short-run and long run alike. Works Cited " Big Tobacco Pays The Price." *Lawsuits Against Cigarette Companies for Deceptive Advertising*. N. p., June 1010. Web. 19 Oct. 2012. " Categorical Imperative." Wikipedia. Wikimedia Foundation, 15 Oct. 2012. Web. 20 Oct. 2012. " False Advertising." Main Page. N. p., 2 Dec. 2009. Web. 20 Oct. 2012. Gary, T. Ford, and E. Calfee John. " Recent Developments in FTC Policy on Deception." *Journal of Marketing* 50. 3 (1986): 82-103. ProQuest Central; ProQuest Research Library. Web. 20 Oct. 2012. Moriarty, Sandra E., Nancy Mitchell, and William Wells. *Advertising & IMC: Principles & Practice*. Upper Saddle River, NJ: Prentice Hall/Pearson, 2012. Print. Nagar, Komal. " Effect of deceptive advertising on claim recall: an experimental research." *Journal of Services Research* 9. 2 (2009): 105+. Academic OneFile. Web. 19 Oct. 2012.

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