



April 11, 2013

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Honors and Awards

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Analysis

Product Demonstrations and Disclosures – The Truth's Not Always Pretty

One of the most important lessons in advertising law, write Venable partners **Amy Ralph Mudge** and **Randal M. Shaheen** in a recent blog post, is that a disclosure – unlike a good foundation, cover-up, or mascara – is not going to mask imperfections in a claim. They point to a recent National Advertising Division case challenging disclosures used by L'Oréal and Maybelline in mascara ads stating "Lashes were enhanced in post-production."

Mudge and Shaheen point out that disclosures should be used only to provide additional detail or clarifying language to put the claim into perspective. Marketers should not make a promise with a claim and then use a disclosure to take away that promise. In the case of cosmetics, altering a photo, regardless of the accompanying disclosures, may be found to be misleading or deceptive.

However, are consumers misled? Or, ask Shaheen and Mudge, do they expect cosmetics ads to be retouched? They see this question as ripe for probing with consumer survey evidence during litigation. Until then, they believe it is best to avoid post-production touch-ups of images that demonstrate how a product works, because disclaimers are unlikely to cure the issue and may even tip off a potential plaintiff.

[Click here](#) to read the full text of the blog post by Mudge and Shaheen on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

Smartphones Spotlight Design Patents

When most people think of patents, write Venable partners **Jeffrey D. Knowles** and **Steven J. Schwarz** in the April issue of *Electronic Retailer* magazine, they think of traditional utility patents. However, design patents, which protect the appearance of an invention, have received significant attention in the wake of a \$1.05 billion district court judgment in favor of Apple in litigation over design patents for the iPhone.

A notable advantage of design patents, write Knowles and Schwarz, is that they are relatively quick to obtain. While utility patents have an average pendency of more than two-and-a-half years, more than 50 percent of design patents are issued within a year of filing, and approximately 90 percent of design patents are issued within two years. This speed, they write, can be a tremendous advantage in markets where product development is fast and products tend to have short life cycles.

[Click here](#) to read the full text of the design patent column by Knowles and Schwarz.

Natural or Synthetic? USDA's Draft Guidance Weighs In

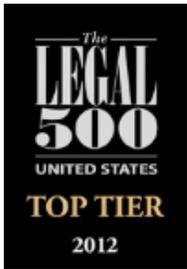
On April 2, the United States Department of Agriculture (USDA) released Draft Guidance addressing an issue that has concerned the National Organic Standards Board for years: how to determine whether a substance is agricultural or non-agricultural and synthetic or non-synthetic. In a recent post to Venable's advertising law blog, Venable attorneys **Claudia A. Lewis** and **Erin E. Seder** write that these determinations are crucial when determining whether a substance may be used in "organic" or "made with organic..." processed foods.



Law Firm of the Year, National Advertising, *U.S. News and World Report*, 2011-2012



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Although the term "natural" has not been defined by the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC), the Draft Guidance explicitly details processes that create non-synthetic or natural substances. This guidance from USDA is crucial to food marketers and manufacturers, write Lewis and Seder, because litigation over "natural" food and dietary supplement claims has exploded during the past year. Because the FDA and FTC have made it clear that they have no plans to establish a definition of the term "natural" any time soon, the Draft Guidance is likely to have a broad effect on the entire food industry, not just USDA-regulated products.

The USDA will accept public comments on the Draft Guidance until June 3, 2013.

[Click here](#) to read the full text of the blog post at www.allaboutadvertisinglaw.com, which outlines specific scenarios that would and would not result in a designation of "synthetic."

[Click here](#), [here](#), and [here](#) to read the USDA's Draft Guidance documents.

Upcoming Events

[American Bar Association 2013 Antitrust Law Spring Meeting - Washington, DC](#)

April 10-12, 2013

This year's 3-day program features more than 50 substantive sessions across a wide range of hot topics in antitrust and consumer protection law, both here in the U.S. and abroad. CLE credit will be available for all sessions. Venable partner [Amy Ralph Mudge](#) will moderate a panel addressing the fundamentals of consumer protection, and Venable partner [Jonathan L. Pompan](#) will present "Navigating Consumer Financial Protection Bureau Enforcement Actions." Venable attorney [Robert P. Davis](#) will discuss the intersection of consumer protection and antitrust in one panel and chair another panel providing an update from the FTC Bureau Directors.

[Click here](#) to register.

[The FTC's Revised .Com Disclosures Guide: What Third Party Advertisers and Lead Generators Need to Know](#)

April 16, 2013

This program will focus on one of the most confusing yet important advertising issues confronting digital advertisers: disclosures. There are critical distinctions in this area that are important to understand for online and mobile advertisers, and there are a host of valuable design techniques of which every advertiser (and their lawyers) should be aware. Venable partners [Jonathan L. Pompan](#) and [Ellen Traupman Berge](#) will focus on the FTC's guidance as well as current enforcement trends by the FTC, the Consumer Financial Protection Bureau, and state Attorneys General.

[Click here](#) to register.

[Electronic Retailing Association Hong Kong Conference 2013: Building Business in Asia](#)

April 20, 2013

This event will improve your knowledge of conducting business in Asia. Venable partner [Roger A. Colaizzi](#) will present "China Culture of Counterfeit," highlighting recent developments in industry's efforts to combat the counterfeiting epidemic. This lively panel discussion will explore intelligent strategies in countering counterfeiting and review the latest developments from Mainland China in 2012.

[Click here](#) to register.

[Electronic Transactions Association Annual Conference - New Orleans](#)

April 30 - May 2, 2013

The ETA Annual Conference and Expo is a premier business and networking event for the payments industry. This event is the largest in ETA history, reflecting the rapid growth in the \$3.6 trillion payments business. Venable partner [Jamie Barnett](#) will speak on the intersection of electronic payments and cybersecurity. Come meet our attorneys on the show floor at booth #1117.

[Click here](#) to register.

[Understanding the Consumer Financial Protection Bureau - George Mason University School of Law, Arlington, VA](#)

May 2, 2013

Please join the GMU Law School's Law & Economics Center for a full day of informative sessions about

the CFPB. Panels will include prominent practitioners, academics, and CFPB representatives. Venable partner **Jonathan L. Pompan** will speak on "CFPB Enforcement Activities" from 4:45 p.m. - 6:00 p.m. ET. Application for approval for this program is pending with the Virginia Mandatory Continuing Legal Education Board for 7 CLE hours (0 ethics).

[Click here](#) to register.

[Click here](#) to subscribe to Venable's Advertising and Marketing RSS feed and receive the Venable team's insight and analysis as soon as it is posted.

Visit Venable's advertising law blog at www.allaboutadvertisinglaw.com.

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