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OVERVIEW: THE ROLE OF CONSUMER RESEARCH IN RECENT NATIONAL ADVERTISING REGULATION¹

by

J. Craig Andrews²

In this volume of the **Advertising Law Anthology**, readers will find several topics in advertising law and regulation that have benefitted immeasurably from consumer research and/or have generated calls for further research from federal agencies. Issues such as the impact of food and drug advertising regulations, cross-cultural advertising law comparisons, professional services advertising, the recent Food and Drug Administration (FDA) tobacco regulations and the influence of "Old Joe the Camel," and extrinsic evidence (e.g., ad copy tests) presented before the Federal Trade Commission (FTC) and in Lanham Act cases have been the beneficiaries of considerable study. These consumer research studies have employed a variety of methods, such as survey work, ad copy tests, baseline and follow-up studies, experimentation, and reviews of recent case decisions. Other emerging advertising law topics listed in this volume (e.g., advertising in cyberspace, dietary supplement advertising, sponsorship advertising) will no doubt receive similar attention by consumer researchers in the future. Thus, the purpose of this volume overview is to highlight two areas (i.e., extrinsic evidence in ad deception cases and national advertising regulation) where consumer research has made a significant

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contribution to advertising law issues. Then, several calls for future consumer research which federal agencies have recently requested will be emphasized.

Extrinsic Evidence in Ad Deception Cases

In FTC ad deceptiveness cases, if the Commission's review of evidence from the ad itself (i.e., intrinsic evidence) does not allow with confidence a clear interpretation of an implied claim,³ then extrinsic evidence is often given substantial weight by the Commission in determining the net impression of the ad on consumers.⁴ In the FTC Deception Policy Statement,⁵ extrinsic evidence is viewed as consisting of "expert opinion, consumer testimony. . . copy tests, surveys, or any other reliable evidence of consumer interpretation" (*Cliffdale Associates, Inc.* 1989 at 176). Preston has provided a thorough review of extrinsic evidence accepted and rejected by the Commission in the form of direct consumer research, expert testimony, and indirect evidence (e.g., prior consumer beliefs).⁶ Other authors have discussed general standards or principles for the consideration of extrinsic evidence before the Commission.⁷ As found in *Stouffer*

³ See Stolle in this volume (p. 933) regarding arguments from *Kraft, Inc.* 114 FTC 40 (1991) relating to the FTC's authority to rely solely on intrinsic evidence in determining ad deception.

⁴ *Thompson Medical Co.* 104 FTC 789 (1984), *aff'd*, 791 F.2d 1989 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

⁵ *Cliffdale Associates, Inc.* 103 FTC 110, 176 (1984), reprinting as an appendix letter dated October 14, 1983, from the Commission to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives ("Deception Statement").

⁶ Preston, Ivan L., *Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases*, 3 COLUMBIA BUSINESS LAW REVIEW 633 (1987).

⁷ See e.g. Jacoby, Jacob and Szybillo, George J., *Consumer Research in FTC Versus Kraft (1991): A Case of Heads We Win, Tails You Lose?* 14 JOURNAL OF PUBLIC POLICY & MARKETING 1 (1995); Maronick, Thomas J., *Copy Tests in FTC Deception Cases: Guidelines for Researchers*, 31 JOURNAL OF ADVERTISING RESEARCH 9 (1991); Morgan, Fred F., *Judicial Standards for Survey Research: An Update and*

Foods Corp. (1994),⁸ difficult methodological tradeoffs often exist in the operationalization of such general standards for ad copy tests, such as the selection of the most appropriate controls to use for the targeted ad(s) and copy test questions.⁹

Other researchers have designed consumer studies examining the misleading representation, omission or practice; reasonable consumer; and materiality elements of the FTC's Deception Policy Statement.¹⁰ For example, recent research has examined how consumers may misinterpret and overgeneralize from implied claims in advertising.¹¹ Other experimental research has explored the roles of product expertise and involvement associated with the reasonable consumer element in

Guidelines, 54 JOURNAL OF MARKETING 59 (1990); Owen, Debra K. and Plyer, Joyce E., *The Role of Empirical Evidence in the Federal Regulation of Advertising*, 10 JOURNAL OF PUBLIC POLICY & MARKETING 1 (1991); Plevan, Kenneth A. and Siroky, Miriam L., (1991) ADVERTISING COMPLIANCE HANDBOOK, 2d ed., New York: Practising Law Institute; Preston, Ivan L., *Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases*, 3 COLUMBIA BUSINESS LAW REVIEW 633 (1987); Preston, Ivan L., *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 CINCINNATI LAW REVIEW 1243 (1989); Stewart, David W., (1995) *Deception, Materiality, and Survey Research: Some Lessons from Kraft*, 14 JOURNAL OF PUBLIC POLICY & MARKETING 15 (1995).

⁸ *Stouffer Foods Corp.* (1994), Commission Decision, FTC Docket No. 9250, slip opinion, October 4, 1-21.

⁹ Andrews, J. Craig and Maronick, Thomas J., *Advertising Research Issues From FTC Versus Stouffer Foods Corporation*, 14 JOURNAL OF PUBLIC POLICY & MARKETING 301 (1995).

¹⁰ See *Cliffdale Associates, Inc.* 103 FTC 175-176. Also see Ford, Gary T. and Calfee, John E., *Recent Developments in FTC Policy on Deception*, 50 JOURNAL OF MARKETING 82 (1986).

¹¹ Johar, Gita Venkataramani, *Consumer Involvement and Deception from Implied Advertising Claims*, 32 JOURNAL OF MARKETING RESEARCH 267 (1995); Pechmann, Cornelia, *Do Consumers Overgeneralize One-Sided Comparative Price Claims, and Are More Stringent Regulations Needed?* 33 JOURNAL OF MARKETING RESEARCH 150 (1996); See also Russo, J. Edward, Metcalf, Barbara L., and Stephens, Debra, *Identifying Misleading Advertising* 8 JOURNAL OF CONSUMER RESEARCH 119 (1981).

the Deception Statement.¹² Also, considerable discussion on the question of the materiality of the "milk equivalency" claim in *Kraft, Inc.*¹³ has ensued among consumer researchers.¹⁴ Finally, consumer researchers have provided a long history of studies and reviews of FTC information remedies, such as corrective advertising.¹⁵

In Lanham Act cases, unless a claim is "false on its face,"¹⁶ the burden of proof rests with the plaintiff in that they must demonstrate that the claim in question is false and misleading, not just that it is unsubstantiated.¹⁷ Examples of contributions from consumer researchers in Lanham Act advertising cases include an extensive review of comparative ad cases,¹⁸ a comparison of extrinsic evidence

¹² Lacznia, Russell N. and Grossbart, Sanford, *An Assessment of Assumptions Underlying the Reasonable Consumer Element in Deceptive Advertising Policy*, 9 JOURNAL OF PUBLIC POLICY & MARKETING 85 (1990).

¹³ *Kraft, Inc.* 114 FTC 40 (1991); *aff'd, Kraft, Inc. v. FTC* 970 F.2d 311 (7th Cir. 1992); *cert. denied*, 113 S. Ct. 1254 (1993).

¹⁴ Jacoby, Jacob and Szybillo, George J., *Consumer Research in FTC Versus Kraft (1991): A Case of Heads We Win, Tails You Lose?* 14 JOURNAL OF PUBLIC POLICY & MARKETING 1 (1995); Stewart, David W., *Deception, Materiality, and Survey Research: Some Lessons From Kraft*, 14 JOURNAL OF PUBLIC POLICY & MARKETING 15 (1995); Sudman, Seymour, *When Experts Disagree: Comments on the Articles by Jacoby and Szybillo and Stewart* 14 JOURNAL OF PUBLIC POLICY & MARKETING 29 (1995). For a discussion of materiality in general, see: Richards, Jef I. and Preston, Ivan L., *Proving and Disproving Materiality of Deceptive Advertising Claims* 11 JOURNAL OF PUBLIC POLICY & MARKETING 45 (1992).

¹⁵ See e.g., Wilkie, William L., McNeil, Dennis L., and Mazis, Michael B., *Marketing's 'Scarlet Letter': The Theory and Practice of Corrective Advertising* 48 JOURNAL OF MARKETING 11 (1984); Bernhardt, Kenneth L., Kinnear, Thomas C., and Mazis, Michael B., *A Field Study of Corrective Advertising Effectiveness* 5 JOURNAL OF PUBLIC POLICY & MARKETING 146 (1986).

¹⁶ *Coca-Cola Company v. Tropicana Products, Inc.* 690 F.2d 312, 317 (2d Cir. 1982).

¹⁷ *American Home Products Corp. v. The Procter & Gamble Company, Syntex USA Inc., and Procter/Syntex Health Products Co.* 871 F.Supp. 739, 758 (D.N.J. 1994).

¹⁸ Petty, Ross D., *The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?* 10 JOURNAL OF PUBLIC POLICY & MARKETING 161 (1991).

requirements between FTC and Lanham Act advertising cases,¹⁹ and a case-by-case review of survey evidence and standards under the Lanham Act.²⁰

National Advertising Regulation

Three important national ad regulation areas receiving considerable attention from researchers recently are the FDA's food labeling regulations in conjunction with the FTC's food advertising policy, the FTC's environmental marketing guides, and the FDA's recently released tobacco rules. The first area of inquiry involves the implementation of the Nutrition Labeling and Education Act (1990) as put forth in the FDA's food labeling regulations²¹ and the FTC's Enforcement Policy Statement on Food Advertising.²² For example, an entire section of the recent Spring 1996 *Journal of Public Policy & Marketing* is devoted to food labeling issues such as alternative nutrition formats, consumer processing of nutrient and health claims on packages, acquisition and comprehension of nutrition information, demographic profiles and nutrition shopping preferences, and alternative reference points for the provision of daily nutrition value information.²³ Recent calls for consumer research by the FTC have included the question of

¹⁹ Preston, Ivan L., *False or Deceptive Advertising Under the Lanham Act: An Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REPORTER 508 (1989).

²⁰ Jacoby, Jacob, Handlin, Amy H., and Simonson, Alex, *Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments From the Bench*, 84 TRADEMARK REPORTER 541 (1994).

²¹ *Food Labeling: General Requirements*, 58 FEDERAL REGISTER 520 (1993).

²² *Enforcement Policy Statement on Food Advertising*, Washington, DC: Federal Trade Commission, (May), 1-28.

²³ See Levy, Fein, and Schucker; Ford, Hastak, Mitra, and Ringold; Moorman; Mathios; and Barone, Rose, Manning, and Miniard, all in 15 JOURNAL OF PUBLIC POLICY & MARKETING 1 (1994). See also Burton, Scot, Biswas, Abhijit, and Netemeyer, Richard, *Effects of Alternative Nutrition Label Formats and Nutrition Reference Information on Consumer Perceptions, Comprehension, and Product Evaluations*, 13 JOURNAL OF PUBLIC POLICY & MARKETING 36 (1994).

whether consumers will generalize from nutrient content claims in advertising given the omission of an important negative nutrient.²⁴ Evidence from one study shows that consumers do indeed generalize from such claims, however, this generalization is dependent on the product category, specificity of ad claims, consumer nutrition knowledge, and disclosure type employed.²⁵ The study of consumer interpretations of health and dietary supplement claims in advertising would be an important extension of such research.

A second topic of interest to consumer researchers is that of environmental marketing claims. Extensive hearings were held this past December at the FTC regarding issues related to the revision of the Commission's 1992 Environmental Marketing Guides.²⁶ Consumer researchers working in this area have provided helpful evidence in the form of tracking studies on environmental claim usage across product categories and geographical areas.²⁷ In fact, an entire recent issue of the *Journal of Advertising* is devoted to research examining environmental marketing claims.²⁸ Further discussion and research continues regarding topics such as exhortations to recycle, lifecycle analyses, recyclability claims, pre- and post-consumer recycled content claims, seal systems, and ozone-related claims.

A third area of note, addressed in this volume, is the recent

²⁴ Starek, Roscoe B., III, (1993) *Ross Starek's Wish List or, A Call for Extrinsic Evidence*. Prepared remarks of Roscoe B. Starek, Commissioner, Federal Trade Commission, East Lansing, MI, (June 4), 1-19.

²⁵ Andrews, J. Craig, Netemeyer, Richard G., and Burton, Scot, (1996) *Consumer Generalization of Nutrient Content Claims in Advertising*, Marketing Science Institute Working Paper #96-115, Cambridge, MA: Marketing Science Institute, 1-34+.

²⁶ (1992) *Guides for the Use of Environmental Marketing Claims*, Washington, DC: Federal Trade Commission, (July 28), 1-27.

²⁷ Mayer, Robert N., Gray-Lee, Jason W., Scammon, Debra L. and Cude, Brenda J., (1995) *Trends in Environmental Marketing Claims Since the FTC Guides* (Tech. Rep.), Salt Lake City, UT: University of Utah, Department of Family and Consumer Studies.

²⁸ See e.g., the six environmental marketing articles in 24 JOURNAL OF ADVERTISING 1 (1995). E.g., Scammon, Debra L. and Mayer, Robert N., *Agency Review of Environmental Marketing Claims: Case-by-Case Decomposition of the Issues*, 24 JOURNAL OF ADVERTISING 33 (1995).

regulatory initiative on children, adolescents, and tobacco proposed by the FDA.²⁹ Early research on the question of whether advertising depicting the character "Old Joe the Camel" disproportionately affected children's logo recognition rates, brand recall and preferences, and market share estimates has been conducted in the medical community³⁰ and further examined and debated in the advertising research profession.³¹

More generally, recent consumer research on adolescents has indicated that exposure to antismoking ads made salient pre-existing beliefs regarding smoking hazards and led to less favorable thoughts about smokers.³² Exposure to cigarette ads resulted in more favorable thoughts about smokers. Other consumer research is evolving on cigarette package labeling, antismoking ads, and interpretation of

²⁹ *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 FEDERAL REGISTER 44396 (1996).

³⁰ Fischer, Paul M., Schwartz, Meyer P., Richards, Jr., John R., Goldstein, Adam O., and Rojas, Tina H., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 3145 (1991); DiFranza, Joseph R., Richards, Jr., John R., Paulman, Paul M., Wolf-Gillespie, Nancy, Fletcher, Christopher, Jaffe, Robert D., and Murray, David, *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 3149 (1991); Pierce, John P., Gilpin, Elizabeth, Burns, David M., Whalen, Elizabeth, Rosbrook, Bradley, Shopland, Donald, and Johnson, Michael, *Does Tobacco Advertising Target Young People to Start Smoking? Evidence From California*, 266 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 3154 (1991).

³¹ See e.g., Boddewyn, Jean J., *Where Should Articles on the Link Between Tobacco Advertising and Consumption Be Published?* 22 JOURNAL OF ADVERTISING 105 (1993); Soley, Lawrence C., *Smoke-filled Rooms and Research: A Response to Jean J. Boddewyn's Commentary*, 22 JOURNAL OF ADVERTISING 108 (1993); Pollay, Richard W., *Pertinent and Impertinent Opinions: Our Contributions to the Cigarette Advertising Policy Debate*, 22 JOURNAL OF ADVERTISING 110 (1993). Also see replication research by Henke, Lucy L., *Young Children's Perceptions of Cigarette Brand Advertising Symbols: Awareness, Affect, and Target Market Identification*, 24 JOURNAL OF ADVERTISING 13 (1995).

³² Pechmann, Cornelia and Ratneshwar, S., *The Effects of Antismoking and Cigarette Advertising on Young Adolescents' Perceptions of Peers Who Smoke*, 21 JOURNAL OF CONSUMER RESEARCH 236 (1994).

numerical tar ratings.³³ Several recent meta-analyses and market-share studies by consumer researchers have examined the overall impact of tobacco advertising.³⁴ Finally, an examination of the final FDA tobacco rules reveals the application of numerous consumer, marketing, and advertising research studies in sections of the regulations (e.g., advertising; 61 FEDERAL REGISTER 44465 (1996).

Calls For Future Consumer Research on Advertising Law and Regulation Issues

The purpose of this volume overview was to share with readers some examples of contributions from consumer research in helping to better understand exactly how consumers interpret advertising in recent national advertising regulation issues, many of which appear in this volume. After all, as the FTC indicates in *Thompson Medical* (1984 at 789), "The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question."

While such consumer research is sought in ad copy test cases and in assessing the impact of national ad regulations, it is not without its difficulties. For example, while generally-accepted principles exist, researchers designing ad copy tests in deception cases often face challenging tradeoffs in the design of such a test (e.g., control ad group choices). Regarding the impact of national ad rules, the use of baseline and follow-up studies is usually recommended to fully assess the rule's impact. However, such research efforts require not only significant

³³ See references to Madill-Marshall and Goldberg et al., Pechmann and Knight, and Cohen in Pechmann, Cornelia, *Emerging Research in US and Canadian Policies Toward Cigarette and Anti-Smoking Advertising and Product Packaging: Effects on Youths and Adults*, 23 *ADVANCES IN CONSUMER RESEARCH* 267 (1996). K.P. Corfman and J.G. Lynch, Jr., eds., Provo, UT: Association for Consumer Research.

³⁴ See e.g., studies and reviews by Andrews, Rick L. and Franke, George R., *The Determinants of Cigarette Consumption: A Meta-Analysis*, 10 *JOURNAL OF PUBLIC POLICY & MARKETING* 81 (1991); Pollay, Richard W., Siddarth, S., Siegel, Michael, Haddix, Anne, Merrit, Robert K., Giovino, Gary A., and Ericksen, Michael P., *The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993*, 60 *JOURNAL OF MARKETING* 1 (1996).

planning on the part of the researcher, but sufficient resources as well.³⁵ In general, consumer researchers working in the policy field also face challenges in achieving the right balance between underlying theory (addressing internal validity concerns) and public policy applications (addressing external validity concerns). In consumer research, internal validity refers to the confidence by which causal inferences can be made among variables measured in the research, whereas external validity is concerned with the generalizability of the findings to other populations, settings, and times.³⁶ While strong theoretical frameworks from fields of consumer behavior, economics, and law can help with internal validity issues, specific calls for consumer research from several federal agencies have assisted researchers with external validity concerns. For example, a recent call for consumer research from the FTC has targeted such needs as research in the areas of health, safety, and leasing disclosures; internet advertising; telemarketing; "Made in the USA" claims; corrective advertising; alcohol advertising; and consumer perceptions of tar and nicotine numbers.³⁷ Similarly, the FDA has called for consumer research help in the areas of patient information, food and drug labeling, and the proposed tobacco regulations.³⁸ These calls have no doubt generated considerable interest among scholars in our field, and are likely to lead to further research contributions applied to national advertising law and regulation issues.

³⁵ Maronick, Thomas J., *Current Role of Research at the Federal Trade Commission*, in, *MARKETING AND ADVERTISING REGULATION: THE FEDERAL TRADE COMMISSION IN THE 1990s* 345, 345-355 (P.E. Murphy and W.L. Wilkie, eds., 1990).

³⁶ COOK, THOMAS D., AND CAMPBELL, DONALD T., *QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS* (1979).

³⁷ Bernstein, Joan Z., *Federal Trade Commission Solicits Consumer Research*, in *23 ADVANCES IN CONSUMER RESEARCH* 313, 313-315 (K.P. Corfman and J.G. Lynch, Jr., eds., 1996).

³⁸ Schultz, William B., *Food and Drug Administration's Suggested Consumer Research Topics*, in *23 ADVANCES IN CONSUMER RESEARCH* 316 (K.P. Corfman and J.G. Lynch, Jr., eds., 1996).