



# DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

## FDA Regulation of Food Labeling

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## Introduction

*Wearing an expensive linen dress, I hear the soothing ballad, smell the lilies, and feel the warmth of the morning rays while watching my perfectly-dressed & faced children run around my upper-class neighborhood. I blink, and find myself in a size-2 designer suit running a fancy corporation, with perfectly-coifed hair and meticulously colored nails. I blink again, and enjoy a stroll down the beach with my loved one. My vision is abruptly interrupted, however, by obnoxiously dark, blocky letters and numbers. I step back, pause a little, and remind myself of why I was at the grocery store.*

As one strolls down a grocery aisle, shift through the maze of cosmetic counters, or sit in front of the television, one is transported into various fantasies, identities, and scenarios. The power of advertisements and package designs to influence the consumers has grown tremendously over the years. Food and cosmetic manufacturers, cognizant of this power, have invested an enormous amount of their resources into the both advertising and packaging – so much so that a fissure has formed between the “image” and the “actuality” of the product. Manufacturers pry on the consumers becoming more impulsive and vulnerable, and the amplification of the product’s “image” has helped this cause. No agency or body of law is curtailing this growth and use of the power except the Food and Drug Administration. Through its stringent labeling regulations throughout this century, the FDA has limited how far the manufacturers can go with their package designs. By imposing its numerous requirements, the FDA has provided the consumers with an “awareness,” and room to dilute the appeal of the “image.” In this sense, the FDA is going far beyond the realm of its traditional role: a “policeman”<sup>1</sup> who “serves the public interest”<sup>2</sup> by “ensur[ing] that food

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<sup>1</sup>Alexander Schmidt, *Nutrition Labeling and the Consumer: Feast or Famine?* 29 FDC L.J. 414 (1974).

<sup>2</sup>Peter B. Hutt, *Philosophy of Regulation Under the Federal Food Drug & Cosmetic Act*, FDC L.J. (50<sup>th</sup> Anniversary Issue) 104 (1995).

is safe, pure, and wholesome...[and that] cosmetics are safe..."<sup>3</sup> The FDA, like, the postmodern artist Barbara Kruger, is serving a significant *cultural* and *political* role. Please note that to keep this essay at a manageable length, I will discuss only foods and cosmetics to illustrate my theses.

### The “Power” of Advertising and Packaging

The advertisements and the packages that food and cosmetics manufacturers create to promote their products exercise tremendous power in our society. By “power,” I am not referring to its traditional interpretation – the notion that power is constituted or embodied in a sovereign, state, or judicial apparatus and that it requires the constant presence of an agent to apply force. I am referring, instead, to the *modern* definition of power that has been developed during the past few decades. In the new definition, power is less concrete than the gun or the police stick: it is subtle, appeals to our emotions, and is consonant with the autonomous self.

The ubiquitous ads and packages are *powerful* because of, interestingly, the *subtle* ways in which they effect the consumers. According to Michael Foucault, the father of the “modern” interpretation of power, power operates through “delicate and minute infiltration” into the very interior of our existence.<sup>4</sup> It is not exerted through physical violence but through symbolic effects. He states, “What makes [power] accepted is simply the fact that it does not weigh like a force...but that it runs through, and it produces, things, it induces pleasure, it forms knowledge, it produces discourse; it...runs through the entire body much more than a

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<sup>3</sup>PETER B. HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW: CASES AND MATERIALS, 2<sup>nd</sup> Edition 21 (University Casebook Series, 1991).

<sup>4</sup>NIKOLAS ROSE, GOVERNING THE SOUL 10 (Routledge, 1990).

negative instrument whose function is repression.”<sup>5</sup> The messages, designs, and images contained in the ads and packages do not push, squeeze, hit, yell at, or even beg the consumer. Unlike the police stick that strikes only the surface and from afar, the ads and packages are able to *penetrate* the consumer at the most profound level through their subtlety.

The ads and packages are powerful also because they bypass the rational and go straight to the emotions and the subconscious. Ads and packages deploy powerful images and graphics that the brain is able to grasp without conscious analysis. Thomas Hine, the author of *The Total Package* emphasizes packaging’s “unique,” “communicative” power.<sup>6</sup> He states, “Emotion can be seen as a very rapid means by which human process information. And no field of design deals more effectively with the emotions than does packaging.”<sup>7</sup> One important way in which ads and packages effect the consumers’ emotions is through their careful portrayals of the “ideal.” They create the binary opposition of whole/lacking, and consequently trigger anxieties among the consumers. The consumer cannot help but compare himself to the “perfect” representations of life presented to him. Life is to imitate the stereotypical images of joy, warmth, achievements, and conviviality presented on the packages and advertisements. Social philosopher Nikolas Rose articulates the anxiety is *Governing the Soul*:

[These images provide] the template against which the mundane dissatisfaction of our lives, the hesitations and uncertainties of our speech, the embarrassed awkwardness of our intercourse with others, the clumsy fumbblings of our loves and passions are to be judged.<sup>8</sup>

Keenly aware that the “ideal” is constantly evolving, manufacturers invent and reinvent their ads and packages. They listen closely to the so-called “lifestyle analysts.” When these analysts declared in 1988, for example, that “materialism” is “out” and “simplicity” is “in,” the companies were paying attention.<sup>9</sup> They replaced the “black, gold, and white palette” associated with the “Reagan-era expensive opulence” with the

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<sup>5</sup>MICHAEL FOUCAULT, *POWER, TRUTH, STRATEGY* 36 (Meaghan Morris and Paul Patton eds., Federal Publications 1979).

<sup>6</sup>Thomas Hine, *The Salesmen in Your Shopping Cart*, CONSUMERS’ RESEARCH MAGAZINE, Sept. 1995, at 18 & 21.

<sup>7</sup>*Id.* at 7.

<sup>9</sup>*Ad Age Predicts Return of the Three R’s*, PR NEWswire, May 16, 1988 (pg. unavail. online).

“Nineties clarity, purity, naturalness and intimacy.”<sup>10</sup>

The ads and packages are also powerful because they fashion and legitimize the consumer’s wants and behavior while preserving the consumer’s sense of autonomy. *The control, therefore, is free of resistance.* According to Foucault, power is efficacious because it is consonant with the concept of the autonomous and responsible self. Power recognizes the desire of “the other” (the one over whom power is exercised) to regulate his conduct and existence for his own welfare. Power acts not through subordination of the will but through “the *promotion* of subjectivities.”<sup>11</sup> In his essay “Subject and Power,” Foucault states that power thoroughly recognizes and maintains to the very end “the other” as a person who *acts*. Objectification entails a training in the minute arts of *self*-scrutiny, *self*-evaluation, and *self*-regulation. The ads and packages possess this power; they place a constant hold on the consumer through the facade of preserving the autonomy of the individual. Because the images remain within the repertoire of wants, the individual views his actions as stemming from his free choice. Consumers, in buying Coke, Wheaties cereal, and L’Oreal lipstick, do not believe that their decisions were shaped. They see their actions as being directly linked to their personal choices, their personal needs. With phrases like “it’s your decision,” “you are an intelligent consumer,” and “choose wisely,” the ads and packages reinforce such a belief.

The power of the ads and packages has increased and will continue to increase tremendously with the growth of technologies. The media that circulate advertisements of foods and cosmetics, like the magazine, newspaper, and television industries (and now the internet) are growing everyday. The mechanisms aimed at improving transmission speeds and facilitating image reproductions are being fine-tuned at incredible levels. The potential for ads to reach and effect the consumers appear limitless at this point. Similarly, the packaging industry is evolving and growing to maximize the potential of the manufacturers to influence the

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<sup>10</sup> *The Front Line of Marketing: Ignore Packaging... at Your Own Risk!* (Excerpt from Thomas Hine’s Book *The Total Package*), BRANDWEEK, October 16, 1995, at 9.

<sup>11</sup> ROSE, *supra* note 4, at 208.

consumers. The new technologies are allowing packages to become more and more unusual and eye-catching in shapes, colors, and proportions. In the article, “New Packaging Technologies,” Dr. Testin predicts that computerized printing technologies will “revolutionize the options for package printing.”<sup>12</sup> They will allow for “high speed, rapid changeover, and customized printing on all food packaging where such features are desired.”<sup>13</sup>

### Manufacturers’ Recognition and Utilization of That Power

Understanding the power of ads and packages today, as well as their growing potential to effect consumers in the future, food and cosmetic manufacturers have increased their investment in their development. Increasing spending on advertising seems to be the first strategy that food and cosmetic companies turn to when they become ambitious. Campbell, for example, announced in September 1996 that it will increase worldwide advertising spending in order to “grow Campbell to the next performance level.”<sup>14</sup> Pepsi-Cola, announced in October 1997 that it will “substantially” increase its advertising spending the following year as it introduces new packaging for its flagship drink.<sup>15</sup> In December 1998, Avon Products, in order to “enhance [its] position as a world-class beauty brand,” decided to increase global advertising spending from 1.3% of total sales in 1997 to approximately 3% of total sales by the year 2000.<sup>16</sup>

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<sup>12</sup>Testin, *New Packaging Technologies*, 50 FDC L.J. 575, 578 (1995).

<sup>13</sup>*Id.* at 579.

<sup>14</sup>Glenn Collins, *Juice Wars: The Squeeze Is On; Snapple Looks Back to See Coke and Pepsi Gaining*, THE NEW YORK TIMES, July 15, 1995, at A37.

<sup>15</sup>*Big Plans*, DAILY NEWS (NEW YORK), Oct. 30, 1997 (pg. unavail. online).

<sup>16</sup>*Avon Names Robert S. Gibraltar Vice President*, GLOBAL ADVERTISING, PR NEWSWIRE, Dec. 11, 1998 (pg. unavail. online).

The fact that advertisement spending continues to rise, even when times are bad and other operating costs are being reduced, shows how crucial manufacturers feel the spending is in their business. Several specific instances illustrate this behavior. Although sales growth for Nestle was only 5% in 1984, it planned to increase its advertisement spending by 20% the following year.<sup>17</sup> When Coors Banquet beer sales dropped 8% in 1987 due to growing competition from Miller Brewing Co.'s Genuine Draft, the company decided to increase its advertisement budget by 35%.<sup>18</sup> To stimulate sales growth in 1996, Grand Metropolitan, the owner of Burger King, Pillsbury, and Smirnoff, spent substantially more on advertising while cutting all other costs.<sup>19</sup> Also, as the competition in the cereal business became fierce in the early 1990s, the big brands, instead of cutting prices to compete, "turn[ed] up the advertising."<sup>20</sup> The juice companies did the same. In 1995, when the juice category was the second-fastest-growing part of the beverage industry after bottled water, beverage giants turned to advertisements, instead of lowering prices to compete in the so-called "juice war." Coke invested \$30 million to advertise its new Frutopia line of juice drinks in 1994, and planned to spend \$67 million to advertise its Hi-C, Five Alive and other juice-drink businesses in 1995.<sup>21</sup> Pepsi, in the meantime, sharply increased its advertising budget for Ocean Spray to \$40 million in 1995. These reactions by such giant suppliers show where their priorities are; and their priorities most accurately reveal what works most effectively in the market.

Also recognizing the actual and potential "power of package design,"<sup>22</sup> manufacturers have spent more and more resources on packaging throughout the years. According to Thomas Hine, this increase is a recent phenomenon; the emphasis on packaging came at a time "when television had fragmented into a multitude of niche channels, and fewer and fewer women were at home during the day to watch the commercials that have

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<sup>17</sup> *Advertising and Marketing*, FINANCIAL TIMES (LONDON), Oct. 11, 1984 (pg. unavailable online).

<sup>18</sup> *Ad Age Predicts Return of the Three R's*, *supra* note 9.

<sup>19</sup> *GrandMet Drinks Growth*, FINANCIAL TIMES (LONDON), Sept. 28, 1996, at 8.

<sup>20</sup> *Four Dollars a Box?* CONSUMER REPORTS, Nov. 1992, at 689.

<sup>21</sup> Collins, *supra* note 11, at A38.

<sup>22</sup> *The Front Line of Marketing...*, *supra* note 10, at 10.

traditionally established national brands.”<sup>23</sup> Because the number of products being advertised on television has been decreasing, packaging has become “the principal way in which a new product gets noticed.”<sup>24</sup> Companies keep the budget for packaging large not just to introduce packaging for new products, but also to redesign the packages of the existing products. As noted earlier (e.g., the Reagan opulence v. 90s’ simplicity), packaging style, “so suitable for a particular moment in history, might easily become outdated.”<sup>25</sup> Major food and cosmetic manufacturers have spent enormous amounts of resources into give their products “a new look.” In 1994, for example, Coke invested \$100 million to restyle its Minute Maid juice packaging, “the most expensive such remake in the history of its foods division.”<sup>26</sup> Similarly, Triarc introduced new packaging for its Snapple, Mystic and Royal Crown cola drinks in 1997-98 “to boost sales.”<sup>27</sup> Manufacturers have also considered extremely meticulous and somewhat surprising details when designing packages. Thomas Hine describes:

Designers have worked and reworked the design on their computers and tested mock ups on the store shelves. Refinements are measured in millimeters. . . . Market researchers have conducted surveys of consumer wants and needs, and consultants have studied photographs of families’ kitchen cupboards and medicine chests to get a sense of how products are used. Test subjects have been tied into pieces of heavy apparatus that measure their eye movement, their blood pressure or body temperature, when subjected to different packages. Psychologists get people to talk about the packages in order to get a sense of their innermost feelings about what they want.<sup>28</sup>

As is the case with advertising, the fact that manufacturers are devoting so much time, money, and effort into packaging illustrates how important manufacturers consider packaging to be in selling a product.

### **The Effects of Such Recognition and Utilization**

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> Collins, *supra* note 14, at A37.

<sup>27</sup> *Morning Briefcase*, THE DALLAS MORNING NEWS, Oct. 30, 1997, a 2D.



The results of such heavy and thought-out investments in advertising and packaging are twofold. The first is that the ability of advertisements and packages to influence people improves dramatically, while the products themselves remain virtually the same in quality and character. A gap develops, therefore, between the *idea* and the *actuality* of the product. The gap most obviously and rudimentarily exists at the cost level. According to *Consumer Reports*, the ingredients of a lipstick (whether it is a \$2 no-name brand or an \$18 famous brand), cost the manufacturer a dime out of every dollar a consumer spends on a lipstick. Twice as much, however, goes into “the illusion” created by packaging and advertising.<sup>29</sup> Similar discrepancy exists in the cereal industry. According to a cost breakdown presented by a marketing analyst in 1991, raw materials account for just 8% of the cereal’s wholesale price. Advertising and packaging budgets, however, account for as much as 30%.<sup>30</sup> These differences in cost bring about fancy containers and glamorous advertisements that move farther and farther away from conveying what the actual product is about. A 1993 issue of *Consumer Reports* commented that advertisements “reek of status, romance, mystery, or sex. . . [b]ut tell you nothing about what’s inside” the product.<sup>31</sup> Beneath the “ideal” images, therefore, are the products themselves that get ignored and oftentimes remain generic. Thomas Hine points out that packaging can give “a powerful image” to products that are “in themselves characterless”; it is, he continues, sometimes “what makes the product possible.”<sup>32</sup> Furthermore, products are “improved” by simple changes in advertising and packaging; companies can “reposition” a product to appeal to new customers, without touching the actual product itself.<sup>33</sup> The stainless-steel fork in the Rice-a-Roni package was replaced in the late 1980s, for example, with a silver one to give the package a more upscale look. Breyers Ice Cream got a new logo and a black carton for the same reason.<sup>34</sup>

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<sup>29</sup> *Lipsticks*, CONSUMER REPORTS, Feb. 1988, at 75.

<sup>30</sup> *Four Dollars a Box?*, *supra* note 20, at 689.

<sup>31</sup> *How to Buy a Fragrance*, CONSUMER REPORTS, Dec. 1993, at 765.

<sup>32</sup> Hine, *supra* note 6, at 15.

<sup>33</sup> *How You Can Save \$2500 a Year in the Supermarket*, CONSUMER REPORTS, March 1988, at 158.

<sup>34</sup> *Id.*

The second outcome, which is closely related to the first, is that people are buying less according to what they actually need in the products, and more according to what the ads and the packages depict. The famous profile of Absolute vodka brings up a clear example of how consumers are buying the packaging and not the product. The Absolute manufacturers use well-known artists and designers to celebrate and re-celebrate the bottle's shape. The contour, consequently, becomes embedded in people's minds as being associated with status, creativity, and culture. Other vodka manufacturers try to follow Absolute's example. "The whole vodka aisle," therefore, has become "a bottle beauty contest."<sup>35</sup> Consumers can buy a whole range of personalities, lifestyles, moods , etc. through the products they pick. They can buy, for instance, "good taste" by purchasing products with fancy packaging and glamorous advertising. Whatever the quality of a Lancome, Estee Lauder, or Chanel lipstick may be, one may rest assured, says the ads, that the package is "luxurious" and "discreet." Similar messages underlie so many of the advertisements and package designs we are bombarded by everyday. Moreover, in times of economic uncertainty, one can buy products encased in glittery packages with full-color graphics that "imply upscale lifestyles" and "offer a strong voice of reassurance."<sup>36</sup> Such packages promise "a way of maintaining your standard of living, even of being able to move up a little, without having to pay very much more than you can afford."<sup>37</sup>

Advertisements and packages can be, and were originally designed to be, valuable sources of information for the consumers. Clearly aware of the their power to impress, however, manufacturers have continued to invest excessively on their development and proliferation. The consumers, therefore, have become more impulsive and vulnerable, oftentimes overpaying for products that they do not really need. This is the context in which one should view and appreciate the significance of the FDA's labeling regulations.

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<sup>35</sup>Hine, *supra* note 6, at 21.

<sup>36</sup>*The Front Line of Marketing...*, *supra* note 10, at 9-10.

<sup>37</sup>*Id.* at 10.

## A Curtailment of the Power

### **The FTC and Intellectual Property Law**

No agency or body of law, outside of the FDA, appears to be creating a significant check on the growing power exercised by the manufacturers. The only limitation that advertisements are potentially subject to is that imposed by the Federal Trade Commission (“FTC”). This limit, however, is a weak one. The only check that may be imposed on package design is that offered by intellectual property law. This check, however, is aimed at protecting manufacturers, not consumers.

According to the Wheeler-Lea Amendments of 1938, 52 Stat. 111, 114, the FTC has the authority to regulate food advertising, and FDA has the primary responsibility for food labeling. Product labeling includes “packaging, inserts, and other promotional materials distributed at the point of sale.”<sup>38</sup> Advertising includes “print and broadcast ads, infomercials, catalogs, and similar direct marketing materials.”<sup>39</sup> According to Sections 14 and 15 of the FTC Act (which the Wheeler-Lea Amendments added), the FTC expressly forbids any food advertisement which is “misleading in a material respect.”<sup>40</sup> This prohibition, however, is based on a “reasonable standard,” which is very “flexible” compared to FDA’s “stringent standard of scientific proof” for food labeling.<sup>41</sup> The FTC articulated the reasonable standard in two policy statements. In a letter to Congress in October 1983, the FTC stated that in determining whether an advertisement is in violation of the FTC Act, “it will be examined ‘from the perspective of a consumer acting *reasonably* in the

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<sup>38</sup>The Federal Trade Commission, *Dietary Supplements: An Advertising Guide for Industry* (<http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.htm>), at 1.

<sup>39</sup>*Id.*

<sup>40</sup>Hutt & Merrill, *supra* note 3, at 187.

<sup>41</sup>*Id.*

circumstances.”<sup>42</sup> In 1984, the FTC added that advertisers must “have a *reasonable* basis for advertising claims before they are disseminated”<sup>43</sup> and that “what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim.”<sup>43</sup>

FTC’s flexible standard has allowed manufacturers to be relatively free in fashioning their advertisements. Some claims that are not allowed to be made on food packages are permissible in food advertisements.<sup>44</sup> Also, the FTC only scrutinizes/strikes what is already said or displayed; the FTC, unlike the FDA, rarely requires *affirmative* statements to be placed on the ads. Even when the FTC pursued a more “vigorous” case-by-case enforcement in the 1980s, it resulted in issuing only four complaints or consent orders, three of which “involved fringe products like dehydrated vegetable pills and wheat germ oil capsules.”<sup>45</sup> The weakness of the FTC standard is clearly illustrated by the “surge” of private false advertising lawsuits brought by competitors under section 43(a) of the Lanham Act. According to Thomas C. Morrison, an attorney specializing in false advertising litigation, “with the FTC’s virtual abandonment of advertising regulation in the 1980s, the Lanham Act has become the primary vehicle for enforcement of truth in advertising.”<sup>46</sup>

Intellectual property law provides some limits on how far manufacturers may go with their package designs. The Lanham Act, state and federal anti-dilution statutes, and state common law of unfair competition, for example, prevent manufacturers from using competitors’ registered (and sometimes even unregistered) trademarks on their packages. Trade dress law also prevents copying of certain distinctive and nonfunctional package designs. These laws do not pose much constraint on the manufacturers, however. In fact, they *enhance* the power of the packages to effect the consumers by preventing the dilution of unique, eye-catching designs. The main pro-consumer aspect of these laws is that discussed by William M. Landes and Richard

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<sup>42</sup>*Id.* (emphasis added).

<sup>43</sup>*Id.* (emphasis added).

<sup>44</sup>FTC, *supra* note 38, at 2.

<sup>45</sup>Peter B. Hutt, *Government Regulation of Health Claims in Food Labeling and Advertising*, 41 FDC L.J. 3, 17 (1986).

<sup>46</sup>Thomas C. Morrison, *The Regulation of Cosmetic Advertising under the Lanham Act*, 44 FDC L.J. 49 (1989).

Posner. Trademark and trade dress, according to them, serve a signaling function to consumers, reducing the cost of having to search for the brand they like each time they buy a particular product.<sup>47</sup> This is an argument of efficiency, not welfare. The power of the packages to subtly influence the consumers has, hence, been left alone, and perhaps even enhanced, by the existence of intellectual property law.

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<sup>47</sup>William Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 JOURNAL OF LAW AND ECONOMICS 265 (1987).

## The FDA's Labeling Regulations

In light of the FTC's weak control over advertisements and the limited role of trademark/dress laws over packaging, one recognizes the significance of FDA's authority over food labeling. The FDA *requires* that manufacturers place information, consisting of numerous words and numbers, on their packages – oftentimes in amounts that overshadow/dilute the effect of package designs. The required information limits how big and prominent the alluring images can be. The numbers, words, and charts inject incongruity into what was intended to carry a soothing appeal of fantasy. I will discuss below the labeling requirements that FDA has imposed on food and cosmetic manufacturers.

Section 403 of the Federal Food, Drug and Cosmetic Act (“FD&C Act”) requires manufacturers to disclose five types of information on food labels. The three simple requirements that do not take up much room are the following: the name of the food, the name and place of business manufacturer, packer or distributor, and the net quantity of contents. The statement of ingredients and nutrient content are the more complex categories. According to the FD&C Act, all the ingredients must be listed in descending order of predominance. Ingredients are to be listed by their chemical names, instead of by their categories or functions. According to section 403(i) of the FD&C Act, however, spices, flavorings, and uncertified colors may be listed generically. The only food ingredient that must be listed by both chemical name and function are chemical preservatives.<sup>48</sup>

Food suppliers must also disclose the nutrient information of their products on their packages. The current detailed nutrition labeling regulations are enumerated at 21 CFR §101.9. According to §101.9(c)(1) - (8), manufacturers, except those who are specifically exempt, are required to provide information on calories, fat (including saturated fat), cholesterol, sodium, carbohydrate (including dietary fiber and sugars), protein,

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<sup>48</sup>Hutt & Merrill, *supra* note 3, at 75.

and vitamins & minerals. Disclosure of more specific information, polyunsaturated fat, monounsaturated fat, potassium, soluble fiber, insoluble fiber, sugar alcohol, and “other” carbohydrates is voluntary. The section provides precise guidelines on what “serving” means and how to format the information. The FDA may also require certain nutrition information “to be highlighted by larger type, bold type, or contrasting color.”<sup>49</sup>

Simply listing the above information is not enough in FDA’s view; the information must be *easily noticeable*. According to section 403(f) of the FD&C Act, the required information must be “prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling).” The information must appear on the packages’ most important panels: the principal display panel or the information panel. According to 21 C.F.R. §101.1, the principal display panel refers to “the part of the label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale.” The information must be placed on the panel without “obscuring design, vignettes, or crowding.” The letters and numbers may not be less than one-sixteenth inch in height, unless the label of the package is too small to accommodate all of the required information.<sup>50</sup> This standardization of size and location was designed to prevent suppliers from manipulating with the requirements.

Food manufacturers are also required to declare certain warnings on their packages. Warnings against unsafe use, especially of product containers, are often required. Ingredients that are known to cause allergic reactions, such as FD&C Yellow No. 5 and sulfiting agents, must also be disclosed on the food labels.<sup>51</sup> Any foods containing ingredients that some people cannot metabolize must also bear warnings on their packages. 21 C.F.R. §172.804(e)(2), for example, states that any food containing aspartame must bear a prominent warning stating, “Phenylketonurics: contains phenylalanine.”<sup>52</sup> Consumers must also be warned against

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<sup>49</sup>*Id.* at 201.

<sup>50</sup>21 C.F.R. §101.2(c) & (f).

<sup>51</sup>21 C.F.R. §74.705(d)(2) and 21 C.F.R. §101.100(a)(4), respectively.

<sup>52</sup>Hutt & Merrill, *supra* note 3, at 83.

the link of saccharine to cancer as well as link of alcohol to birth defects and impairment of one's driving ability. In addition, foods containing ingredients known to cause side effects, like sorbitol, must bear warning statements.

The FDA requires similar disclosures for cosmetic manufacturers. Section 602 of the FD&C Act requires them to reveal the name of the cosmetic, the name and place of business of the manufacturer, packer, or distributor, and a statement of the quantity of contents. According to 21 C.F.R. §701.3, each cosmetic label must also list each ingredient in descending order of predominance, except fragrance or flavor, which may be listed as just "fragrance" or "flavor."

As in the case with foods, the above information must be placed "prominently" with "conspicuousness" on the labels, according to section 602 of the FD&C Act. And again, under 21 C.F.R. §701.3(b), the letters of the listed ingredients must not be less than one-sixteenth of an inch in height and must not be free of "obscuring design, vignettes, or crowding."

Cosmetic manufacturers, like food manufacturers, must also state warnings against certain ingredients and uses. According to sections 201(n), 601, and 602 of the FD&C Act and 21 C.F.R. §740.1, a cosmetic label "must bear any warning statements that are necessary or appropriate to prevent a health hazard that may be associated with the product."<sup>53</sup> Manufacturers are also required to state, "*Warning*—The safety of this product has not been determined," when the safety of any cosmetic ingredient or product has not been substantiated.<sup>54</sup> And under 21 C.F.R. §740.11, cosmetics in self-pressurized containers must bear the warning, "Avoid spraying in eyes. Contents under pressure. Do not puncture or incinerate. Do not store in temperature above 120 F. Keep out of reach of children. . . ."

The areas on product packages that contain the numerous disclosures discussed above provide valuable *spaces of truth* that reduce the tantalizing effect of colors, graphics, and images. Section 403 of the FD&C Act is de-

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<sup>53</sup>*Id.* at 842.

<sup>54</sup>21 C.F.R. §740.10(a); Hutt & Merrill, *supra* note 3, at 844.



signed to force food suppliers to “tell the *truth*”<sup>55</sup> about their products. Nutrition labeling allows consumers to understand the “*true* . . . value” of the food they are eating.<sup>56</sup> Cosmetic ingredient labeling is designed to “prevent the deception of consumers” and to contribute to consumers’ “*knowledgeable judgment*.”<sup>57</sup> The list of ingredients on a cosmetic package is the only area where a consumer can “find out the *truth*” about what s/he is purchasing; and becoming familiar with the list “can help counter some of the alluring appeal showcased elsewhere on the product.”<sup>58</sup> And with the FDA’s efforts toward standardization, these spaces of truth are *locked in* – in blocky, legible form, and on the most visible panels of the packages.

### The Expansion of Labeling Regulations

The FDA has required more and more information to be placed on food and cosmetic packages as time passed. The correlation of this increase with that of the power of the product “image” displays, perhaps, the FDA’s *conscious* battle to curtail this power.

The requirements for food labeling increased tremendously since Congress passed the federal statute governing the food supply in 1906. The 1906 Food and Drugs Act did not require food manufacturers to state any specific information on their packages<sup>59</sup>; it was merely a *broad* statute prohibiting the misbranding and adulteration of foods. The Gould Amendment of 1913 required manufacturers for the first time to disclose the net quantity of contents on food packages. It was not until the FD&C Act was enacted in 1938 that all of the following information were required to be disclosed: the food’s name, the list the ingredients, the net

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<sup>55</sup>Hutt & Merrill, *supra* note 3, at 36 (emphasis added).

<sup>56</sup>*Id.* at 139 (emphasis added).

<sup>57</sup>*Id.* at 850 (emphasis added).

<sup>58</sup>Carol Lewis, *Clearing Up Cosmetic Confusion*, FDA CONSUMER, May-June 1998 (pg. unavail. online) (emphasis added).

<sup>59</sup>The Food and Drug Act of 1906 did require food and drug manufacturers to disclose few types of information. Section 8, for example, ordered suppliers to disclose “the quantity or proportion of any alcohol, morphine, opium, cocaine, heroine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid, or any derivative or preparation of any such substances contained therein.” It also required food articles to be labeled “compound,” “imitation,” or “blend,” if they met the words’ definitions.

quality of contents, and the name and place of business of the manufacturer, packer or distributor.

More labeling requirements were put in place between 1969 and 1989 when, according to Peter Hutt and Richard Merrill, there was a “new emphasis on provision of adequate information to consumers rather than on establishing rigid standards for product composition.”<sup>60</sup> This shift of focus from food to information seems to parallel the food manufacturers’ shift of focus from product to advertising and packaging. As the manufacturers focused increasingly on the packages, *so did the FDA*. In the 1970s, the labeling requirements became more stringent. In 1973, for example, the FDA promulgated 21 C.F.R. §101.22(j), interpreting section 403(k) of the FD&C Act (which simply requires that chemical preservatives be “stat[ed]” on the label), to require that the preservatives be declared “*both* by its chemical name and by a separate description of its function.”<sup>61</sup> The FDA has also opted for specificity, and against genericness. Section 403(i)(2) of the FD&C Act originally permitted generic declaration of flavorings and colors in the list of ingredients. In 1973, however, FDA “promulgated complex regulations in 21 C.F.R. §101.22(g) governing prominent label disclosure of natural and artificial flavoring.”<sup>62</sup> Later in 1978, the FDA Commissioner asked the 100 largest food suppliers to “voluntarily label” the specific colors that they use in their foods, pointing out that “[o]nly through full ingredient disclosure can the consumer exercise in full measure the fundamental right to choose to be informed, and to be assured of safety.”<sup>63</sup> In 1990, the Nutrition Labeling and Education Act (“NL&E” Act) amended section 403(i)(2) “to require the declaration of all colors not required to be certified under section 706(c).”<sup>64</sup>

Also between 1969 and 1989, new rules governing food names were put in place. Manufacturers were to include, as a part of the food name, “the percentage of any characterizing ingredients, or a statement that

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<sup>60</sup>Hutt & Merrill, *supra* note 3, at 40.

<sup>61</sup>*Id.* at 76 (emphasis added).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 77.

<sup>64</sup>*Id.*

the food does not contain ingredients that might otherwise be expected. . . .”<sup>65</sup> Warning statements became a requirement as well during this period. In 1973, the FDA promulgated a regulation establishing warnings on food labels under section 201(n) of FD&C Act. Since then, according to Hutt and Merrill, the number of required and voluntarily-provided warnings has risen significantly.<sup>66</sup> Also during this period, the location and type size of the mandatory information on food labels were standardized under 21 C.F.R. §101.2. Prior to 1973, the FDA based their judgments “solely on the subjective impressions and informed judgments of agency compliance personnel.”<sup>67</sup> The 1962 case, *United States v. 46 Cases, More or Less, “Welch’s Nut Caramels*, 204 F. Supp. 321 (D.R.I. 1962) articulates subjective test used prior to the standardization: “[T]he requirements of . . . section 403(f) are met. . . if such statements are prominent enough to be seen and understood by the ordinary individual who is interested in discovering and learning the information disclosed thereby, and who makes a minimum examination of the package. . . .”<sup>68</sup>

Significant additions were made in the early 1990s as well. The 1990 NL&E Act mandated that manufacturers list *all* ingredients in standardized food. Under section 403(g) of the FD&C Act, which the Act amended, “the label of a standardized food need not declare any mandatory ingredients and need declare only those optional ingredients that are prescribed by the standard.”<sup>69</sup> The NL&E Act also required that manufacturers of vegetable and fruit juice drinks disclose the percent of each juice on the label’s information panel. The most significant addition to the labeling regulations in the 1990s was, however, nutrition labeling. The NL&E Act added 403(q) to the FD&C Act, which “requires nutrition labeling for virtually all FDA regulated food products.”<sup>70</sup> Prior to the Act, consumers had no readily-available, standardized source to obtain their nutrition information. Section 403(q), which is longer and more intricate than most of the

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<sup>65</sup> *Id.* at 41.

<sup>66</sup> *Id.* at 82.

<sup>67</sup> *Id.* at 61.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 76.

<sup>70</sup> *Id.* at 201.

sub-sections of the FD&C Act, was quite a breakthrough in labeling history.

The labeling requirements for cosmetics have increased with time as well. Before 1976, manufacturers were not required to bear ingredient lists on the packages. Ingredient labeling requirement for cosmetics came nearly four decades later than it did for foods, most probably due to the industry's and the regulators' views that it is economically costly and wasteful.<sup>71</sup> After years of "urging, petitioning, rule-making, objecting, amending and litigating," however, cosmetic labeling became a reality in 1976.<sup>72</sup> The number of warning statements that are required increased as well. In 1973, the FDA prescribed a warning statement for feminine deodorant sprays due to the "reported adverse reactions."<sup>73</sup> And the FDA promulgated a regulation requiring a warning about skin and urinary tract irritation from bubble bath products in 1980.

The above developments show that as the industries moved up a notch, the FDA did so as well. The expansion of labeling regulations increased as the power of the "image" grew. This implies that perhaps the FDA was on a mission to curtail that power.

### **The FDA's Effectiveness**

All this work by the FDA seems to be paying off. Recent studies and surveys show that consumers are paying more and more attention to the food and cosmetic labels. The response has been the most dramatic

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<sup>71</sup>See Walter E. Byerly, *Cosmetic Ingredient Labeling—An FDA Chimera*, 31 FDC L.J. 109 (1976).

<sup>72</sup>Heinz Eiermann, *Cosmetic Ingredient Labeling Requirements*, 31 FDC L.J. 115 (1976).

<sup>73</sup>Hutt & Merrill, *supra* note 3, at 845.

with regards to nutrition labeling. According to the Food Marketing Institute and Prevention Magazine's "Shopping for Health" survey, 52% of consumers in 1992 stated that they read the nutrition label when shopping for a food for the first time. According to its 1995 survey, that figure increased to 61%.<sup>74</sup> The figure is even higher in a 1998 study conducted in Washington state: 80% of the 1,450 adults surveyed stated that they read nutrition labels on foods.<sup>75</sup> This increase in awareness has been manifested in consumer *behavior*. According to a survey that the Food Marketing Institute conducted in 1994, 32% of consumers reported to eating less fat.<sup>76</sup> Not surprisingly, in 1994, "baloney sales [were] down. . . , super premium ice cream sales [were] melting, and peanut butter sales [were] off by 4%."<sup>77</sup> Similarly, the Washington state survey also indicated that those who read the nutrition labels have a lower intake of fat.<sup>78</sup>

Studies also indicate that consumers have developed a sense of trust in the FDA-regulated information on packages, and a sense of distrust in everything else surrounding it. A 1980 FDA survey showed that "the perceived honesty/integrity/truthfulness of the food label is very high," compared to that of food advertisements.<sup>79</sup> According to a 1984 study, 57% of the surveyed stated that labels on food packages were the most useful in learning about the nutritional content of food, where as only 4% stated that advertisements were the most useful.<sup>80</sup> The confidence has lasted throughout the years. A July 1996 article in *Food Labeling News* stated that the majority of consumers found the food label to be the most useful source of nutrition information, followed by friends and relatives.<sup>81</sup> Consumers feel, the article also points out, that everything that is outside of the nutrition facts box, the ingredient list, and other FDA-regulated information, is a

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<sup>74</sup> *Consumer Dietary Behaviors Change with New Food Label*, FOOD LABELING NEWS, July 27, 1995 (pg. unavail. online).

<sup>75</sup> *Researchers Find Most Consumers Read Nutrition Labels and Eat Less Fat*, Food Labeling & Nutrition News, Jan. 16, 1999, at 1.

<sup>76</sup> *Consumer Dietary Behaviors Change. . .*, *supra* note 74.

<sup>77</sup> *Id.*

<sup>78</sup> *Researchers Find Most Consumers. . .*, *supra* note 75, at 1.

<sup>79</sup> Hutt & Merrill, *supra* note 3, at 188.

<sup>80</sup> *Id.*

<sup>81</sup> *Understanding Consumer Attitudes Key to Using Label Claims Effectively*, Food Labeling News, July 11, 1996 (pg. unavail. online).

“form of advertisement and self-promotion.” As a result, the consumers “don’t give it a lot of credibility.”<sup>82</sup>

People feel similarly about cosmetics. Consumers feel that their “best friend” is the ingredient label.<sup>83</sup>

All these surveys and studies show that the fancy, colorful, and innovative designs in advertisements and packages are having less and less impact on the consumers. The ingredient, nutrition, and warning information consist of “words and numbers, directed to the *rational* mind, while other facets, consisting of shapes, colors, and graphic expressions, bypass the rational an appeal directly to consumers’ *emotions*.”<sup>84</sup> The rational, therefore, is being switched on, while the emotional is being switched off.

A strong evidence of FDA’s effectiveness lies in the manufacturers’ responses. Manufacturers seem to understand the ability of the words and numbers to cut into the appeal of the otherwise alluring and coherent packages. When physicians in the 1950s testified that cosmetic ingredient labeling would very helpful in treating and diagnosing patients, for example, the cosmetic manufacturers opposed on the ground that “a long list [of ingredients] affixed to the product would destroy the attractiveness of the package.”<sup>85</sup> The impact of labeling regulations is also unveiled by how cleverly the manufacturers are contriving to meet the standards. Manufacturers, for example, are placing warning statements in “condensed light-faced type that is difficult to read,” and making unfavorable disclosures “among the skinniest words in the language.”<sup>86</sup> In addition, companies are fighting back with even stronger images. For example, during the mid-1990’s when companies faced environmental concerns and corporate cost cutting, they began selling their products in their primary containers rather than in paperboard boxes. This move caused a problem for the manufacturers because it reduced the surface area formally available to place the list of ingredients, nutrition facts, warnings, and other FDA-required information. To counter the increased effect of the standardized letters and words, therefore, the companies made the packages “*more aggressive visually*,” with bolder graphics and

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<sup>82</sup>*Id.*

<sup>83</sup>Lewis, *supra* note 58.

<sup>84</sup>Hine, *supra* note 6, at 18 (emphases added).

<sup>85</sup>Hutt & Merrill, *supra* note 3, at 817.

<sup>86</sup>Hine, *supra* note 6, at 17.

more distinctive profiles.<sup>87</sup>

### Conclusion: The FDA and Barbara Kruger

The FDA “hope[s] to slow shoppers down, not speed them up,” states Thomas Hine.<sup>88</sup> The FDA-required letters and numbers on the labels cause us to pause, take a breath, give a thought before reaching for the product. Oftentimes in blocky, black letters and numbers, the information interrupts the alluring effect of the adjacent images, and even brings out underlining ironies. In this way, FDA’s work is closely related to the work of postmodern artist Barbara Kruger. See figures on the last page.

Barbara Kruger is keenly aware of the formative power of commercial images that surround us everyday and from every angle. She understands their capacity to effect deep structures of belief. She points to “the tendency to reduce the plural spaces of lived life to surfaces, the shimmering expanses of the movie, television, or video screen, the billboard, or magazine advertisement.”<sup>89</sup> She knows that power implements its impositions through the imagistic stereotype, the pose, leaving “the other” passive to be constructed within the dichotomous structures of whole/lacking. Her goal is to dismantle these structures, to erode the rigidity of social norms, in order to transform the passive “other” into an active viewer. Kruger proposes to intervene in stereotypical representations, disrupting their hold, and clearing a space for enlightened awareness.

How does she do this? Instead of being manipulated *by* the images, she manipulates the images themselves.

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<sup>87</sup> *The Front Line of Marketing...*, *supra* note 10, at 4 (emphasis added).

<sup>88</sup> Hine, *supra* note 6, at 19.

<sup>89</sup> KATE LINKER, *LOVE FOR SALE 30* (Harry N. Abrams, Inc., 1990).

Recognizing that images are power, she uses them herself as her arsenal. She chooses various images from different media sources. These images are then cropped, enlarged, overprinted, and juxtaposed with verbal statements. Her method of adding strident words to the exaggerated stereotypical image creates fissure in the process of identification. The image, against the assaultive and contradictory words, no longer does what it aims to do to “the other.” Thus, Kruger’s device is to (in her words) “intercept the stunned silence of the image with the uncouth impertinence and uncool embarrassments of language.”<sup>90</sup> She creates a gap between image and text, clearing a space for “the other” to roam. The “place” of the viewer is ruptured as she uses various pronouns, such as “I,” “me,” “we,” and “you,” which act as shifters. They work to dislocate the mastering effect of the image, showing that the viewer’s place can shift, be indefinite, and refuse alignment. In that mobility lies “the prospect of counterlanguage” aimed against the images’ “shackling rigidification.”<sup>91</sup>

The nutrition facts, the list of ingredients, the name and address of the manufacturer, and the warnings imposed on the attractive containers, like Kruger’s disruptive phrases, provide the consumers with a “counterlanguage.” The information, like Kruger’s words, is in dark, plain, and blocky letters - oftentimes enclosed in a white box with a black border. It disrupts the allurements of the surrounding designs, giving the consumers a chance to step back. In this respect, the FDA is doing more than what it is traditionally thought to be doing for our society. It is going far beyond making sure that foods and cosmetics are safe and that their containers truthfully labeled. A “policeman,” it is, but one that has, consciously or not, assumed an important cultural and a political role.

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<sup>90</sup>Barbara Kruger, *Remote Control*, in *BLASTED ALLEGORIES 401* (Brian Wallis ed., The New Museum of Contemporary Art, 1987).

<sup>91</sup>Kate Linker, *Representation and Sexuality*, in *ART AFTER MODERNISM 406* (Brian Wallis ed., The New Museum of Contemporary Art, 1984).