



Bridging the Gaps:
An Advertising Law Symposium





PANEL 1: Where to Get Relief: Disputes Involving Competitors' Comparative Claims



Roger Colaizzi
Partner,
Venable LLP



Randy Shaheen
Partner,
Venable LLP

8:30 AM to 9:30 AM



FACT: The Conway Power Blaster® can shoot water, sand, or any other substance you want to propel at a given surface.

FACT: The Conway Power Blaster® removes 100% of paint from any surface, better than any competing brand.

FACT: 73% of Conway Power Blaster® users prefer it to SandStorm power blasters.

Conway Power Blaster®

Blast anything away with a Conway

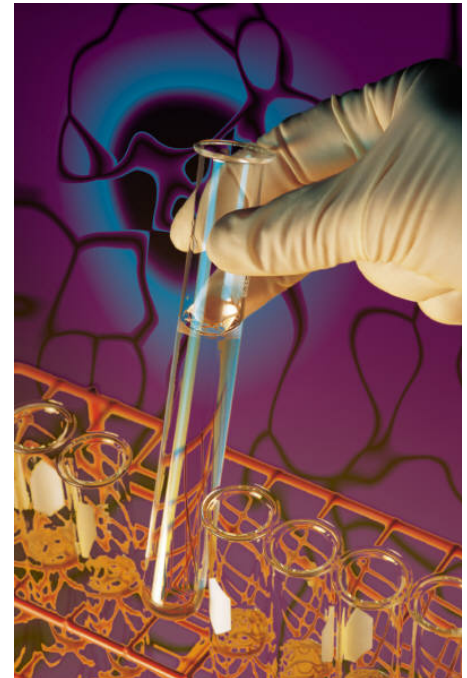
Home Improvement Specialist Approved!!!

See more at www.conwayrules.com



Comparative Superior Performance Claims

- Challenger generally bears burden of submitting its own testing to prove the claim is false.
- Establishment claim is the exception to this rule
 - “Studies Show”; “Tests Prove”.
 - Can be implied.
 - Challenger can prevail by showing the advertiser’s testing is not sufficiently reliable to support the claim.

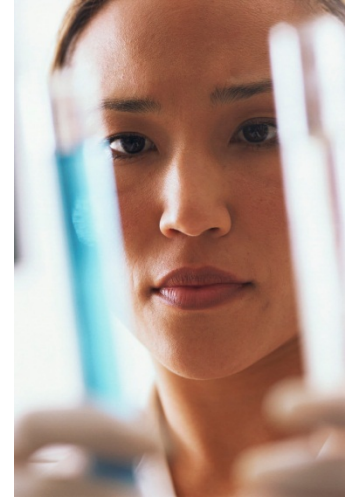




Comparative Superior Performance Claims

Common Product Testing Issues

- Is there an industry standardized test?
- Is the methodology sound?
- Did the study test the actual products at issue?
- Can a correlation be drawn between the test results and the challenged claims?
- Are the parameters of the test consumer relevant/clinically meaningful?





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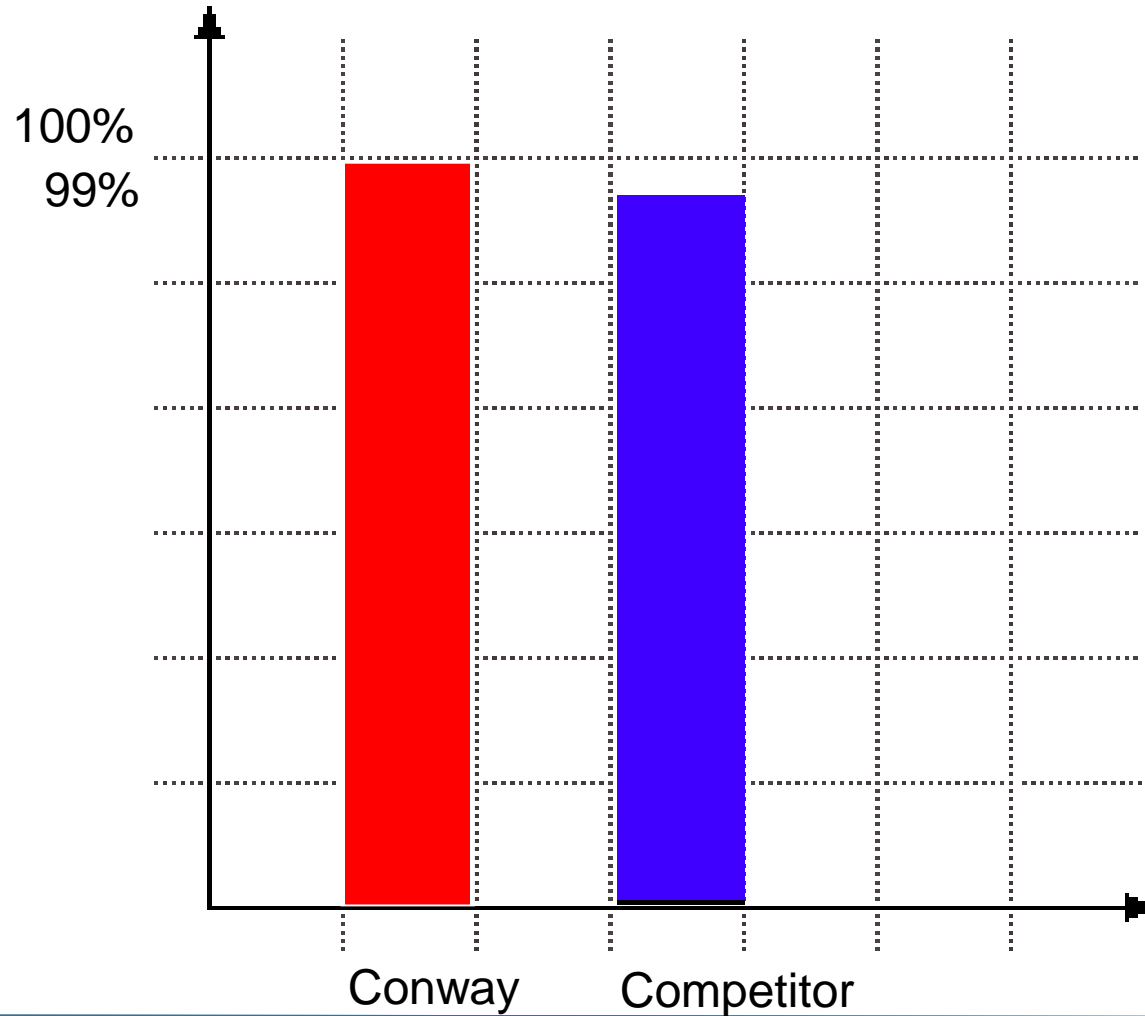
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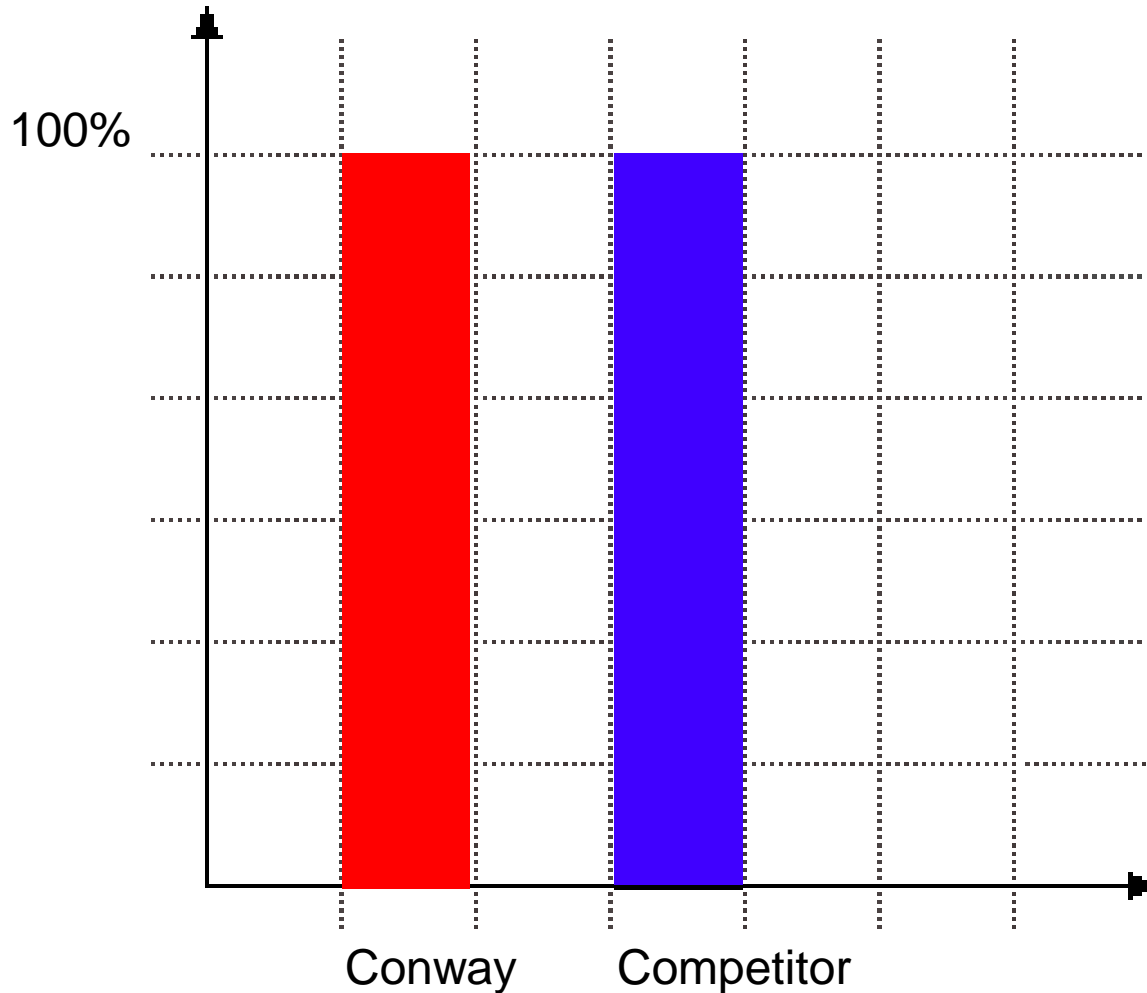


Percentage Of Paint Removed From Wood Surfaces





Percentage Of Paint Removed From Metal Surfaces





Comparative Superior Performance Claims





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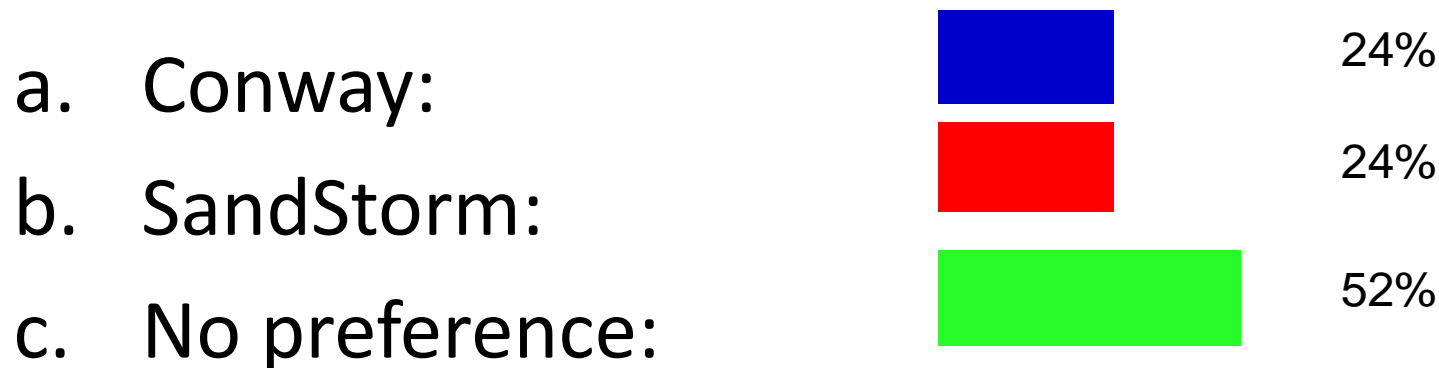
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Comparative Preference Claim

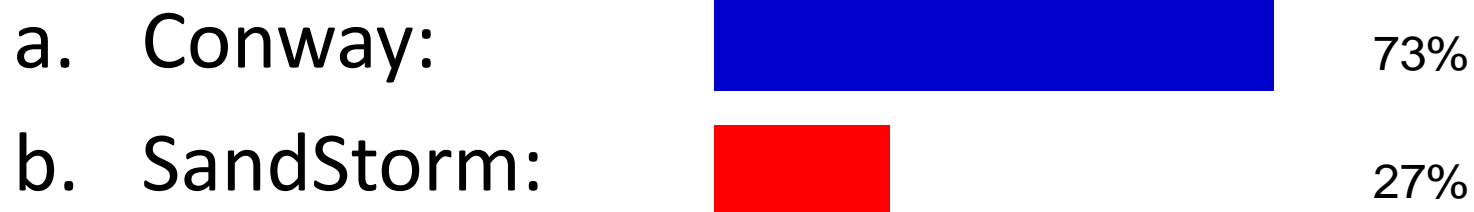
Q1: Which brand of power blaster do you prefer?





Comparative Preference Claim

Q2: Between Conway and SandStorm, which brand of power blaster do you prefer?





Consumer Perception Surveys

- Survey must be well designed and reliable.
 - Representative population;
 - Proper control;
 - Use of non-leading questions;
 - Proper coding and analysis; and
 - Fit between the survey and the relevant question at hand.



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**MORE
DURABLE
CONSTRUCTION
THAN ANY
BRAND**

“Home Improvement Specialist Approved” Claims

- What is a “Home Improvement Specialist”?
- How many Home Improvement Specialists must approve the product before the advertiser can claim that the Conway is generally approved by Home Improvement Specialists?





Fake Blogs

- Fake Blogs/Gripe Sites
 - Lanham Act False Advertising?
 - FTC Testimonial Guidelines
 - Require disclosure of material connections that consumers would not expect between advertisers and endorsers.
 - Applies to blogs.



Bruce's Home Improvement Blog

Serious Reviews for Serious DIYers

[Click Here to Buy Conway](#)



**Conway Power
Blaster®**
Consumer Reviews



[Click Here to Buy Conway](#)

To: Bruce's Home Improvement Blog
From: CrazyJaney@AsburyPark.org
Re: Blasting Made Easy

The Conway can strip away anything using any material. I ran out of sand and used gravel from my driveway to finish blasting paint off of my house.

To: Bruce's Home Improvement Blog
From: SaintIntheCity@EStreet.com
Re: Makes Me Look Super Tough

Not only is the blaster great at removing paint, but its gun like appearance makes me look tough. I carry it around with me in the city to deter would be muggers from attacking me. It is working great because I haven't been attacked yet. Conway is keeping me safe.

To: Bruce's Home Improvement Blog
From: BaltimoreJack@DarlingtonCounty.gov
Re: Working on the Highway

I work for the County out on route 95. All day I hold a red flag and watch traffic pass me by. Last week, a car swerved and nearly ran me over. Thanks to Conway's powerful blasting, I was able to blast the tail of the car, rending the taillights useless. Thanks Conway.

To: Bruce's Home Improvement Blog
From: Homer@simpson.com
Re: So Easy, Even a Caveman Could Do It.

The triggering system on the Conway is so easy, I let my 2 year old help out with my sand blasting while I lay in a hammock sipping a nice cold Duff beer. Mmmmmmmm Duff. Thanks Conway!!!



False Advertising v. Puffery

Better Sand;
Better Blasting;
Conway®





False Advertising v. Puffery

- **False Advertising or Puffery?**

- Similar to Pizza Hut v. Papa John's
("Better Ingredients. Better Pizza.")
- Fifth Circuit ruled:

- Standing alone, statement is subjective opinion puffery.
- In the context of Papa John's broader comparative advertising campaign, statement became misleading.





Challenging the Claims

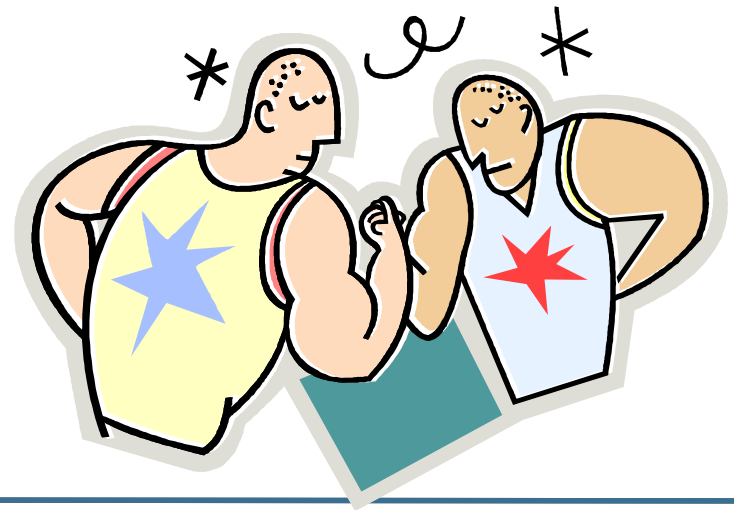
- Cease and Desist Letter
 - Should you notify the other side?
 - Possibility of amicable resolution.
 - Risk of Declaratory Judgment (DJ)?
 - A letter may slow the process.
- The advertiser's response to the demand letter.
 - Is the claim-in-question literally false?
 - Can ad be changed executionally without affecting campaign?
 - DJ? Counterclaim?





Where to Challenge?

- A challenger has a number of options for filing an advertising claim.
- Selecting the appropriate forum depends on the particular facts and goals of the challenge.
- Considerations:
 - Burden of proof?
 - Timing?
 - Evidence?
 - Cost?
 - Other issues?





Where to Challenge?

- FTC Trade Complaint
 - Section 5 of FTC Act.
 - Only FTC can enforce FTC Act, but FTC will consider complaints filed by market participants in determining whether to bring action.
- Considerations
 - FTC can be a useful tool against improper advertising
 - Burden of proof is on the advertiser to provide a "reasonable basis" for its claims.
 - But, a challenger "loses control" over the challenge.
 - Timing?
 - Agency likely has different concerns/incentives versus challenger.



Where to Challenge?

- National Advertising Division (NAD)
 - Self-regulation for advertisers; voluntary process.
 - No enforcement power, but FTC will often enforce advertising violations brought to its attention by NAD.
 - Electronic Retailing Self-Regulation Program (ERSP) is a similar process.
- Considerations
 - Burden of proof is on the advertiser to substantiate all reasonable interpretations of its claims.
 - No survey required for implied claims.
 - But, NAD process can take longer than litigation (4-6 months).
 - Lack of discovery can be a disadvantage.



Where to Challenge?

- Commercial Litigation.
 - Lanham Act, 15 U.S.C. 1125(a)(1)(B); Section 43(a);
 - State Laws; and
 - TRO/Preliminary Injunction.
- Considerations.
 - How significant is the claim-in-question? Timing?
 - Burden of proof on plaintiff to establish falsity of claim.
 - Survey evidence may be required.
 - Risk of counterclaims.
 - Discovery can be both “good” and “bad”.



PANEL 2: Litigating Class Certification Advertising Class Actions (Mock Hearing)



*Daniel
Silverman*
Partner,
Venable LLP



*Judge Marilyn Hall
Patel (retired)*
US District Court
for the Northern
District of
California



*Angel
Garganta*
Partner,
Venable LLP



Tina Wolfson
Attorney,
Ahdoot &
Wolfson PC

9:30 AM to 10:45 PM



Class Certification Issues in False Advertising Litigation re Consumer Products



Overview

- Ascertainability
- Reliance & Materiality
- Damages
- Nationwide Class



Ascertainability



Ascertainability

- An implied prerequisite under FRCP 23
- “A class definition should be precise, objective and presently ascertainable,” such that it is “administratively feasible to determine whether a particular person is a class member.”
 - *Allen v. Hylands*, 2014 WL 3819713 at *8 (C.D. Cal. August 1, 2014)



Ascertainability

- *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)
 - Court refused to certify a class of purchasers of Bayer's One-A-Day WeightSmart
 - Most consumers would not have receipts, and retailer records could not be used to identify class members





Carrera v. Bayer Corp.

- What about self-identification?
 - Court found that plaintiff could not demonstrate (based on objective criteria) that self-identification was reliable and administratively feasible
- *Carrera* = a significant win for manufacturers of low-value consumer products



Carrera in the 9th Circuit?

- *Brazil v. Dole Packaged Foods LLC*, 2014 WL 2466559 (N.D. Cal. May 30, 2014)
 - Plaintiffs sought to certify a class of California residents who purchased “all natural” Dole products
 - Relying on *Carrera*, Dole argued that the class was not ascertainable





Brazil v. Dole Packaged Foods LLC

☐ Court:

- ☐ *Carrera* “is not currently the law in the Ninth Circuit.”
- ☐ “In this circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.”

Ascertainability

- *Allen v. Hylands, Inc.* 2014 WL 3819713 (C.D. Aug. 1, 2014)
 - Plaintiff challenged 12 homeopathic products on the grounds that the active ingredients are so diluted that the ingredients are “effectively non-existent.”





Allen v. Hylands, Inc.

- “[9th Circuit] District courts . . . have frequently held that similar classes—composed of purchasers of consumer products with allegedly misleading packaging during a specified timeframe—were ascertainable.”
 - Citing *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014) (rejecting *Carrera*) and others
- “If class actions could be defeated because membership was difficult to ascertain at the class certification stage, ‘there would be no such thing as a consumer class action.’ ”



But see . . .

- *In re Pom Wonderful LLC*, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014)
 - “Pom Wonderful” juice allegedly falsely advertised as providing health benefits supported by millions of dollars of research
 - The court originally certified the class but ultimately decertified the class on various grounds, including ascertainability concerns.





In re Pom Wonderful LLC

- Ascertainability problem:
 - Allegedly misleading “100 percent juice” statement was only in Pom’s advertising (not bottles or product labels)
 - Given the volume of sales, every adult in the U.S. was a potential class member
 - No reliable way to determine who purchased Pom or when they did so, or to identify purchasers who saw the alleged misleading statement



Other Decisions Adopting *Carrera*-type Reasoning

- *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097 (N.D. Cal. Jan. 7, 2014)
 - Plaintiffs alleged Ben & Jerry's ice cream was not “all natural” because it contained cocoa alkalized with synthetic ingredients.
 - Class not ascertainable because there was no way to determine which cocoa suppliers used synthetic ingredients to alkalize their cocoa (not all did).





Other Decisions

Adopting *Carrera*-type Reasoning



- *Hernandez v. Chipotle Mexican Grill*, 2013 WL 6332002 (C.D. Cal. Dec. 2, 2013)
 - Plaintiff alleged that Chipotle served conventionally raised meats despite advertising its use of “naturally raised” meats.



Hernandez v. Chipotle Mexican Grill

- Class not ascertainable:
 - Class members could not reliably list “every time they ate at Chipotle,” the locations (not all served conventionally raised meats), or what they ordered
 - Class funds would be given out “basically at random”

Can Retailers' Loyalty Cards Solve Ascertainability Problems?

- *In re Clorox Consumer Litigation*, 2014 WL 3728469 (N.D. Cal. July 28, 2014)
 - Class cert. denied on ascertainability concerns (customers can't reliably remember purchases of Fresh Step cat litter)





Can Retailers' Loyalty Cards Solve Ascertainability Problems?

- *In re Clorox Consumer Litigation*, 2014 WL 3728469 (N.D. Cal. July 28, 2014)
 - Identification of customers through loyalty reward cards may cure ascertainability concerns
 - Problem for plaintiffs: only 2 of 16 retailers that plaintiffs contacted could identify a substantial number of plaintiffs.



Reliance & Materiality



Reliance/Materiality

- *In re Tobacco II Cases* 46 Cal.4th 298 (2009):
 - Creates two exceptions to the usual requirement that plaintiffs must prove actual reliance on allegedly false statements to establish standing to sue under FAL/UCL:
 - (1) if misrepresentations were part of “an extensive and long-term advertising campaign”
 - Or (2) if there is a showing that the misrepresentations were “material” — in which case reliance can be presumed





Reliance/Materiality

- Key Question: Is *Tobacco II* limited to standing only, or does it apply at class cert. for purposes of predominance and commonality?
 - In other words, should class-wide reliance be presumed in false advertising cases?
 - Case law is mixed



Reliance/Materiality

- Some courts have recognized that *Tobacco II*'s holding is limited
 - *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) (*Tobacco II* “does not stand for the proposition that causation and injury should be inferred on a classwide basis” in every case)
 - *In re Clorox*, 2014 WL 3728469 (N.D. Cal. July 28, 2014) (Plaintiffs not entitled to a class-wide presumption of reliance in the absence of the kind of decades-long, massive advertising campaign at issue in *Tobacco II*)



The Reasons Behind Consumer Purchases May Be Important

- For these courts, the subjective reasons behind consumer purchases are very important.
 - Courts may find “no cohesion among [class] members” when their subjective reasons for purchasing products differ or when “they [are] exposed to quite disparate information.”
 - *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011)



Courts May Look at the Reasons Behind Consumer Purchases

- *Moheb v. Nutramax Labs. Inc.*, 2012 WL 6951904 (C.D. Cal. Sept. 4, 2012)
 - Plaintiff challenged Defendant’s claim that its dietary supplement “Cosamin” had been proved to “reduce joint pain.”





Courts May Look at the Reasons Behind Consumer Purchases

- *Moheb v. Nutramax Labs. Inc.*, 2012 WL 6951904 (C.D. Cal. Sept. 4, 2012)
 - Class cert. denied:
 - Some members of the class never saw or relied on the allegedly false ads
 - Instead, they relied on the recommendations of doctors, veterinarians, news articles, or retailers' sales pitches



Courts May Look at the Reasons Behind Consumer Purchases

- *Jones v. ConAgra Foods Inc.*, 2014 WL 2702726 (N.D. Cal. June 13, 2014)
 - Hunt's Canned Tomato products: "100% Natural"
 - Pam: "100% Natural"
 - Swiss Miss Hot Cocoa: "Natural Source of Antioxidants"





Courts May Look at Consumers' Understanding of Ads

- *Jones v. ConAgra Foods Inc.*, 2014 WL 2702726 (N.D. Cal. June 13, 2014)
 - Class cert. denied.
 - No predominance when consumers were exposed to “label statements that varied by can size, variety, and time period (and the challenged ingredients also differed), [and] more importantly because even if the challenged statements were facially uniform, consumers’ understanding of those representations would not be.”



Reliance/Materiality

- Although some courts look at the subjective reasons behind consumer purchases, others find that subjective reasons behind consumer purchases are immaterial.
- To these courts, the question is instead whether an advertisement would be material to an objectively reasonable consumer.



No Individual Examination of Materiality/Reliance Is Necessary

- *Brazil v. Dole*, 2014 WL 2466559 at *7
 - “Whether Dole's label statements constitute material misrepresentations does not depend on the subjective motivations of individual purchasers, and the particular mix of motivations that compelled each class member to purchase the products in the first place is irrelevant.”



No Individual Examination of Materiality/Reliance Is Necessary

- *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012)
 - “factual variation in the circumstances underlying each putative class member’s claims [including the reasons for each consumer’s purchase, the factual circumstances surrounding the purchase, or the price paid] have marginal legal significance for purposes of . . . Rule 23’s commonality requirement.”



No Individual Examination of Materiality/Reliance Is Necessary

- *Lanovaz v. Twinings North America, Inc.*, 2014 WL 1652338 at *4 (N.D. Cal. April 24, 2014)
 - Plaintiff challenged Twinings promotion of the presence of antioxidants in its tea products





No Individual Examination of Materiality/Reliance Is Necessary

- *Lanovaz v. Twinings North America, Inc.*, 2014 WL 1652338 at *4 (N.D. Cal. April 24, 2014)
 - CA class certified
 - “As materiality is an objective inquiry, no individualized examination of materiality is necessary . . . Lanovaz need only prove that a reasonable consumer would attach importance to Twinings’ [allegedly false] antioxidant statements, or that Twinings knows or has reason to know that its consumers are likely to regard the label statements as important in making purchasing decisions.”



Damages



Damages Rule From *Comcast*

- *Comcast Corp. v. Behrand*, 133 S.Ct. 1426 (2013)
 - Rule 23(b)(3) requires a “rigorous analysis” showing that common questions of fact and law relating to injury and damages predominate
 - The damages model must “measure only those damages attributable to” the proposed plaintiff class’s theory of liability
 - (*i.e.*, plaintiff’s damages methodology must calculate damages that result from the wrong alleged)



Practical Effect of *Comcast* on Consumer Class Actions?

- In the consumer class action context, the practical effect of *Comcast* is that courts must now take a more critical look at the evidence showing how damages can be awarded for purchasing a falsely advertised product, before certifying a class.
- Individualized damages issues can defeat class certification where they are not amenable to class-wide resolution.



3 Types of Damages Models

- Full Refund Model
- Price Premium
- Price Regression





3 Types of Damages Models

- Full Refund Model:
 - Under the full refund model, plaintiffs argue that the falsely advertised product is worthless; therefore each class member should receive a full price refund.
 - (*e.g.*, falsely advertised supplement pill)





3 Types of Damages Models

- Price Premium Model:

- The price premium model of damages assumes that if a product was not falsely advertised, the demand for the product (and its price) would be lower.

- E.g.

100%  All Natural

- Damages are calculated by comparing the price charged for the falsely advertised product with the price of comparable products (that are not falsely advertised).



3 Types of Damages Models

- Price Regression Model: Analyzes the relationship between variables.
 - *Brazil v. Dole*: “Price regression analysis involves the relationship between a variable to be explained, known as the ‘dependent variable,’ such as the quantity demanded of a particular good or the price of a particular good, and additional variables that are thought to produce or to be associated with the dependent variable, known as the ‘explanatory’ or ‘independent’ variables . . .”



3 Types of Damages Models

- Put more simply, a price regression model can be designed to determine the impact of certain factors (*e.g.*, false advertising or marketing misrepresentations) on price in order to estimate the portion of sales obtained as a result of false advertising.

Comcast Analysis in Action

- *Brazil v. Dole*:
 - Plaintiffs offered the three damages models at class certification.
 - However, neither a full refund model nor a price premium damages model satisfied *Comcast* . .





Comcast Analysis in Action

- *Brazil v. Dole*:
 - The full refund model ignored the benefits that plaintiffs had received from eating the Dole products (*e.g.*, calories, nutrition, vitamins, and minerals).
 - The price premium model failed to account for the fact that a premium may be placed on products for reasons beyond just false advertising (*e.g.*, brand loyalty, product quality).



Price Regression Model

- Plaintiff's expert compared product sales before and after Dole placed "all natural" on its product labels, using regression analysis to control for variables that could otherwise explain changes in sales.
- Court: This price regression model "sufficiently tie[d] damages to Dole's alleged liability under *Comcast*," because it allowed the plaintiff to compare Dole's profits for the same products with and without the "all natural" label.



Full Refund and Price Premium Model

- The “full refund” and “price premium” models may be flawed in certain consumer products cases (*e.g.*, food/drinks):
 - *In re POM Wonderful LLC*, 2014 WL 1225184 (rejecting a full refund model because consumers benefited from consumption of the defendant’s products);
 - *Jones v. ConAgra Foods Inc.*, 2014 WL 2702726 (rejecting price premium model when expert simply compared brand-name products to generic competitor products).



Full Refund Model

- But the “full refund” model may work in other consumer products cases (*e.g.*, homeopathic products):
 - *Allen v. Hylands., Inc.*, 2014 WL 3819713 (Plaintiff’s full refund damages model satisfied *Comcast* because “Plaintiffs’ [liability] theory is that [Hyland’s homeopathic products] are entirely ineffective and thus any purported ‘benefit’ customers experience can be attributed to the placebo effect.”)



Insufficient Data May Cause Problems for Plaintiffs

- In *Lanovaz*, the allegedly false statement (“Natural Source of Antioxidants”) was on Twinings’ tea labels during the entire class period, meaning that “before and after” pricing data was not available.
 - Plaintiff’s own expert acknowledged that, given this lack of data, it would be impossible to perform a price regression analysis.



Nationwide Class



Nationwide Class

- Plaintiffs often seek to certify a “nationwide” class of consumers.
- Key Question: Can California’s stringent consumer protection laws be imposed on a nationwide basis?





Nationwide Class

- *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012)
 - California law “may only be used on a classwide basis if the interests of other states are not found to outweigh California’s interest in having its law applied,” as determined by a “three-step governmental interest test.”



The *Mazza* 3-Part Test

- First, the court determines whether the relevant laws of each state are the same or different.
- Second, the court examines each state's interest in the application of its laws under the circumstances of the particular case.
- Third, the court evaluates the strength of each state's interest and then applies the law of the state whose interest would be more impaired if its law were not applied.



Mazza Result

- The Court examined CA consumer protection statutes vs. consumer protection statutes across other states and determined that.
 - California's consumer protection laws could not be imposed on a nationwide basis (material differences exist - *e.g.*, some states require scienter, reliance, and willfulness to recover damages, CA does not)
 - Instead, each class member's consumer protection claim should be governed by the laws of the state where the transaction took place.



Post-*Mazza* Decisions

- Many expected that *Mazza* would effectively preclude certification of nationwide classes brought under CA consumer protection laws.
 - *Kowalsky v. Hewlett-Packard Co.*, 2012 WL 892427 (N.D. Cal. 2012) (“*. . . Mazza* controls and forecloses the certification of the proposed nationwide class.”)
 - *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096 (C.D. Cal. 2012) (denying class certification based on *Mazza* and variation in state consumer protection laws).



Post-*Mazza* Decisions – Defendant Has the Burden

- *Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D. Cal. 2012) (denying motion to decertify a nationwide class based on *Mazza*).
 - California's choice-of-law analysis must be applied on a case-by-case basis because it requires analyzing various states laws “under the circumstances of the particular case.”
 - The *Bruno* defendants failed to set forth material differences in California and other states’ laws.



Post-*Mazza* Decisions – Defendant Has the Burden

- *In re: Pom Wonderful Marketing and Sale Practices Litigation*, 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012)
 - Reached a similar conclusion, holding that defendant failed to meet its burden under the choice-of-law analysis and a nationwide class was certifiable under California law



Post-*Mazza* Decisions – Defendant Has the Burden

- In *Allen v. Hylands, Inc.*, 2014 WL 3819713 (C.D. Cal. August 1, 2014)
 - Court rejected Hyland’s argument that it is never possible to certify a nationwide class under California law
 - Citing *Bruno*, the court held that Defendant has the burden of showing that other states’ laws should apply
 - The court specifically criticized Hyland’s reliance on *Mazza*, rather than fully addressing the choice of law requirements



PANEL 3: The Regulatory Road Ahead



Yan Fang
Attorney,
Federal Trade
Commission,
Western
Regional Office



Michael Elisofon
Deputy Attorney
General,
Consumer Law Section
Office of California
Attorney General



*Leonard
Gordon*
Partner,
Venable LLP



*Michael
Signorelli*
Counsel,
Venable LLP

11:00 AM to 12:00 PM



LUNCH: Keynote Speaker

12:15 PM to 1:15 PM



Ross Hoffman

Director of Brand Strategy US,
Twitter



PANEL 4: Branded Entertainment in the Digital Age



Po Yi
Partner,
Venable LLP



Gabriel Martinez
Advertising Counsel,
The Clorox Company

1:15 PM to 2:00 PM



AGENDA

- What is Branded Content?
- Different Types of Branded Content
 - Entertainment content
 - Commercial content
 - Consumer-directed content
- Key Deal Issues
- Key Legal Issues



WHAT IS BRANDED ENTERTAINMENT?

Branded entertainment, also known as branded content or advertainment, is an entertainment-based vehicle that is funded by and complementary to a brand's marketing strategy. The purpose of a branded entertainment program is to give a brand the opportunity to communicate its image to its target audience in an original way, by creating positive links between the brand and the program. These projects are often the result of a content partnership between brands, producers and broadcasters.

- Wikipedia



ORIGINAL CONTENT PARTNERSHIP

We Could Be King

- Documentary produced by Tribeca Digital Studios in association with Dick's Sporting Goods Foundation
- Premiered at 2014 Tribeca Film Festival in April and is being distributed via various channels by Tribeca for Dick's

[We Could Be King Trailer](#)



ORIGINAL CONTENT PARTNERSHIP

#Hell Week

- Short episodic segments providing an intimate look at the most brutal week in high school sports with behind-the-scenes coverage of high school athletes
- Produced by Tribeca Digital Studios for Dick's Sporting Goods Films
- Distributed via Dick's ESPN relationship plus Dick's digital channels

#HELLWEEK

HELL WEEK ACROSS AMERICA



@dickssportinggoods



@dickssportinggoods



It's not just about X's & O's at #HELLWEEK.
Tune in to see @MLK_football on
@SportsCenter tonight on @espn at 6p ET.
pic.twitter.com/3GriTCN4Ri

@DICKS



@dickssportinggoods



episode 3 of #HELLWEEK tomorrow
on at 6pm ET on @SportsCenter.
c.twitter.com/YK5I8HPXLK

@DICKS



"#HELLWEEK is a triumph for
everyone involved." -Coach Dunn
#MLKHS

@DICKS



"Real football players get excited
about #HELLWEEK" -AJ Jackson
#MLKHS

@DICKS



@dickssportinggoods



COMMERCIAL CONTENT

Soy Vay A Pollo '13

- Marketing campaign to connect with a new target demographic
- Content is centered around the product
- Online commercial distributed via the internet only
- Companion website for additional content related to the campaign
- Guerilla marketing live event in Memphis

[Soy Vay A Pollo '13](#)



A POLLO '13

[MISSION](#)[GALLERY](#)[CAPSULE](#)[TEAM](#)[RECIPE](#)

MISSION SUCCESSFUL

The A Pollo '13 Space Mission started with a dream to take teriyaki to new heights. On October 12, 2013 Soy Vay made that dream a historic reality, by successfully cooking a marinated chicken in space!

the MISSION

Get ready to take teriyaki to the next level

Soy Vay A Pollo '13 — Mission to the Stars Full...



SPACE

100,000 FEET

CONSUMER-DIRECTED CONTENT



CONSUMER-DIRECTED CONTENT

Clorox Ick Awards



- Challenge
 - Continue Icktionary success to build affinity w/ modern moms and dads around parenting's icky moments
- Solution
 - Leverage social to gather icky stories from Twitter and act them out with the help of Second City
 - Host a 4 hour Twitter party to collect consumer tweets, capture video and send content out throughout the event
 - Enlist SNL and Second City alum Rachel Dratch to host the event
- Results
 - 130MM+ impressions & 13,000 tweets in just four 4 35+ videos created
 - Worldwide trending topic (#ickies) for 4 hours
 - Media coverage on WGN, OK Magazine, Media Post, Red Eye Chicago, and more
- Learnings
 - Take risks, but invite legal along the way
 - Tap influencers to drive engagement (bloggers for Twitter parties, Rachel Dratch & Second City)
 - We're winning on humor, but need to continue to secure support for affinity driving campaigns even in tough, value-focused times (no large ick activation for FY15)



WHO ARE THE PLAYERS?

- Brand
- Agency/Studio/Producer
- Filmmaker/Director
- Talent
- Distributor



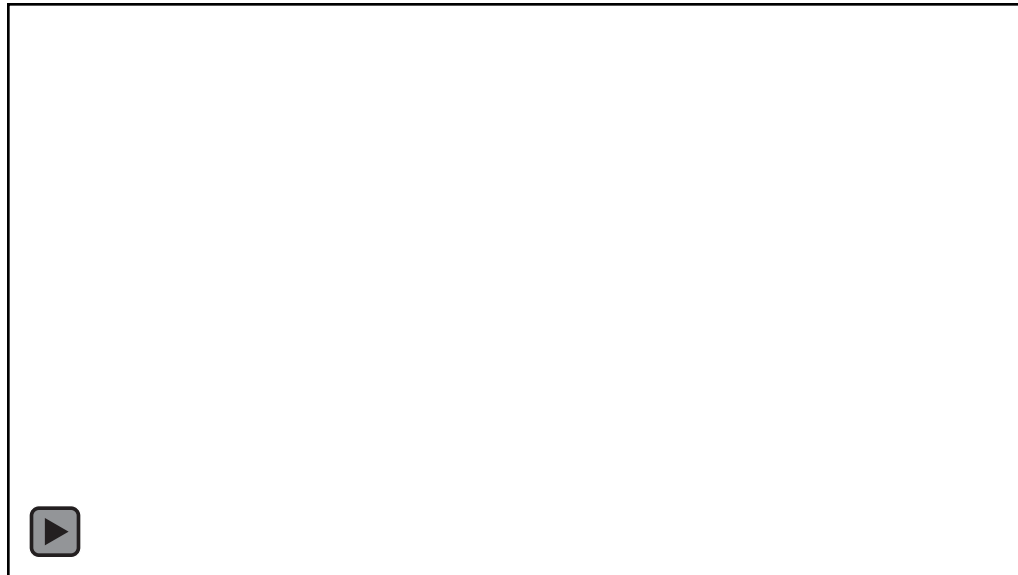
CONTENT PARTNERSHIP – KEY DEAL TERMS

- Content production
 - If UGC is involved, determine who is handling moderation of UGC and rules for such moderation, as well as submission guidelines for UGC
 - Third-party rights clearance (e.g., talent, music); can be tricky with UGC
 - Online videos referencing an advertiser may be subject to SAG Commercials Contract
- Ownership of content, format, derivative rights
 - Restriction on producing similar content/no restriction on format exploitation by either party
- Distribution/usage rights - during and after the term
 - Distribution through same media player allows for easier content management
 - If content is monetizable, then agree on backend participation, if any
- Sponsorship, marketing & promotional rights
 - Inclusion of proper disclosure
 - Review of social media posts
- Payment
 - Production budget, marketing budget, talent fees
 - Early termination payment obligations



BRANDED CONTENT – KEY LEGAL ISSUES

- Disclosures
 - Clearly disclose brand's connection with the content
 - Identify the content as advertisement if not clear from the content itself
- Substantiation
 - All claims in the content must be substantiated
- Third-party clearance
 - IP clearance
 - ROP clearance
- SAG
 - SAG Commercials Contract applies to digital content, including user generated content

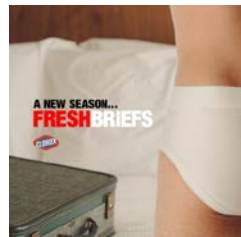




Clorox Social “Always On”



GAME OF THRONES →



- Challenge
 - How does Clorox build relevance with a new audience
- Solution
 - Go big on social by enacting a heavy “always on” plan on Facebook & Twitter
 - Get involved in the conversation daily to build genuine participation in the community
 - Find unique opportunities with buzz potential to insert Clorox relevant messages
 - Partner with media to extend the reach
- Results
 - Surpassed 1 million Facebook fans
 - Continued increase in Twitter following with little media support
 - Several earned media wins around especially creative pieces of commentary and/or social intercepts (Game of Thrones, Olympics, Breaking Bad)
- Learning
 - Be creative, take risks, have fun
 - Keep Clorox brand in mind and what unique commentary/take we have on a conversation
 - Create strong brand voice and staff social with people who know the brand and are creative



PANEL 5: Navigating Your Way Through Social Media



Laura Brett
Staff Attorney,
National Advertising
Division (“NAD”)



Amy Mudge
Partner,
Venable LLP

2:00 PM to 2:45 PM



Navigating Your Way Through Social Media



@Laura Brett #NAD

@Amy Mudge #Venable

@MelissaSteinman #Venable



www.asrcreviews.org





NAD

Resolves issues as to the truth and accuracy of national advertising claims

CARU

Analyzes and evaluates advertising directed to children under 12

ERSP

Resolves issues as to the truth and accuracy of claims made in direct response marketing

NARB

The appellate body of the self-regulatory forum





What Is NAD?

- **NAD provides** an effective, successful self-regulatory mechanism for resolving false advertising claims. The self-regulatory forum insures that advertisers are held responsible for their claims and practices. Rigorous review serves to encourage consumer trust.
- **NAD's forum is a quick, private and low-cost alternative to litigation**
Companies can bring advertising challenges and expect they will be resolved while the ad campaign is still running. NAD keeps confidential all data it receives in reviewing a case. NAD's decision, including a summary of the challenger's and advertiser's positions, and a statement by the advertiser are made public.
- **NAD helps to ensure a level playing field**
NAD has earned the respect of consumers and regulators alike for providing an effective, successful self-regulatory mechanism. Advertisers' willingness to support NAD and voluntarily adhere to its decisions helps to ensure an honest and open playing field in advertising.



NAD Jurisdiction

NAD monitors national advertising for truthfulness and accuracy.

Cases can be brought by a competitor challenge or through NAD's routine monitoring program.

NAD will not exercise jurisdiction if the advertising claims are:

- The subject of pending litigation;
- The subject of a federal government agency consent decree or order;
- Permanently withdrawn *prior* to the date of the challenge and the advertiser represents in writing that the claims will not be used in future advertising.



Social Media and the Role of Industry Self-Regulation

Are You Advertising?

Advertiser's Commercial Messages in Social Media Are Advertising. Advertiser's presence on

- Website
- Facebook
- Twitter
- Pinterest
- You Tube


Maybe:
User generated content in Social Media



Case Reports

Archives serve as a research tool offering education, guidance and support; access to NAD/ERSP/CARU decisions and NARB appeals.

Case reports are available via online subscription at: www.asrcreviews.org




A service of the advertising industry and Council of Better Business Bureaus


[Home](#) [Supporting Self-Regulation](#) [Events](#) [Press Releases](#) [Today's Must-Read](#) [Contact Us](#) [CARU»](#) [ERSP»](#)
[NAD»](#) [NARB»](#) [The Accountability Program»](#)

[Home » Case Reports](#)


Case Reports




[NAD® CASE REPORTS](#)



[NARB CASE REPORTS](#)



[CARU® CASE REPORTS](#)







[ERSP® CASE REPORTS](#)

Contact Us

Advertising Self-Regulatory Council
70 W. 36th Street, 13th Floor
New York, NY 10018
212.947.5131 or 866.344.6272
tgomez@asrc.bbb.org

Connect With Us

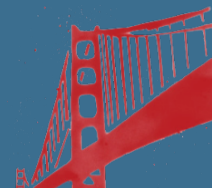
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We do not collect or use personal information. View our [Privacy Policy](#) [here](#). If you require any more information or have any questions about our privacy policy, please feel free to contact us by email at lbean@asrc.bbb.org.

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Erik Kain, Contributor

I write about video games: the industry and the culture.

+ Follow (1,430)

f Follow 2k

GAMES | 2/04/2014 @ 5:03PM | 9,223 views

On Its 10th Anniversary, Facebook Isn't Cool Anymore And That's Okay

+ Comment Now + Follow Comments

Facebook turned ten years-old today—sort of ancient in tech years.

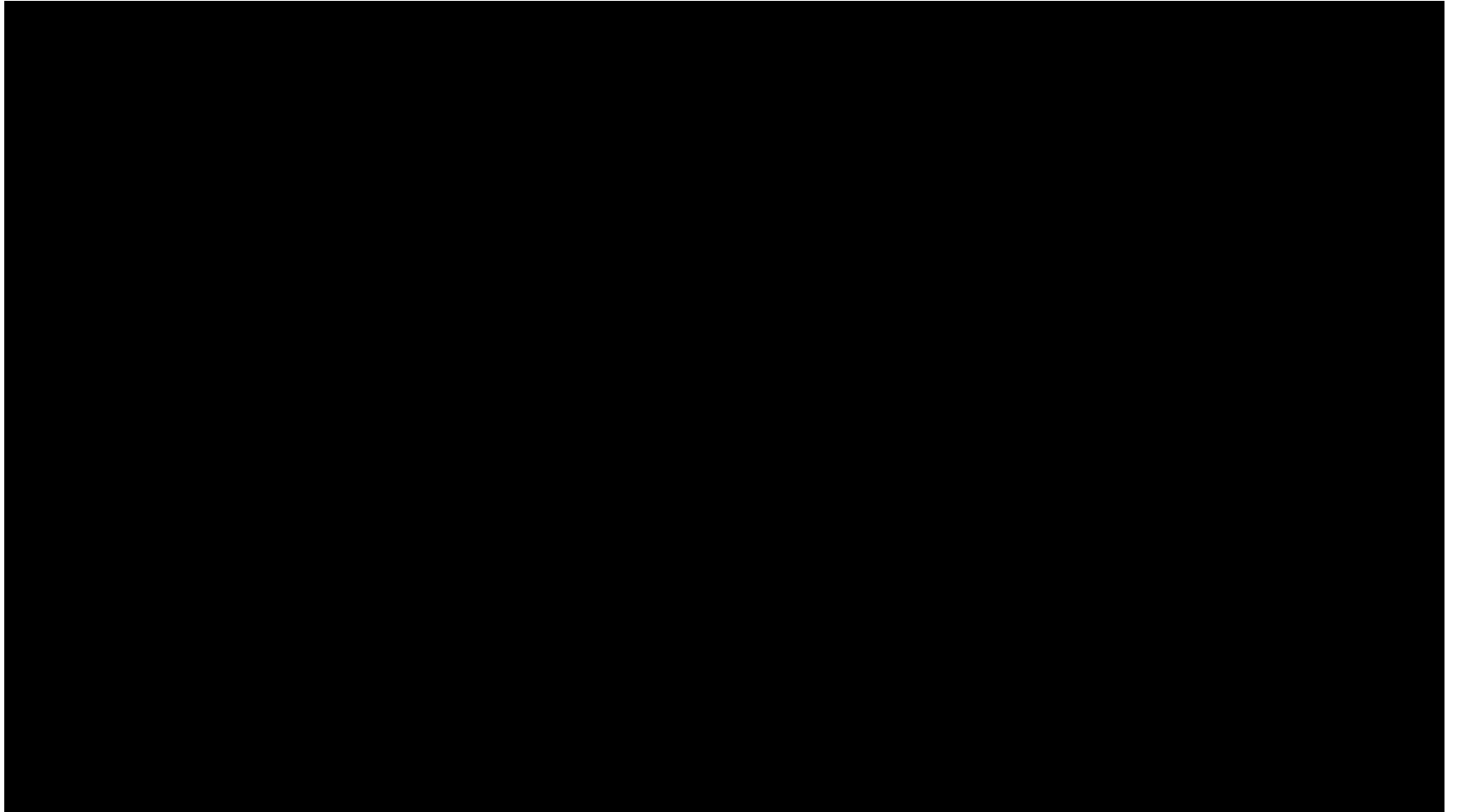
When the social media site launched a decade ago, it looked very little like it does today. It was entering into an internet not yet defined by social media and sharing. And it was the exclusive club of the country's young and elite.

There was nothing else like it—and it was cool, basically, because you weren't allowed in. You saw *The Social Network*. Savvy nerds made something all the cool kids couldn't live without.

At first, only college kids at select universities could sign up, and then any college kid could get an account, and then so could your weird aunt and your grandparents and ex-boyfriends and girlfriends who you hadn't seen in years.

Read on, Facebook junkies!


	Facebook	Twitter	LinkedIn	Google+	Instagram
1. Facebook is the most popular social media site in the world.	91	1	14	1	1
2. Facebook is the most popular social media site in the world.	74	17	12	1	1
3. Facebook is the most popular social media site in the world.	38	17	11	1	1
4. Facebook is the most popular social media site in the world.	37	11	18	1	1
5. Facebook is the most popular social media site in the world.	31	11	10	2	1
6. Facebook is the most popular social media site in the world.	1	11	24	1	1
7. Facebook is the most popular social media site in the world.	17	11	25	1	1
8. Facebook is the most popular social media site in the world.	17	11	22	1	1





Pharrell Williams  @Pharrell

03 Mar

Thank you to whoever bought my Grammy hat on [@eBay](#) for \$44,100. Your donation benefits From One Hand To AnOTHER. 



Arby's 
@Arbys

 Follow

.@Pharrell You're welcome. We're HAPPY to support a great cause & get our hat back. Good luck at the #Oscars tonight! pic.twitter.com/2oA7qDPX9z

8:17 PM - 2 Mar 2014

Item number: 181329060057



Pharrell Williams' Vivienne Westwood "Mountain" Hat worn at the 2014 GRAMMY's

Winning bid: **US \$44,100.00**

Shipping: **Free -- Standard Shipping (FedEx Ground or FedEx Home Delivery).**

Bidders: 21 Bids: 131 Time Ended: Mar-02-14 17:00:22 PST Duration: 10 days

 arbysrestaurantgroup, you're the winner!

10,054 RETWEETS 7,477 FAVORITES





Miller Lite ✓
@MillerLite

Follow

Miller Lite. The official beer of award winning actor's dads.

11:56 PM - 2 Mar 2014

2,014 RETWEETS 1,343 FAVORITES



Mucinex ✓
@Mucinex

Follow

How come no one ever thanks their cold medicine?

11:48 PM - 2 Mar 2014

4 RETWEETS 2 FAVORITES





"While we were a sponsor of the Oscars and had an integration with ABC, we were delighted to see Ellen organically incorporate the device into the selfie moment that had everyone talking. A great surprise for everyone, she captured something that nobody expected. In honor of this epic moment and of course, the incredible response of nearly 3 million re tweets, we wanted to make a donation to Ellen's charities of choice: St Jude's and the Humane Society [of the United States]. Samsung will donate 1.5 million dollars to each charity."



**That viral made me LOL so
hard, I think I'll buy
the car that was in it.**





Social is Many Things Lawyers Do Not Like



spontaneous



messy



uncontrollable



noisy

Social Media

Risks Are Significant:

- Damage to reputation
- Legal violations/potential for litigation
- Exposure of trade secrets/leaks
- Forum for complaints
- Distraction
- Even simple # campaigns can go wrong

But There Are Benefits to Social Media Too:











- Exposure/PR/advertising
- Member networks
- Collaboration opportunities
- Real time customer service
- Collection of information
- Interactive contests and promotions







“Social Media” in a ~~nutshell~~ Donut

- Twitter  I'm eating a #donut
- Facebook  I like donuts
-  This is where I eat donuts
- Instagram  This is a vintage photo of my donut
- YouTube  Here I am eating my donut
- LinkedIn  My skills include eating donuts
- Pinterest  Here's a recipe for making donuts
- Last FM  Now listening to “Donuts”
- Google+  I've joined a circle of donut-eating enthusiasts
- Reddit  There's a conspiracy around donut eating



Source: Many

@stephendale

Collabor
n8w!



Social Media Compliance

- How do you take a legally-vetted appropriately risk-balanced campaign designed for television and print and cover your bases in
 - 140 characters?
 - 6 second videos?
 - Boards of pins?
 - Square shaped photos?
- Can I trust my digital media agency to handle?
- Am I covered as long as I have a social media policy for our employees and third party agents?





Process Not Policy

- Is there a regular check-in to understand which platforms your brand's using and how?
- How is “official” brand social media reviewed?
- How is spontaneous/live/unplanned activity monitored?
- What is your take down policy for posts with false or unsubstantiated claims? Unfavorable posts?
- Does your brand reuse unsolicited social chatter and do they have guardrails?
- What is your training on your social media policy and how do you monitor employees and third parties for compliance?

What Are the Advertising Rules of the Road That Apply to Social Media





General Legal Standards in Social Media



- Same rules apply to social media as traditional media
 - viral nature of social media and the limited space available for messaging
- Material terms & rules must be disclosed
 - FTC's .Com Disclosures guide – Revised March 2013
 - FTC's Endorsements and Testimonials guides
- Other agency guidance depending on the product
- For social promotions/contests, CAN-SPAM, postal/, mobile/telemarketing, privacy laws, platform compliance



No Company Name – Is It Advertising?

- Even without a company name, an advertiser needs substantiation for any objectively provable claims that are communicated.
- In many circumstances a company needs to disclose that it is advertising.

YouTube - Popcorn - Cell phones : made by CARDO SYSTEMS Page 1 of 2

Worldwide (AU) English (US) Sign Up QuickList (0) Help Sign In

Home Videos Channels Community

Popcorn - Cell phones : made by CARDO SYSTEMS

This is a video response to Popcorn at portable : c'est une vidéo virale CardioSystems !

Rate: 301 ratings Views: 650,560

Share Favorite Playlists Flag

MySpace Facebook Digg (more share options)

More From: Kratz1987

Related Videos

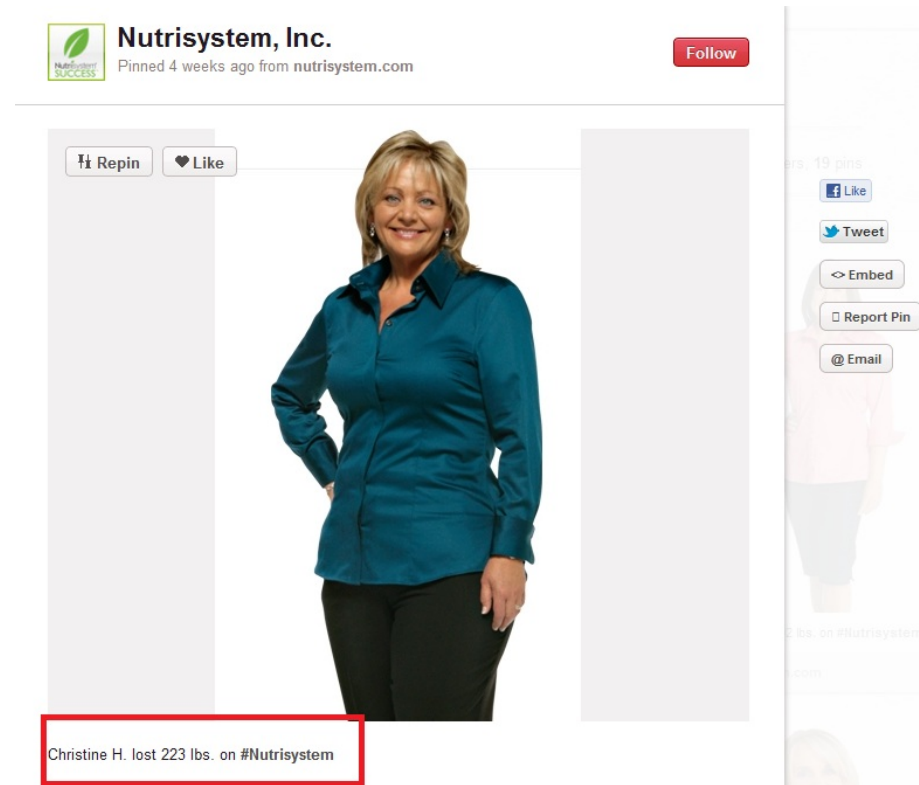
Promoted Videos

8/1/2008

Cardo Systems, NAD Case #4934

Same Rules in Social Media as in Traditional Media

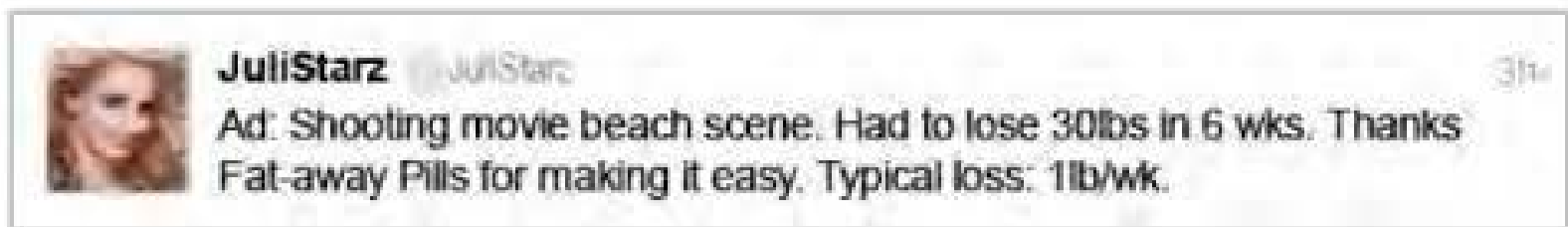
- Advertising must be truthful, accurate and not misleading.
- Disclosures required to prevent a claim from being misleading must be clear and conspicuous and in close proximity to the main claim.
- Endorsements must disclose the connection between the endorser and the advertiser.

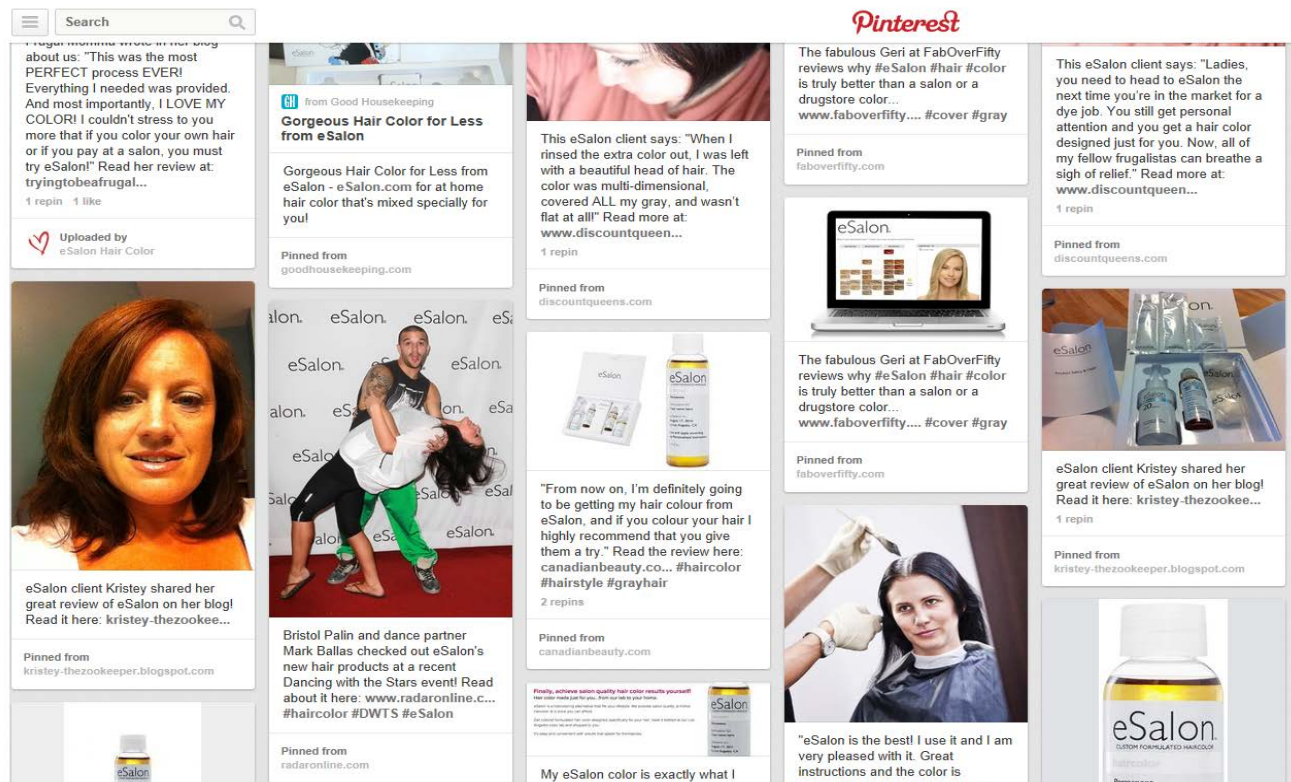


Nutrisystem Pinterest., NAD Case #5479



Disclosing Material Connections





Pinterest – Advertisers have an “obligation to advise consumers when there is a connection between the advertiser and content that directly or indirectly promotes the advertiser’s product.”

eSalon (Custom Formulated Hair Color) Report #5645



FTC Enforcement: Influencer Endorsements

- March 2014 : ADT Settlement

- Misrepresented that paid endorsements from safety and technology experts were independent reviews
- ADT paid spokespeople to demonstrate and review the product on blogs but connection was not disclosed



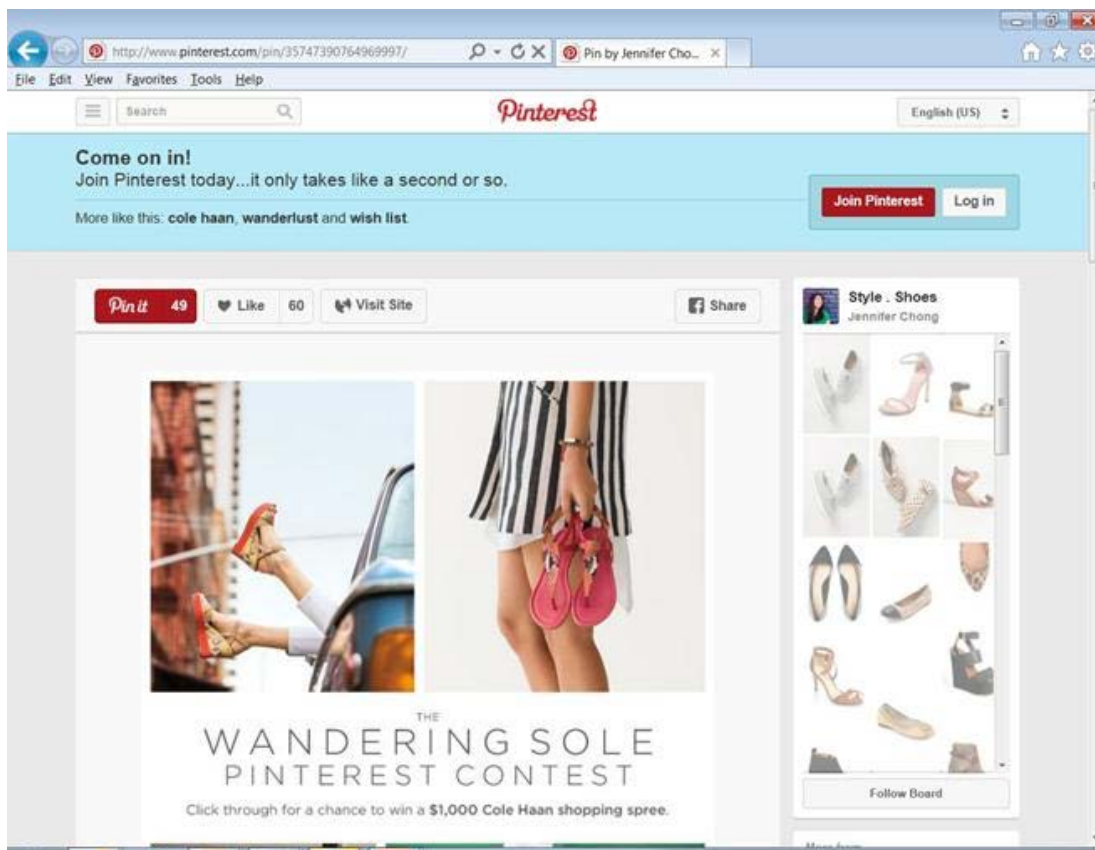
- April 2010: Ann Taylor Closing Letter

- December 2011: Hyundai Closing Letter

- Initial enforcement (or lack) shows FTC is reasonable if advertiser has policy, trains on it, and audits for compliance



FTC Enforcement





FTC Testimonials and Endorsements Guides

- Must be truthful
- Marketer cannot make a claim by an endorser that could not be made directly by the company
- Must be typical of what an average user can expect (or if not must disclose expected typical results)
- Anytime it is not obvious that an endorser is being compensated, this must be disclosed
- Suggest #AD, #paid, #IworkwithCompany, #sponsored



About the Endorsement Guides

Do your ads use endorsements or testimonials? The FTC's Endorsement Guides establish guidelines for advertisers.

[WATCH THE VIDEO >>](#)



FTC Dot.Com Guidance

- Disclose the fact of sponsorship within the content or near to it
- Discourage scrolling
- Discourage hyperlinks for simple disclosure like sponsorship unless industry adopts a symbol that is recognized by consumers
- Disclosure must be clear and conspicuous on all devices and platforms

.com
Disclosures

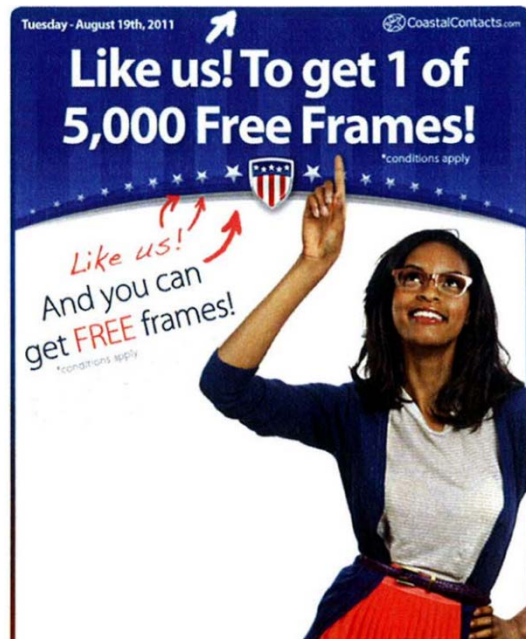
How to Make Effective Disclosures
in Digital Advertising



Likes



What is a “like” on Facebook



The promotion offered a free pair of glasses by “liking” the Facebook fan page but failed to disclose material limitations of the offer.

Do the “likes” from the promotion have to be removed?

Terms & Conditions: Offer valid on Tuesday August 19, 2011 starting at 9am EST until midnight or until 5000 frames have been given away. Lenses, upgrades and shipping & handling extra. Coupon eligible frames only. Valid for first time free recipients only. Limit one per household.

Coastal Contacts, Inc., NAD Case #5387



Facebook Likes





Not the End of the “Like” Question...

- FDA sent a warning letter to a dietary supplement maker asking them to discontinue “liking” testimonials on Facebook related to unapproved uses of its product.
- Facebook policy change allowing “likes” to be used by advertisers as though they were an endorsement.
- Will companies be held liable for user-generated content on their websites or social media sites?
- Will companies be liable for re-tweeting or promoting user-generated content?



Is the Coastal Contacts decision still relevant? Facebook's New "Like-Gating" Policy



- **Facebook's new platform policy:** "You must not incentivize people to use social plugins or to like a Page. This includes offering rewards, or gating apps or app content based on whether or not a person has liked a Page. . . . To ensure quality connections and help businesses reach the people who matter to them, we want people to like Pages because they want to connect and hear from the business, not because of artificial incentives."

Found at, <https://developers.facebook.com/blog/post/2014/08/07/Graph-API-v2.1/>

UGC

[Home](#) > [Help Fight ALS](#)

[Share](#)  [Print](#) 

THE ALS ICE BUCKET CHALLENGE

Thank you for
the outpouring
of support.



WHAT IS ALS? 

WHAT WE DO 

DONATE 

User-Generated Content

- Blogs, in general, are presumed to be user-generated content – not advertising.
- If a blog is not consumer generated (but rather, used as a form of advertising) that fact must be clearly and conspicuously disclosed.
- When a blog endorses a product – blogger must disclose any material connections between the blogger and the product.

Herbal Groups, Inc., NAD Case #5005

Prostate Health Blog

Prostate Health Blog

Page 1 of 3

Prostate Health Blog

A blog about resources on prostate therapy, mens' health industry news, and much more.

WEDNESDAY, JULY 30, 2008

Summer special!

We're put together a summer special package to get the word out that

About Me

Name:
Prostalex Plus
Location:

We're put together a summer special package to get the word out that prostate health is very important. Maybe you know a guy that isn't too hip on his health. Send him to prostalexplus.com and encourage him to get a summer special and give it a shot. The package includes a 30 day supply of Prostalex Plus, one Longlife Solutions Multivitamin, and a diet and exercise booklet that has great tips and recipes for boosting health overall. [Click here to visit the order page.](#)

going on with the people living around you so why not share your new found love for prostate health with them. A simple question like, "Have you had a prostate exam lately?" can break the ice and provide a moment to laugh before starting a conversation. It's a fact that some men are afraid to go to the doctor for routine check ups so encourage your male friends and family members to stay healthy now before minor issues turn into major problems. Labels: [barbecue](#), [exam](#), [friends](#), [prostate health](#)

posted by Prostalex Plus @ 2:20 PM

0 comments

MONDAY, APRIL 21, 2008

New Years Resolutions

Many of us have forgotten our New Years Resolutions while some of us are still maintaining our lofty goals! Personally I am working on maintaining and improving my health overall for 2008 and beyond. Of course prostate health is vitally important to me and so is keeping a high level of cardio fitness through bicycle racing. You don't need to take things to extremes like I do but you can do a few things daily to help you.

Summer special!

Summer is right around the corner!

[New Years Resolutions](#)

[Your health matters](#)

[News: Prostate Test Flaws Prompt New Strategy](#)

[Natural Products Expo West](#)

[Your health](#)

[Media Buzz](#)

[Exercise prevents cancer](#)

[Prostatitis](#)

Archives

[January 2008](#)

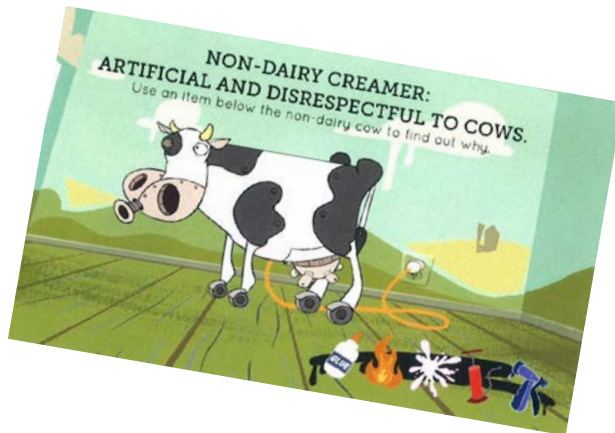
[February 2008](#)

[March 2008](#)



Links to User Generated Content

NAD noted that Advertisers can be responsible for false or misleading claims conveyed through 3rd party content where the advertiser promoted the content in its own advertising.



NON-DAIRY COW TIP:

Some ingredients in non-dairy creamers are hot.
And by hot we mean flammable.



[SHARE THE TRUTH.](#)

[LEARN ABOUT LA CRÈME.](#)

[f POST ON FACEBOOK.](#)

LALA-USA, Inc., NAD Case #5359

How Can Advertisers Mine Social Media Posts?

[General Mills, Inc. \(Yoplait Blended Greek Yogurt\), Report #5715, NAD/CARU Case Reports \(May 2014\)](#)



- **Issue:** Use of substantiated taste test claim for blueberry flavored yogurt in proximity to solicited user-generated content about consumer taste preferences generally.
- The solicited comments on social media were statements of opinion which did not by themselves require claim support.
- **However, when the tweets were “aggregated and reposted in close proximity to the advertiser’s taste test claims” the user-generated twitter feed could convey a broader unsubstantiated message regarding the scope of the taste test.**
- NAD recommended that the advertiser more clearly separate the taste test claim from the user-generated content to avoid conveying an unsubstantiated message.



Consumer Reviews





Enforcement: Phony Reviews

NY AG Enforcement against Astroturfing

- AG sweep found several SEO companies using IP spoofing techniques to flood the Internet with fake consumer reviews on Yelp, Google Local and CitySearch



FTC Enforcement – Reverb / Legacy

- Reverb: marketers had employees write and post positive reviews of clients' games in the Apple iTunes Store without disclosing that they were being paid to do so
- Legacy: hired affiliate marketers to write and post positive reviews of a “learn and master guitar” course



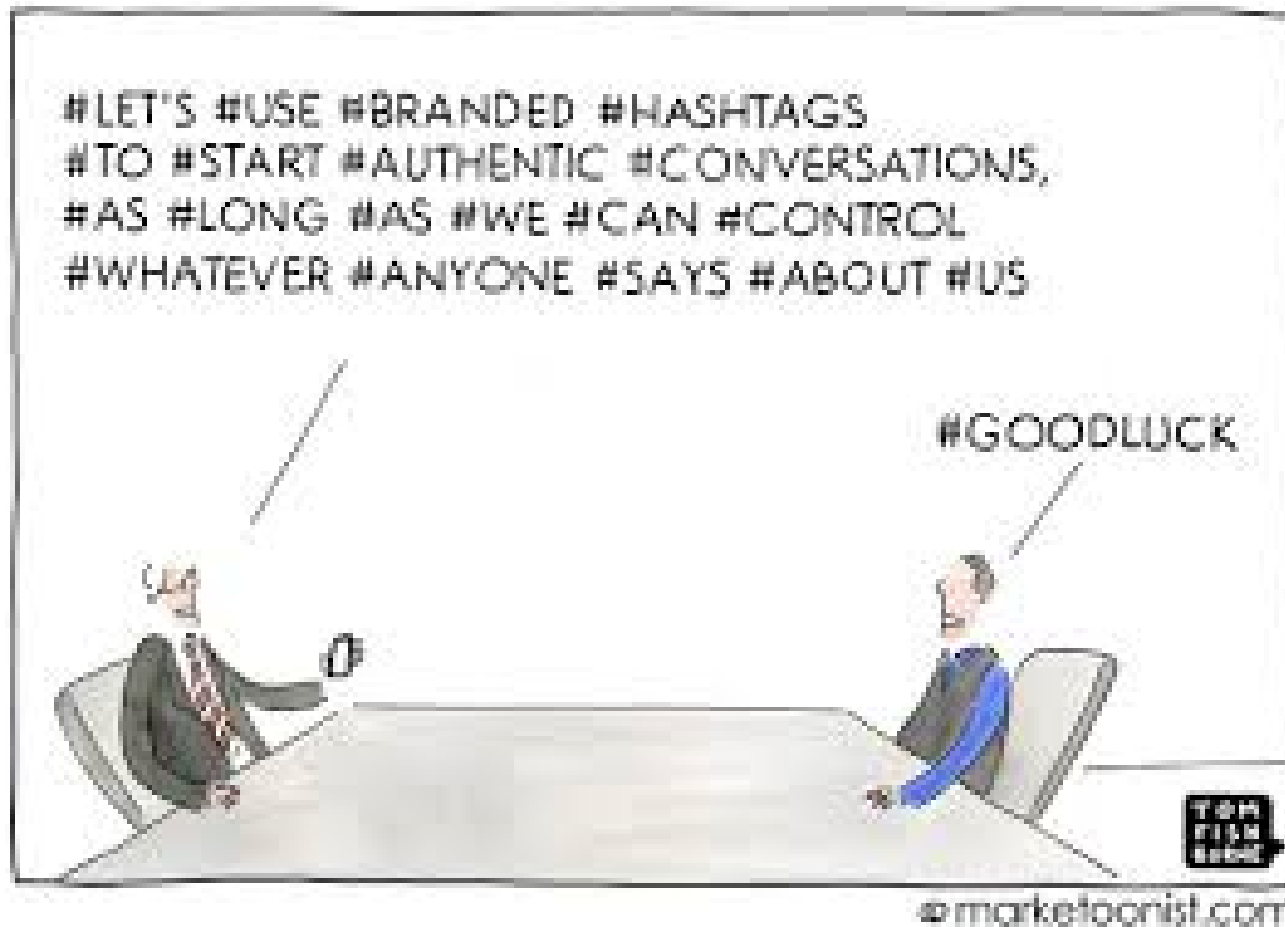


Euro-Pro Operating LLC, NARB Panel #196

“The panel appreciates the usefulness of online consumer reviews and recognizes that consumers increasingly rely on them. The panel’s decision is not intended to preclude the possibility that web-based consumer review data can be aggregated across websites in support of advertising claims. While Euro-Pro’s analysis might possibly support narrower claims, the panel finds that it does not support the broad “America’s Most Recommended” claims made.”

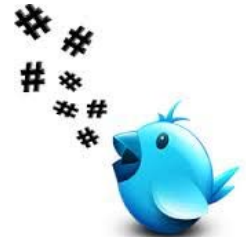


Hashtags





#Hashtags



- Clicking on #s show what other people on social media are saying about that particular topic.
- “Trending” topics increase brand exposure
- Facebook introduced hashtag function similar to other services like Twitter, Instagram, Tumblr and Pinterest

#hashtag
mania





HashTag Fails: Entenmann's

Entenmann's®



Entenmann's @Entenmanns

5 Jul 11

Who's #notguilty about eating all the tasty treats they want?!

Expand





HashTag Fails: Entenmann's



Entenmanns Entenmann's

Our #notguilty tweet was insensitive, albeit completely unintentional. We are sincerely sorry.

1 hour ago



Entenmanns Entenmann's

Sorry everyone, we weren't trying to reference the trial in our tweet! We should have checked the trending hashtag first.

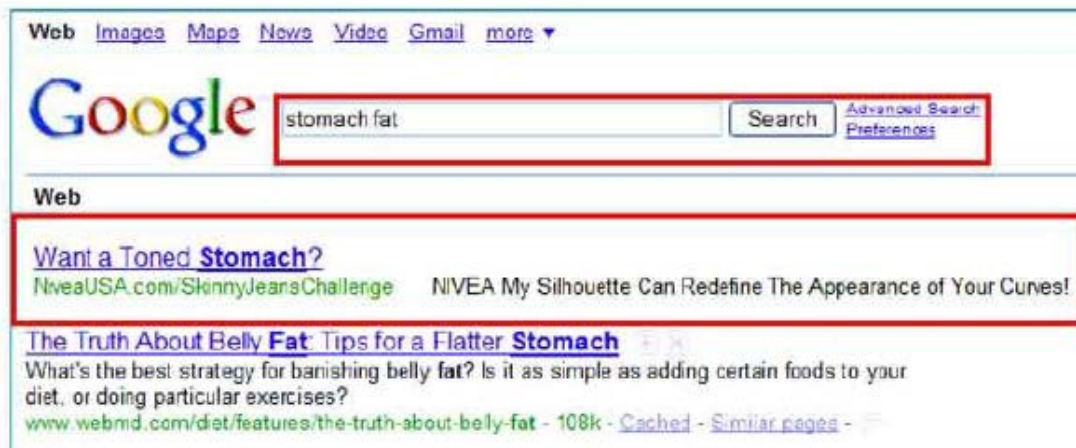
1 hour ago





Can Hashtags Be Claims?

- FTC 2011 settlement with Nivea included allegation that sponsored search terms were impermissible claims



Re

Sponsored Link



Native Advertising





Facebook Sponsored Stories



13 Ways To Be "Tough"

England's annual **Tough Guy Challenge** involves an eight-mile run through fire, ice, barbed wire, and tunnels made of tires.

Alanna Okun 15 minutes ago 3 responses



14 People Making The Best Of Bad Situations

When life gives you lemons, carve them in to tiny helmets for squirrels. Always remember to look on the bright side. Come on. Get happy.



PRESENTED BY
Volkswagen

FEATURED PARTNER



This Guy Saved A Freezing Baby's Life, NBD

And other morning links.

Raymond Sultan 15 minutes ago respond



Promoted Tweets





“If a social network were to stream recommended restaurants based on what a particular consumer’s social contacts have enjoyed, it should clearly distinguish as advertising any information feeds included or prioritized based in whole or in part on payments from a third party”





Progressing information and research in the treatment of Apraxia

Parental Feedback

HOME
UNDERSTANDING APRAXIA
STUDY GROUP PARTICIPATION
CLINICAL RESEARCH
RESEARCH PUBLICATIONS
PARENTAL FEEDBACK
HELPFUL HINTS
CONTACT US

NEW STUDY PUBLISHED!
Syndrome of Allergy, Apraxia and Malabsorption:
Characterization of a neurodevelopmental phenotype that responds to Omega 3 and Vitamin E supplementation.
[Read More](#)

"I started using a patented omega-3 / vitamin E speech supplement three weeks ago for my 5 yr old son, adopted by me at 2 yrs of age, who had always talked in a mumbled, muffled voice. He'd been in speech therapy for over 3 yrs. On his seventh day, taking 2 capsules a day, Robbie began talking more clearly and in full sentences. On his 8th day I began giving him 3 capsules a day. On his 14th day I met with his school teacher as well as his speech teacher. Both wanted to know what we had done to improve Robbie's speech so quickly and so dramatically. I explained to them about the supplement and gave them some literature to review.

Also, Robbie's speech teacher from his preschool days is now working with Rebecca, Robbie's sister. When she was here last week she kept saying over and over how she couldn't believe the change in Robbie's speaking ability. With Rebecca, she is now on three capsules a day. Although she is nonverbal I have noticed an increase in her swallowing ability. This we hope will inevitably lead to her trach being removed. A blessing in itself. Her complexion and appearance look so good. We are also noticing an improvement in her muscle tone and spasticity. In fact, Rebecca's chiropractor commented that she was showing great improvement in her whole body since she has started the patented omega-3 / vitamin E supplement. He was impressed.

A friend of mine, whom I gave some of the supplements to 5 days ago, now has had her 5 yr old grandson on 2 capsules a day. This morning she reported that Brahan was moving his mouth muscles attempting to speak and that his spasticity had greatly improved. She was thrilled. She will move him up to 3 capsules once a day starting Sunday.

We have seen remarkable results in a very short period of time. This is truly a blessing. In fact, Rebecca's Neurologist at Vanderbilt Children's Hospital inquired about the patented omega-3 / vitamin E formulation and we gave him a brochure. This supplement has, in a short period of time, greatly exceeded our expectations. Thank you so much. I will keep you informed.

- The advertiser maintained website promoting benefits of Omega-3 and Vitamin E supplements without disclosing its relationship to the website.
- Advertiser required to disclose its connection to the website.

NourishLife (Speech Nutrients Speak) NAD Case #5620



The Tech That Makes the Pebble Watch Tick

1.4k
PHOTOS

140 517 5 41 342 6
Facebook Twitter Google+ LinkedIn YouTube



The Pebble smart watch is the most successful Kickstarter project in history, raising more than \$10 million from more than 65,000 backers.

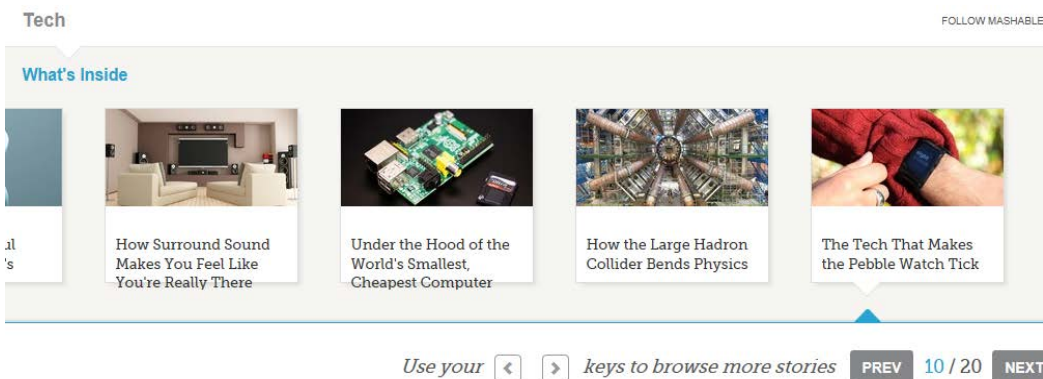
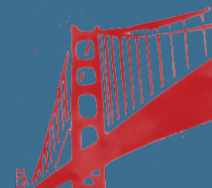
At CES 2015, the company revealed final details of the device, and showed off the shipping device to the public.

SEE ALSO: Hands On With Pebble, the Internet's Favorite Smart Watch

Now that the device is shipping to Kickstarter backers, we have a much better idea of how the watch works from the inside out.

"[S]ponsored content can convey an explicit or implicit message about a product, the benefits of using the product, or the disadvantages of a competing product. In such circumstances consumers have a compelling interest in knowing the sponsor of the content because the content conveys a commercial message that benefits the advertiser."

Qualcomm Inc.,
(Snapdragon Processors),
Case Report #5633



The Tech That Makes the Pebble Watch Tick

1.4k SHARES

140	817	9	41	342	6
Share	Tweet	+ Share	in	va	p



Sponsor label removed from sponsored series after contractual sponsorship period ended.

Factors:

- Content did not mention advertiser or products.
- Advertiser did not create, plan or post content.

Qualcomm (Snapdragon Processors) Report #5633



Live Healthy

NEWS

WATER WORKS!

Quenching your thirst keeps you healthy and energized, but sometimes plain water is just so, well, plain. Here's a tasty (and nourishing) new way to be certain you're getting ample H₂O.

It gets short shrift, but staying hydrated is just as important as the rest of your health and beauty regimen. About 60 percent of your body is water, and being even mildly parched—a likely possibility, considering that fluid loss occurs throughout the day—may lead to problems such as fatigue, headaches, and weight gain.

People who are active need to be extra diligent about sipping. The American College of Sports Medicine warns that failure to drink up before, during, and after prolonged exercise puts you at risk for heat exhaustion. Losing just 2 percent of your body weight from fluid, which can even happen during the cooler months, impacts speed and endurance.

Drink more, slim down

Regularly wetting your whistle may also help you reach your goal weight. Researchers from Virginia Tech found that people who downed two glasses of water 20 to 30 minutes before eating consumed 75 fewer calories during each meal and shed pounds more quickly than dieters who didn't prehydrate. German researchers have also shown that water slightly boosts metabolism because it requires energy to process it.

Other good reasons to hit the (water) bottle include banishing bloat, warding off constipation, beating fatigue, and clearing out toxins (including those found in alcohol).

So, are you getting enough?

It's unlikely. Although the exact amount of water you need varies from person to person (dark urine is a sign you're lacking), the Institute of Medicine (IOM) suggests that women aim for nine cups a day. (For guys, it's 13 cups because of their higher muscle mass.) But 45 percent of adults get less than four!

The IOM guidelines don't strictly refer to plain H₂O; water-rich foods like soup and fruit count too, as do other beverages. But if you rely heavily on sugary drinks, your waistline is going to pay the price: A 20-ounce "single serve" bottle of soda contains 240 calories (similar to a candy bar). And about 7 percent of the total calories in the typical American's diet come from soft drinks alone, according to the Center for Science in the Public Interest.

The obvious solution is to stick with water, but about 20 percent of Americans reportedly don't like the taste. If that sounds like you, check out the new **SHAPE Water Boosters** (\$8; CVS, Rite Aid, and

drugstore.com). Just a single squeeze (equal to a half-teaspoon) adds delicious flavor—but not calories—along with a concentrated punch of nutrients that offer some important bonus benefits. The portable packaging and great taste are designed to meet the needs of the health-conscious woman on the go. Look for them in the following four varieties:



Beauty (Grape)



Contains:
• Biotin
• Proprietary blend of herbs, collagen, and fruit extracts

Wellness (Pomegranate)



Contains:
• Vitamin C
• Folic acid
• Acai and other superfruit extracts

Slim (Pink Lemonade)



Contains:
• Chromium
• Raspberry ketone
• Vitamin D

Energy (Blue-Cherry)



Contains:
• Green tea extract
• Vitamin B12
• Taurine and tyrosine

LARRY FERGUSON/PHOTOS, STYLING: NICOLA HANCOCK

The “Water Works” article was formatted and titled and appeared to be a news article yet it promoted SHAPE Water Boosters as part of the news.

The article was preceded by the headline “News” and included information about the importance of hydration and recommended SHAPE Water Boosters as a healthful way to stay hydrated.

American Media, Inc. (Shape Water Boosters) Report #5665



HFW
Haircolor for Women

by eSalon

HOME

HOT NEWS

STYLING TIPS

HAIR COLORING FAQS

Search...



HAIR COLORING FAQS

Is Permanent Or Demi-Permanent Color Best For You?

Are you using the right kind of hair color? When it comes to coloring your tresses, knowing all your options will help you get the

[...read more »](#)

Featured Posts



Your Guide to Rescuing Dry, Damaged Hair
Aug 18, 2014



Don't Let Humidity Weigh You Down!
Jul 24, 2014



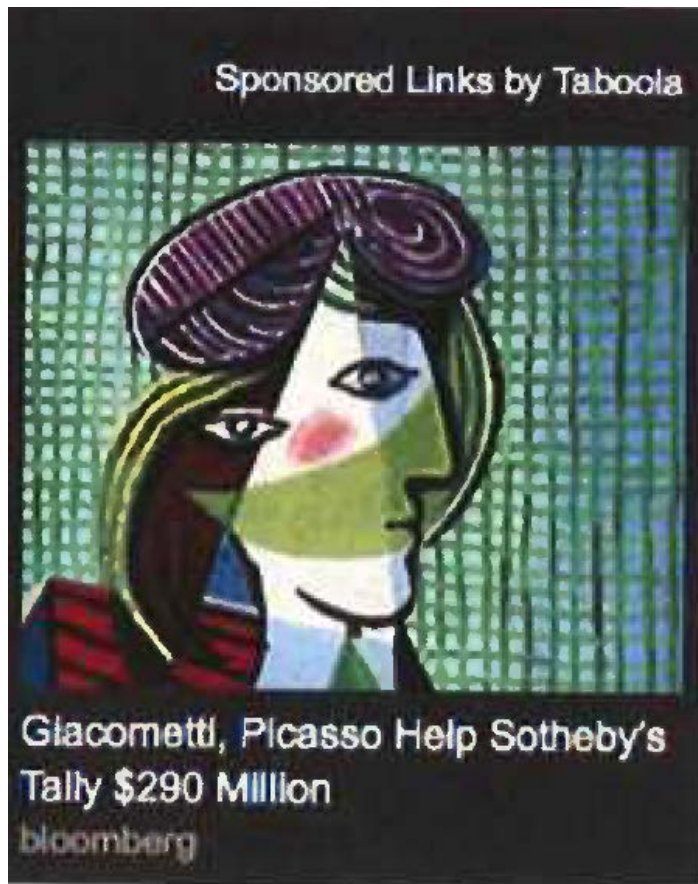
Hair Essentials for Summer
Jun 3, 2014



3 Tips for Seamless Hair Color
May 16, 2014

Advertisers have an “obligation to advise consumers when there is a connection between the advertiser and content that directly or indirectly promotes the advertiser’s product.” *“NAD recommended that the advertiser disclose that it maintains the blog clearly and conspicuously on the top of the landing page of the blog, where it will be easy to notice, read and understand.”*

eSalon (Custom Formulated Hair Color) Report #5645



"NAD rejected challenger's contention, however, that Taboola needed to use the word 'advertisement' to inform consumers that its links are sponsored."

"In the absence of consumer-perception evidence demonstrating that consumers do not understand the words 'sponsored consent' or 'promoted content' to mean the content is paid, NAD is reluctant to mandate specific words to use for disclosure."

Taboola, Inc. (Online Advertising)
Case Report #5708



Sponsored Content by Taboola



**MLB celebrates Jackie Robinson
Day 67 years after his debut**
fox sports

“Taboola has an obligation to clearly and conspicuously disclose when it is linking consumers to sponsored content”

“NAD thus recommended that the advertiser modify its disclosure to increase the visibility of the ‘Sponsored Content’ or ‘Promoted Content’ disclosure in terms of font size, font color and boldness, as well as its placement on the page to make clear that the linked content is sponsored”

Taboola, Inc. (Online Advertising)
Case Report #5708



**Homeowners Are In For A
Big Surprise...**

Smart Life Weekly

“NAD cautioned that the combination of the thumbnail photograph, article title, and name of the destination site on Taboola’s widget should convey a truthful and accurate message of the content to which consumers are linking. To the extent that a link does not accurately describe the content provided at the link, consumers can be misled.”

Taboola, Inc. (Online Advertising) Case Report
#5708



"An advertiser taking consumers from a third party website to their own website should avoid misleading consumers about the purpose of their initial contact with those consumers" and "Links to sponsored content should reasonably describe the content to which consumers are linking clearly and conspicuously and in a way that is easy for consumers to notice, read and understand."

American Express Company (OPEN Forum Sponsored Content) Case Report # 5760



Native Takeaways

- Find out what your clients on doing (not whether – they are)
- Default should be disclosure of company name and connection to the content, clearly and conspicuously within content or at top of content
- Marketers responsible not just for disclosure but accuracy of any product claims within content

Promotions on Social Media

The same rules apply to promotions on social media as to any other type of promotion

- **Must comply with criminal lottery and gambling laws**
 - Prize + Chance + Consideration = Illegal Lottery
- **Follow federal and state sweepstakes and contest laws, general consumer protection/UDTPA statutes**
 - Material terms & rules must be disclosed
- **Follow other laws and regulations for specific types of promotions**
 - CAN-SPAM, postal
 - “refer-a-friend”
 - mobile/telemarketing
 - COPPA



Promotions! Platform Rules



- Each social platform has its own set of rules and usage guidelines
- Promotions are subject to the rules and guidelines of such platform
- Some promos are not appropriate for certain platforms
- Violation could result in premature shutting down of the promotion, which could subject the brand to legal and regulatory risks

UGC Issues in Social Promotions

- Include clear (content and technical) submission guidelines in terms and conditions; if applicable, include judging and voting provisions as well
- If promo requires UGC, the rules should include IP releases that allow the brand to pose submissions online
- Ask for a broad right to use submissions
- Can require copyright assignment from winner (which requires separate document)
- Consider prescreening all submissions prior to posting. If not possible, use post-moderation and issue clear take-down policy
- Consider privacy issues





Facebook Rules for Promotions

Can run a sweepstakes or contest directly on **non-personal** Facebook pages/timelines or use an app to run Facebook promotion (can't run on personal pages)—consider which makes sense

RECENT CHANGE IN RULES PROHIBITS “LIKE-GATING” AND INCENTIVIZING PROMOTION ENTRY

- **Not ok: “LIKE TO ENTER”**
- **Not ok: “Share video to receive an extra entry ”**
- **Ok: “Share with friends and receive an extra entry if they enter”**



CAN use Facebook features (e.g., “Like” button) as **voting** mechanism

CAN collect entries by having users comment on a picture or post to be entered, having users message page

CAN announce winner on page; require entrants to come back to see who won

CAN tag in entries, but a Page may not tag or encourage others to tag themselves in content in which they do not appear

MUST STILL include specific releases/disclosures re: Facebook

- Facebook not affiliated, sponsor of promotion
- Releases/disclose in rules and on entry form
- **BUT NOT** required to disclose that data submitted by entrant is provided to sponsor, not Facebook



Instagram Promotion Guidelines

Fastest-developing medium for promotions: picture is static but comments can be used for disclosures and communications with entrants.

- Current standard practice for entry and winner selection is to have entrant comment on a picture that includes an explanation of the basics of the sweepstakes or contest
- The entrant can include an email address in the comment so he or she can be contacted by sponsor
 - Or the sponsor may notify the entrant using a comment in the same post
- The official rules can be posted:
 - via a static link in the picture,
 - a link in a comment, or
 - a “track-back” reply to any commenters (which is the only reliable way to get consent to the terms and conditions)





Twitter Promotions

- *Link to abbreviated rules and avoid retweets! Not appropriate for complex promotions.*
- Twitter Terms and Conditions discourage creation of multiple accounts; rules regarding retweeting to enter
- Limit on number of tweets/entries to one per day
 - E.g., don't encourage retweets to win
- Recommend including @usernameMention in tweet entries so will be visible in user timeline
- Suggest including relevant "hashtag" topics in tweet entries
 - E.g., #promotion or #companyname

– **Vine Rules: Stay tuned!**



Pinterest and Prizing

You can't make people pin what they don't want to pin.

Don't:

- Suggest that Pinterest sponsors or endorses you or the contest
- Require people to add Pins from a selection—let them add what they like.
- Make people Pin your contest rules. This is a biggie.
- Run a sweepstakes where each Pin, board, like or follow represents an entry.
- Encourage spammy behavior, such as asking participants to comment.
- Ask people to vote with Pins, boards, or likes.
- Overdo it: contests can get old fast.
- Require a minimum number of Pins. One is plenty.
- Call your contest a “Pin it to win it” contest.



Favorite Shop

Show us your board
on *Pinterest*



Pinterest and

Favorite Shop

Show us your board





*Among the top 50 pharmaceutical companies, half do not engage with consumers or patients on healthcare-related topics through social media, and only 10 companies utilized all three assessed channels. Twitter is utilized by 22 of the 50 companies studied, followed by YouTube which is used by 17 companies, and Facebook is used as a channel by 15 companies. **Engaging Patients Through Social Media** – IMS Health Report (January, 2014 – 47 pages – free but [registration](#)*



Another section of the report went into substantial detail around the prevalent use of Wikipedia which the authors suggest ***“is the leading single source of healthcare information for patients and healthcare professionals.”*** They researched the top 100 pages by disease topic and presented this chart relative to the top 25 (“English” language page – globally).

Rank	Wikipedia Health Topic Page	Visits in millions (last 12mos)
1	Tuberculosis	4.2
2	Chrohn's Disease	4.1
3	Pneumonia	3.9
4	Multiple Sclerosis	3.8
5	Diabetes Mellitus	3.4
6	Gout	3.3
7	Meningitis	3.2
8	Down's Syndrome	3.2
9	Parkinson's Disease	3.0
10	Gastroenteritis	2.8
11	Lymphoma	2.7
12	Lyme Disease	2.7
13	Herpes Simplex	2.7
14	Fibromyalgia	2.5
15	Syphilis	2.5
16	Malaria	2.4
17	Hypertension	2.4
18	Cerebral Palsy	2.4
19	Amyotrophic Lateral Sclerosis (ALS)	2.4
20	Anemia	2.4
21	Cystic Fibrosis	2.4
22	Tinnitus	2.4
23	Psoriasis	2.4
24	Insomnia	2.3
25	Leukemia	2.2



FDA & Social Media

- **No “one size fits all policy” applicable to food, drugs, medical devices and cosmetics alike.**
- **Agency Monitoring Social Media:**
 - September 2013: FDA contracted with small company of former President Obama campaigners to track public response to FDA’s *own* social media outreach.
 - February 2014: FDA is currently soliciting a contractor to monitor social media chatter about products it regulates and how chatter shifts as a result of agency risk warnings.
 - E.g., FDA wants to track conversation spikes, trends, most-cited news stories, sentiment, and sample verbatim consumer comments.
- **2 Types of Regulatory Action To Date:**
 - *Draft Guidance*
 - *Warning Letters*



FDA & Social Media cont'd...

- **Draft Guidance**

- Issued January 2014.
- Only applicable to prescription human and animal drugs and biologics.
- Company “control” of social media content directly correlated to regulatory responsibility.

- **Warning Letters**

- Issued over the past 2-3 years.
- Applicable to all FDA-regulated products.
- General Takeaways:
 - A company is responsible for its own comments made via social media.
 - A company is responsible for customer comments on the company’s own social media sites.
 - “Liking” or “re-Tweeting” represents an endorsement of the underlying content.







Dos and Don'ts for Social Media and Financial Products

Financial Products

- Mortgage loans
- Automobile loans
- Student loans
- Installment loans
- Credit cards (etc.)

Social Media

- Facebook
- Twitter
- NOT include email and text



Dos and Don'ts for Social Media and Financial Products

FFIEC (Interagency) Guidance

<http://www.fdic.gov/news/news/financial/2013/fil13056.html>

Issued on and effective as of December 11, 2013



Dos and Don'ts for Social Media and Financial Products

Do

- **Embrace social media.** Banks and lenders have been slow to embrace social media as a medium to communicate with existing customers and reach new customers.
- **Monitor Social Media.** Reputation is of the utmost importance to banks, credit unions and other lenders. So it is important for lenders to monitor social networks to identify customer complaints and potential “viral stories” that could be harmful.



Dos and Don'ts for Social Media and Financial Products

Do:

- **FFIEC Guidance.** Review the FFIEC Social Media guidance and adopt as a formal policy.
- **Review Regulations.** Consider how the medium of social media affects your advertisements. Can you provide all required disclosures under the Truth in Lending Act, the Truth in Savings Act or other applicable laws?
- **UDAAP.** Ensure that social media advertisements are not presented in a misleading manner.



Dos and Don'ts for Social Media and Financial Products

Don't

- **Ignore Social Media.** Don't take the position that you can ignore what happens in social media just because your institution does not use it to reach customers. Be on the lookout for brand hijacking!
- **Discriminate.** Don't utilize social media to advertise financial products in a way that discourages minorities and other protected class members from applying for the product.



Dos and Don'ts for Social Media and Financial Products

- **Outsource Compliance.** Don't assume that a third party vendor will assume your compliance obligations.
- **Privacy.** Don't forget to provide consumers with your privacy policy as well as your privacy notice as required under Gramm-Leach-Bliley



PANEL 6: Health Related Marketing Claims for Food and Dietary Supplements



Todd Harrison
Partner,
Venable LLP



Claudia Lewis
Partner,
Venable LLP

3:00 PM to 3:45 PM



Product Claims

- Structure/Function Claims
- Nutrient Content Claims
- Health Claims
- Qualified Health Claims





Structure/Function Claims

- Affect the structure and function of the body by providing nutrition to sustain life and health
- FDA does not regulate foods that bear structure/function claims in their labeling as drugs as long as the claimed structure/function effect derives from the product's character as a food — its taste, aroma, or nutritive value
- If a structure/function claim promotes a product for a use other than providing taste, aroma or nutritive value, the claim may cause the product to be a drug (by changing its primary use)



Nutrient Content Claims

- Claim characterizing the level of a nutrient in a product
- Beverages may bear authorized nutrient content claims on their labels and in other labeling
- Example: free, high and low
- Currently, the nutrient content claims that FDA has authorized by regulation are listed in the Code of Federal Regulations





Health Claims

- Characterize the relationship between a substance (food or food component) and a disease or health-related condition
- Limited to claims about reducing the risk of a disease or health-related condition
- Do not include claims about treating, mitigating, or curing disease (drug claims)
- A beverage or other conventional food bearing a health claim that is not authorized by regulation or by the FFDCA is misbranded
- Currently, the health claims that FDA has authorized by regulation are listed in the CFRs
 - Ex: “Diets low in sodium may reduce the risk of high blood pressure, a disease associated with many factors.”







Qualified Health Claims

- Like health claims, they characterize the relationship between a nutrient and a disease condition, but they can be based on less than significant scientific agreement
- Claim language discloses the limitations of evidence in support of the claimed relationship
- Cannot deviate from FDA-approved language.

Ex: “Supportive but not conclusive research shows that consumption of EPA and DHA omega-3 fatty acids may reduce the risk of coronary heart disease. One serving of X provides Y gram(s) of EPA and DHA omega-3 fatty acids.”



Claim Substantiation

- FTC and FDA require “competent and reliable scientific evidence” to substantiate all claims used in advertising and structure/function claims used on labels
- “Competent and reliable scientific evidence” equals:
 - Tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area,
 - That have been conducted and evaluated in an objective manner by persons qualified to do so,
 - Using procedures generally accepted in the profession to yield accurate and reliable results.





Claim Substantiation

- Advertising Claims

- More often than not, advertising claims will not suggest that a certain level of support exists for a claim. In this situation, the level of scientific support necessary to substantiate a claim ***depends on the amount of research experts in the field would consider adequate*** to establish the claim's truthfulness
- Context is KEY.
 - E.g., not a health claim, but a statement of dietary guidance: "A diet rich in fruits and vegetables may reduce the risk of coronary heart disease."
 - No reference to a specific substance
 - Do not include graphics depicting medicine or heart health
 - Must be truthful and not misleading





Claim Substantiation

- Factors Affecting Required Levels of Substantiation:
 - Type of product
 - Type of claim
 - Benefits of truthful claim
 - Consequences of false claim
 - What qualified experts in field believe is reasonable
 - Is specific level of support stated or suggested in the claim?





Claim Substantiation

□ **Acceptable Scientific Evidence:**

- Well-controlled, double-blind studies are likely to be given more weight than non-blind studies;
- Long-term studies are better than short-term studies;
- Study's result should be statistically significant;
- Nature and quality of the written report is important;
- Studies published in reputable peer-reviewed scientific journals are looked upon with favor;
- Studies not published in peer-reviewed journals may be used to substantiate claims if they would be considered properly designed and controlled by experts in the field.





Claim Substantiation

□ Scientific Evidence Must Be Relevant

- Evidence must be relevant to specific claim
- Study endpoints must match claim
 - Ensure that you understand meaning of claim to determine what endpoints are relevant
- Consider: dose, dosage form, route of administration, formulation, total length of exposure, frequency of exposure, study population
- Foreign Research
 - Note that differences between populations, such as differences in diet, general health, or patterns of use, could confound results



Claim Substantiation

Issues with Other Types of Scientific Evidence

■ FDA View: Alone, items listed below generally will not substantiate claims:

- Animal Studies - best is based on data from studies in appropriate animal models, on data that have been reproduced in different laboratories, and on data that give a statistically significant dose-response relationship
- In vitro Studies - best is based on data that have been reproduced in different laboratories
- Testimonial/Anecdotal Evidence - “honest opinion” not enough
- Meta-analysis - may identify relevant reports, which may provide substantiation
- Product monographs - may provide background information useful to understand relationship between substance and claimed effect





Optional Food Labeling Claims

- These are statutorily defined as “optional labeling claims” and claims are up to you
- Ex: 21 C.F.R. 101.81(d) lays out 7 specific types of optional information under health claims related to “soluble fiber from certain foods and risk of coronary heart disease”
 - (7) “The claim may include information on the number of people in the United States who have heart disease. The sources of this information shall be identified, and it shall be current information from the National Center for Health Statistics, the National Institutes of Health, or “Nutrition and Your Health: Dietary Guidelines for Americans,” USDA and DHHS, GPO.”





FDA Cleared Health Claims Becoming Unauthorized Claims

- ❑ FDA warning letters have targeted food products containing health claims which have been authorized under FDA's premarket clearance process
- ❑ FDA claimed the particular language used was not authorized by the previously approved claims and constituted unauthorized health claims and/or unauthorized disease prevention claims
- ❑ Examples: Cheerios, Diamond Walnut





Cleared Health Claims Becoming Disease Prevention Claims

- ❑ Must be careful of labeling claims
- ❑ Cheerios label stated results of a clinical trial
 - “You Can Lower Your Cholesterol 4% in 6 weeks”
- ❑ FDA alleged this demonstrated intent to market the product for disease prevention purposes, and therefore the product was an unapproved new drug







PANEL 7: Using Gamification and Gaming in Consumer Promotions: What's the Buzz?



Sheila Jambekar
Senior Counsel,
Zynga, Inc.



*Melissa Landau
Steinman*
Partner,
Venable LLP

3:45 PM to 4:30 PM



Why Add Gamification to Your Online and Mobile Strategy?

What are the potential legal traps and triggers if you do?





WHY GAMIFY?

1. New Way to Engage Customer and/or Capture a Certain Audience
2. Raise Awareness of Brand/Company
3. Encourage Sharing of Brand Experience in Social Media
4. Strengthen Connection With Followers
5. Data Capture
6. Other Uses: Employee Engagement or Consumer Education
7. Fun!





Sweepstakes vs. Illegal Gambling



Lottery & Gambling Laws

*First step in evaluating any game or promotion is ensuring that it is not an illegal **lottery** (which is a form of gambling and a criminal offense).*

Lotteries generally have three elements:

1. A **prize** is awarded
2. Winners are determined on the basis of **chance**.
3. Participants must provide **consideration** to enter
 - Consideration=something of value that must be given to participate.
 - **Monetary** (i.e., *a payment or purchase*)
 - **Non-monetary** (e.g., *an expenditure of substantial time and/or effort*)



Violation can lead to violations of related laws: Wire Act, RICO, UIGEA



Legal Framework



- Regulated at state and federal level
 - **Federal:**
 - Section 5 of FTC Act used to regulate deceptive sweepstakes
 - FCC Act regulates sweepstakes on TV and radio, telemarketing and mobile
 - FTC has rule mandating specific rules disclosures and has been very active in enforcing
 - Deceptive Mail Prevention and Enforcement Act
 - CAN-SPAM—Refer-a-Friend
 - Children’s Online Privacy Protection Act (COPPA)
 - Wire Act, RICO, UIGEA



State Laws

- ***State law***
 - **Many state laws have specific requirements on RULES:**
 - Should be readily available to all participants and clearly set forth the details
 - Required disclosures in advertising: odds of winning, eligibility, deadlines, description and ARV of prizes, identity of sponsor
 - Some states require posting rules (e.g., MA, RI); some states also require posting of winners' lists
 - Best practice to include liability disclaimers/releases
 - ***Most social media sites have their own rules, require special disclosures***
 - **Registration and/or bonding**
 - Sweepstakes over \$5,000—NY and FL (\$500 for RI)
 - “Amusement contests” in AZ
 - **Special rules**, e.g., instant win, bottle cap promotions



State Laws (*cont.*)

- Other states prohibit sponsor from making certain representations:
 - Chance of winning will be improved by purchase of product
 - Person is a winner, is specially selected, or is a finalist (unless true)
 - Mailing is urgent or time-sensitive (unless true)





Sweepstakes

- If consideration is requested to enter (such as purchase of brand item), **alternate method of free entry** must be included
 - ***Equal Dignity: cannot favor*** one form of entry over another
 - Free AMOE must be ***clearly and conspicuously disclosed***
 - See FTC Dot.Com Disclosures, state settlements on what that means
- Other states prohibit sponsor from making certain representations:
 - Chance of winning will be improved by purchase of product
 - Person is a winner, is specially selected, or is a finalist (unless true)
 - Mailing is urgent or time-sensitive





Contests

- E.g., sports, photo and video contests, trivia contests, poker???
“Not chance” vs. contestants must control outcome.
- Games of skill don’t include the element of chance, so consideration may be permitted
 - A number of states don’t permit consideration in skill contests, e.g., AR, CO, FL, MD (VT until last year)
- Different tests for whether a game is a game of chance or skill:
 - Any chance
 - Material element
 - Dominant element
- Must be clear criteria for judging and independent judging



International Considerations

- Online gaming and sweepstakes law varies drastically across countries
- Important to check with counsel if sweepstakes or game will occur outside of U.S.
 - Some countries prohibit cash awards (e.g., Brazil)
 - Others require disclosures in particular language (e.g., Canada)





Understanding the Social Landscape

- Each social network has its own set of rules and usage guidelines (and prohibit gambling and lotteries)
- Make sure your team is familiar
- Consider in structuring your promotion whether you advertising or administering your promotion on the platform or on an app
- Consequences of violation? **Your promotion may be pulled down!**



Mobile Marketing and Text-to-Win



- Same laws as prize promotions conducted through traditional media, plus unique issues:
 1. Under federal law (TCPA), marketer must obtain ***express prior written authorization*** to send marketing messages via cell phone
 2. How do you make adequate disclosures with limited space available?
 3. Text messages may potentially be *consideration* if sent in connection with a sweepstakes/contest (*American Idol/Deal or No Deal* cases; *Hardin v. NBC Universal, Inc. et al*)
 - Premium text messages are almost certainly consideration
 - Whether a standard text message is consideration is an open issue.
 - Will a free AMOE solve the problem?
 - Substantial potential exposure to class action liability
- Mobile Marketing Ass'n guidelines are a great resource



Higher Risk Games

- Certain types of online games resemble gambling or contain gambling-like mechanics, look or feel.
- Games offering cash prizes have increased risk
- Common examples
 - Internet Cafes
 - Online Gaming and Fantasy Sports





Regulation of Internet Cafes

- Internet Cafes sell Internet time or telephone cards to use on computers with sweepstakes games
- Some states have attempted to ban Internet cafes through legislation—VA, OH, MS, NC
 - Redefine definitions of “lottery” or “illegal gambling” to explicitly include electronic sweepstakes games
- State AG regulations and guidance also address growth of Internet cafes
- Practical and Constitutional issues with overbroad statutes?
- Difficult to shut down because of loopholes (e.g., game of skill)





Gambling and Fantasy Sports – Federal Law

- Trend towards “sweepstakes gaming” sites, fantasy sports apps, penny auction sites—but are they legal?
 - In 2006, Congress passed the UIGEA: illegal to knowingly accept funds or proceeds of Internet gambling, defined as a bet or wager that is unlawful under federal or state law
 - Wire Act
 - Prohibits using wire communication to transmit bets or wagers on sports
 - 2011 DOJ Interpretation indicates it applies only to sporting events and contests, will not prosecute gambling transactions that are legal in-state
- NJ, DE, NV moving to regulate online gambling



Fantasy Sports

- Exception for fantasy sports: Federal law (and similar state law exceptions)
 - Predetermined prize
 - Winning outcomes reflect relative knowledge and skill of the participant and are determined predominantly by accumulated statistics
 - No winning outcome based on a single score, point spread, or performance of real-world team
 - No winning outcome based on single player's performance
- Risky States
 - AZ: AG opinion indicating “fantasy football pools” would be unlawful
 - LA: AG opinion stating that fantasy league where players selected by phone violated state gambling laws.
 - MT: statute forbids operators from retaining more than 15% of the entry fees, creating issue in games with fixed prize but unlimited participants
 - WA: AG opinion stating fantasy sports are illegal
- In particular, Daily Fantasy leagues could be subject to challenge, e.g., FanDuel *qui tam* lawsuit in Illinois did not reach merits, but the court noted that daily leagues only relied on one day's worth of performance



Other Issues in Gamification

- Rewards programs
- Endorsements and Testimonials
- Sponsorships and Product Placement
 - Native
- Intellectual Property
- CAN-SPAM and email marketing
- Privacy
- Virtual Currency



Virtual Currency and Games



What is virtual currency?

- **US Treasury** – “a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency”
- **European Central Bank** – “a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community”
- **European Banking Authority** – “a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically”



Categories of Virtual Currency

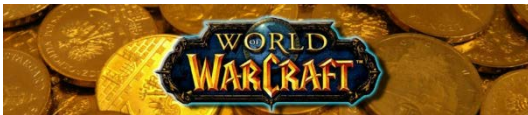
- Fully-closed loop
 - E.g., World of Warcraft Gold
- Partially-closed loop
 - E.g., Farmville Farmcash
- Convertible
 - E.g., Linden dollars for Second Life; BitCoin
- Centralized
 - Single repository/administrator; purchaser of centralized VC transfers real \$ to entity that credits purchaser's account with VC
 - E.g., Linden Dollars
- Decentralized
 - No central repository/authority for managing currency; usually obtained by purchase on open market or completing tasks to aid in operation of currency
 - E.g., BitCoin



Using Virtual Currency in Sweeps and Promotions

Key Question:

Does the form of virtual currency you are using have a *real world value*?





Using Virtual Currency in Sweeps and Promotions

- Scenario 1:
 - Spend virtual currency, get a chance to win more virtual currency.
- Scenario 2:
 - Spend fiat (aka real) money, get a chance to win virtual currency.
- Scenario 3:
 - Spend virtual currency, get a chance to win real world prizes.



Virtual Currency: Tax and Other Legal Implications

- Is virtual currency property?
 - Bitcoin – according to the IRS, it is property
- Do you need to collect sales tax on it if you sell it?
 - State-by-state analysis
- Escheatment issues
 - Transferability – what about accounts/unused amounts?
- FinCen rules
 - Money services business and money transmitter regulations
- Watch for state rules regulating VC
 - E.g., NY Dep't of Financial Svs proposed rules re: cryptocurrency like Bitcoin



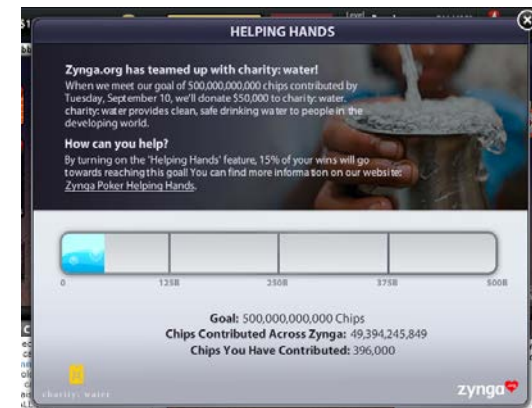
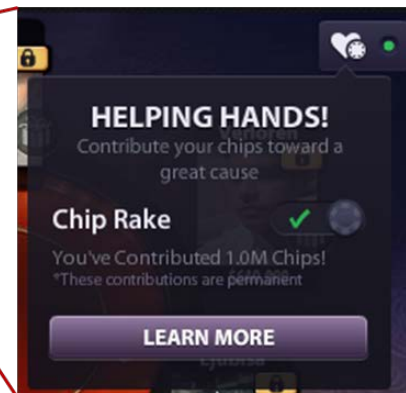


Lessons in Gamification:

Integrating Gamification into Sweepstakes and Promotions



Zynga Poker Helping Hands – Gamifying Charitable Donations

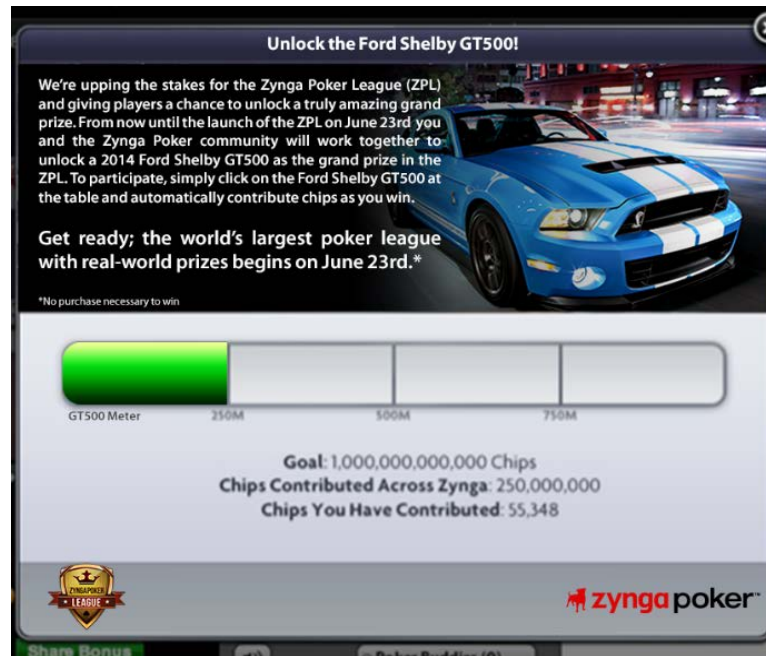
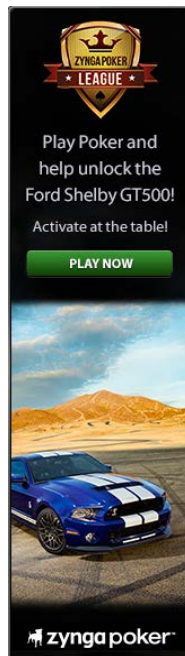




Zynga Poker Leagues Sweepstakes



Rake mechanic used pre-promotion period for players to “contribute” towards a better Grand Prize.





Zynga Poker Leagues Sweepstakes, cont.

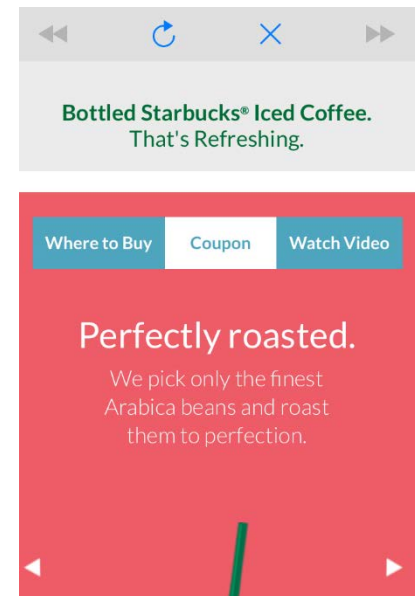
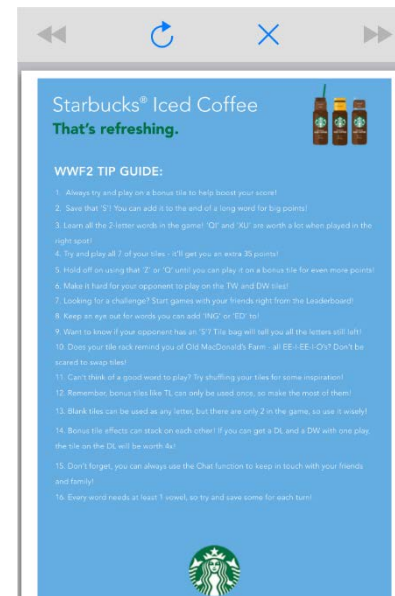
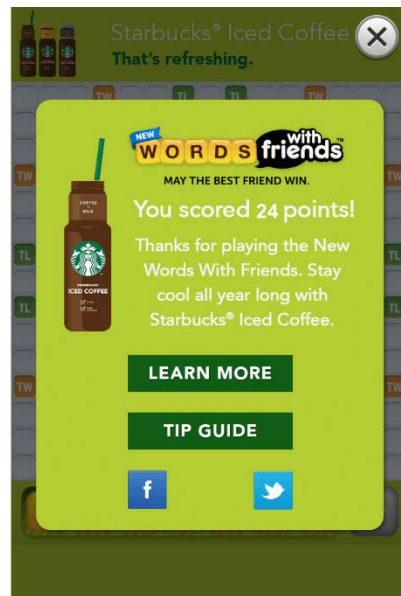
Excluded various states due to restrictions on poker and sweeps.
U.S. only.

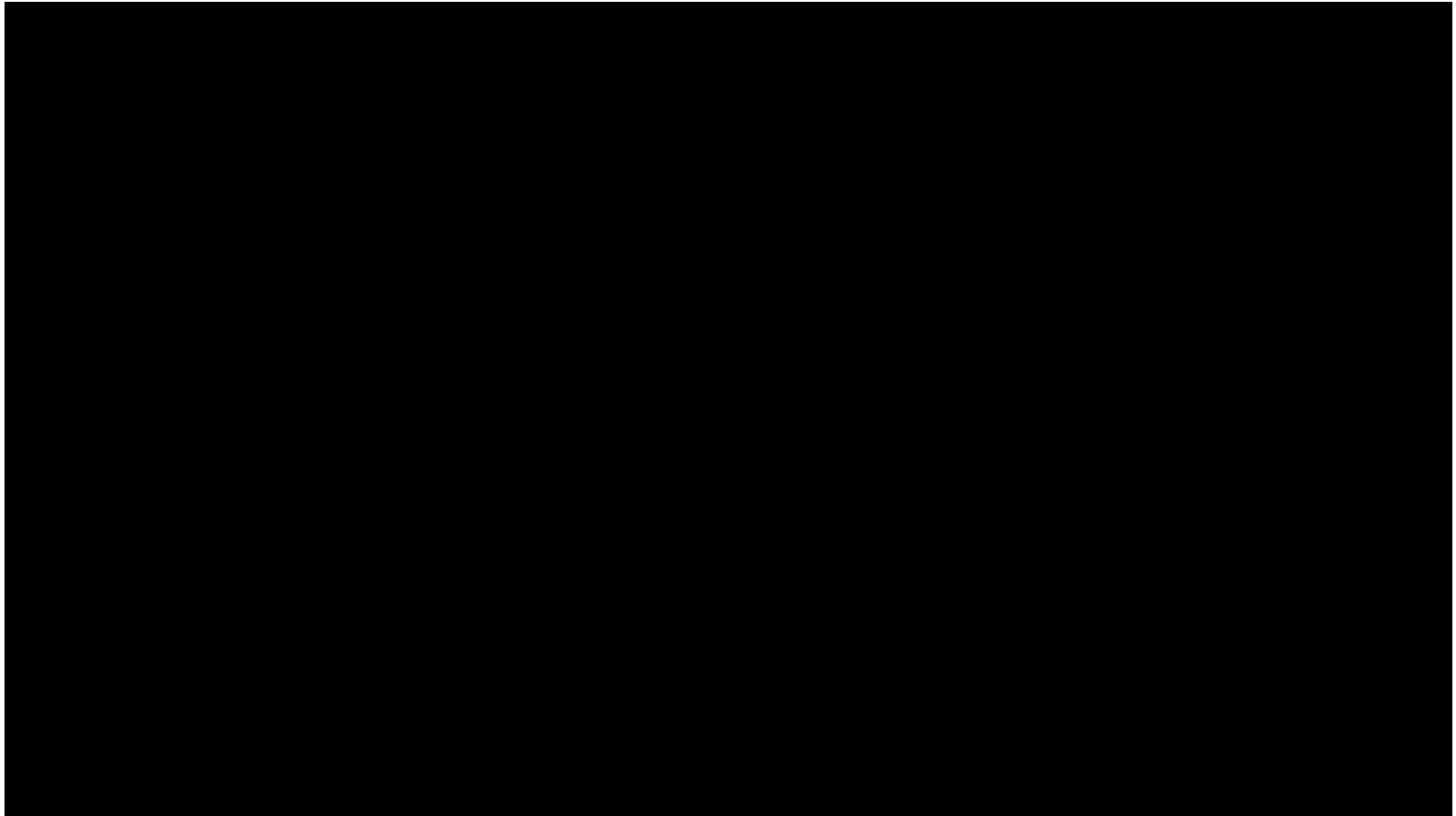
Points could be converted to sweeps entries at the end of season.

The screenshot displays the Zynga Poker Leagues Sweepstakes interface. On the left, a vertical menu includes 'GOLD IV League' with a gold IV icon, 'Performance' with a line graph icon, 'Rewards' with a trophy icon, and 'Friends' with a group of people icon. The main area features a 'Sweepstakes' section with a red sports car image and the text 'PLAY FOR A CHANCE TO WIN ONE OF THESE AWESOME REWARDS!'. Below this, it lists prizes: 'DREAM TRIP FOR TWO' (with an airplane icon), '10 TABLETS' (with a tablet icon), '15 HEADPHONES' (with a headset icon), and '2000 T-SHIRTS' (with a t-shirt icon). A disclaimer at the bottom states: 'No purchase necessary. Void where prohibited. Sweepstakes 6/23 - 8/17 2014. U.S. residents 18+. Sponsored by Zynga Inc. Restrictions apply. See Rules'. On the right, a 'WEEK 6' section shows 'TIME REMAINING' as 13 H 02 M and 'LEAGUE POINTS EARNED' as 7950, with a 'LEARN MORE' button below.

New Words With Friends - Starbucks

- Created a mini game-in-game interstitial ad between moves in New Words With Friends.







Marriott Social Xplor

Legal/Practical Issues:

- Registration and bonding required?
- Importance of trademark knockout search and registration
- Email and mobile marketing efforts: compliance challenges
 - Mobile app—need for carrier approval, compliance with TCPA requirements for express consent
 - Mapping out social media campaign
- Implications of proposal to expand play to other countries? What are the issues when running an international contest? E.g., taxes, prize fulfillment, translation, registration
- Privacy
- Use of Rewards Program to appeal to core customer
- Practical challenges posed by complexity of gameplay
- Integrations/in-app brand marketing

Integrating Gamification: Chipotle Scarecrow Game

- Scarecrow film and arcade-style mobile game encourages users to buy natural and wholesome food by asking you to outsmart the “Crowbot” and unlock prizes in the form of a BOGO offer redeemable in 1500 locations worldwide
- 6.5 million YouTube views in less than two weeks; sales spiked in Q1 2014; top honors at the 2014 Cannes Lions Festival





Chipotle Scarecrow Game

- Some argue the “advergame” is designed to push unhealthy food and drinks to children by exploiting legal loophole in the regulations applicable to advertising through traditional media.
- As of late August 2014 , no prizes left.
 - Rules: contest runs “until 12/31/2014 or until supplies last.”
 - Is there consideration when a BOGO is offered as a prize?
 - US entrants only are eligible, who can redeem prize at any “participating restaurant”—does this include international?
 - Is there any list of participating locations provided?
 - Rules must be clear with games just as they must be clear with traditional sweepstakes





Takeaways

- Planning is important—and Legal should be involved from the beginning
 - In particular, mobile approvals can take considerable time
 - Geographic scope should be carefully considered from the start
- Games should offer meaningful rewards
 - Gamification for sake of gamification does not work
 - If virtual currency will be used, implications must be carefully considered
- Gamification done right is still an effective tool
 - Can generate buzz and encourage interaction
 - Can use social media and loyalty programs to generate buzz—provided that you comply with platform rules, CAN-SPAM, and your own program terms!
 - Brand integrations can strengthen programs, but may trigger need for partner agreements and compliance with third party marketing guidelines
- One size does not fit all
 - Game should have a strategic purpose (e.g., Chipotle)
 - Consider whether there are additional regulations that apply because of audience (e.g., children)



QUESTIONS?





PANEL 8: B2B Service Providers in the Crosshairs – A Look at How Today’s Regulatory Landscape Affects Relationships Between Merchants and the Companies that Support Them



David Morgan
Chief Revenue Officer,
Performline



Ellen Traupman Berge
Partner,
Venable LLP

Jonathan Ellerman
Sr. Vice President, Regulatory Compliance and Government Affairs,
Vantiv

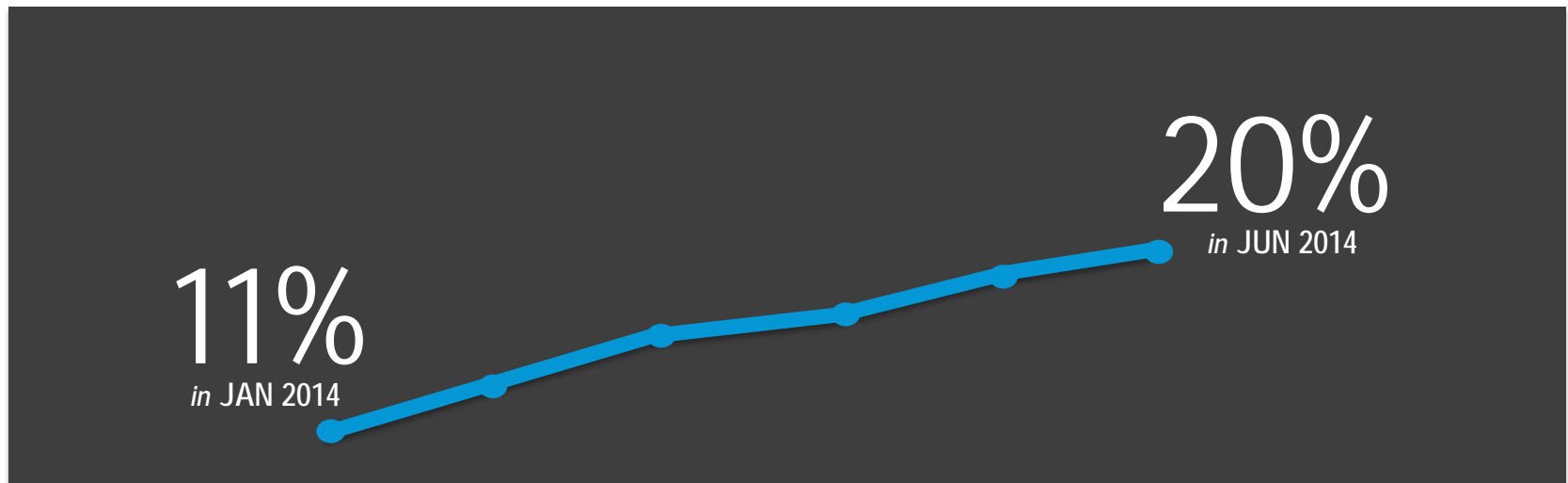


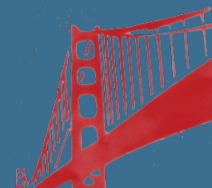
performline

discover. monitor. act.

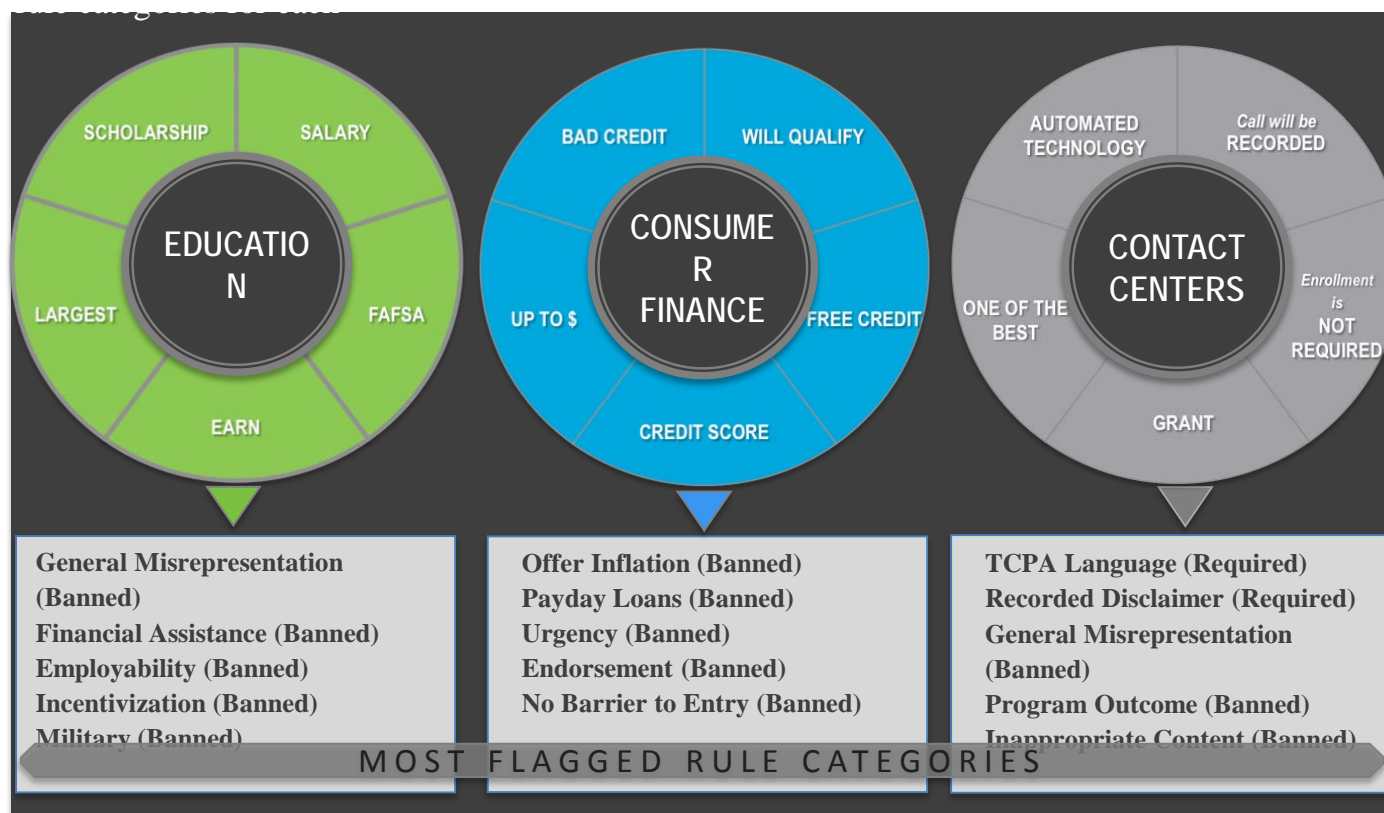


WEBPAGES WITHOUT VIOLATIONS





MOST POTENTIAL VIOLATIONS



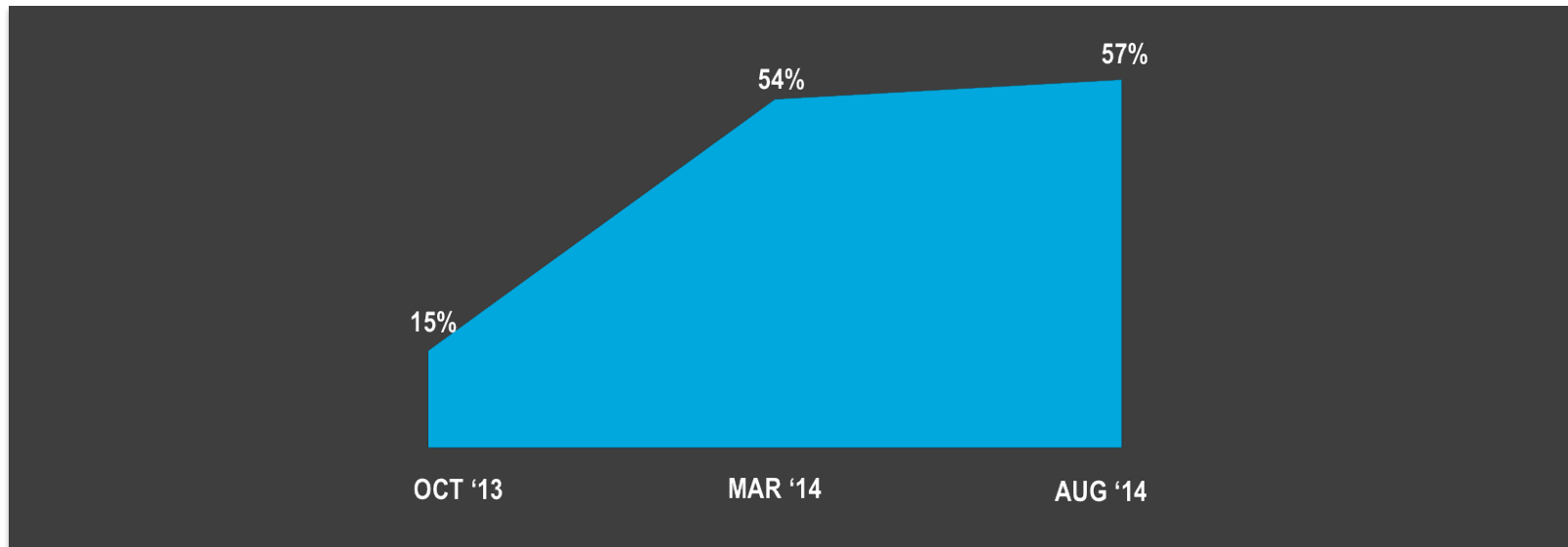


CHANGE IN EDU TRIGGER TERMS





TCPA COMPLIANCE TRENDS





QUESTIONS?



Bridging the Gaps:
An Advertising Law Symposium

