

Table of Contents

PART I. TEXT

CHAPTER 1. CORPORATE COUNSEL'S ROLE IN THE COMPANY'S ADVERTISING

- § 1:1 Introduction and overview
- § 1:2 Overview of the legal implications of the content of advertisements
- § 1:3 Overview of key contract issues
- § 1:4 Reviewing the content of an advertisement—
Truthfulness
 - § 1:5 —The substantiation requirement
 - § 1:6 —Copyright and publicity issues
 - § 1:7 —What is the status of the product?
 - § 1:8 —Are there any trademark issues?
 - § 1:9 —Does the advertisement mention warranties?
 - § 1:10 —Safety or product liability issues
 - § 1:11 —Advertising to children
 - § 1:12 —Internet issues
 - § 1:13 —Promotional advertising
 - § 1:14 —Pricing
 - § 1:15 —Labelling
 - § 1:16 —Other issues
- § 1:17 Contracts relating to advertising
- § 1:18 Taxation
- § 1:19 Conclusion

CHAPTER 2. THE FEDERAL TRADE COMMISSION RULES ON ADVERTISING

- § 2:1 Introduction
- § 2:2 —The FTC Act and the 1994 amendments
- § 2:3 —Trade regulation rules
- § 2:4 —The FTC's enforcement authority
- § 2:5 — —Administrative enforcement
- § 2:6 — —Judicial enforcement
- § 2:7 —Advertising guides and policy statements
- § 2:8 — —Advertising guides
- § 2:9 — —Policy statements
- § 2:10 Substantive law of unfair and deceptive trade practices
- § 2:11 —What is unfair and deceptive advertising?—The FTC
policy statement on deception

ADVERTISING LAW AND AGREEMENTS

- § 2:12 — — —Consumer intelligence standard
- § 2:13 — — —Advertising to children
- § 2:14 — — —The FTC policy statement on unfairness
- § 2:15 — — —Omissions
- § 2:16 —Determining the meaning of an advertisement
- § 2:17 —Determining the truth of a claim
- § 2:18 —FTC policy statement regarding advertising substantiation
- § 2:19 —Other illustrative cases
- § 2:20 Specific areas of FTC activity
- § 2:21 —Health and nutrition claims
- § 2:22 —Marketing food to children
- § 2:23 —Environmental claims
- § 2:24 —Business and trade status
- § 2:25 —Price claims
- § 2:26 —Guarantees and warranties
- § 2:27 —Origin of product
- § 2:28 —Unfair interferences
- § 2:29 —Lotteries and gambling schemes
- § 2:30 —Push money
- § 2:31 —Unsolicited merchandise
- § 2:32 —Issues of public interest
- § 2:33 —Endorsements and testimonials
- § 2:34 — —Consumer Review Fairness Act
- § 2:35 — —Online reviews
- § 2:36 —Demonstrations, tests, and surveys
- § 2:37 —Exploiting consumer weakness
- § 2:38 —Comparative advertising
- § 2:39 —Automotive advertising
- § 2:40 —Alcoholic beverages
- § 2:41 —Telemarketing
- § 2:42 —Mortgage products
- § 2:43 Internet advertising—FTC guides on internet advertising
- § 2:44 —Privacy—FTC response to privacy concerns
- § 2:45 — —Children’s Online Privacy Protection Act of 1998
- § 2:46 —Other FTC cases involving internet advertising
- § 2:47 —Unsolicited commercial e-mail
- § 2:48 Remedial powers of the FTC
- § 2:49 —Corrective advertising
- § 2:50 —Affirmative disclosure
- § 2:51 —Banning products and limiting business
- § 2:52 —Trademarks
- § 2:53 —Restitution and damages
- § 2:54 —Divestiture

TABLE OF CONTENTS

- § 2:55 —Trade regulation rules
- Appendix 2-A. Environmental Claims—Summary of the Green Guides
- Appendix 2-B. Marketing Your Mobile App: Get It Right from the Start (Federal Trade Commission—April 2013)
- Appendix 2-C. FTC’s Endorsement Guides: What People Are Asking (June 2023)
- Appendix 2-D. Part 255—Guides Concerning Use of Endorsements and Testimonials in Advertising
- Appendix 2-E. Advertising FAQ’s: A Guide for Small Business (Federal Trade Commission—April 2001)
- Appendix 2-F. Featuring Online Customer Reviews: A Guide for Platforms (January 2022)
- Appendix 2-G. Soliciting and Paying for Online Reviews: A Guide for Marketers (January 2022)

CHAPTER 3. TRADEMARK ISSUES IN ADVERTISING

- § 3:1 Introduction
- § 3:2 Trademark infringement—Introduction
- § 3:3 —Protectability of a trademark
- § 3:4 — —Extraterritoriality
- § 3:5 —Likelihood of confusion
- § 3:6 — —Distinctiveness or strength of a mark
- § 3:7 — —Passing off/reverse passing off
- § 3:8 — —Parody
- § 3:9 — —Geographic distance
- § 3:10 —Contributory infringement
- § 3:11 —Defenses to trademark infringement: Fair use
- § 3:12 —Use of disclaimers
- § 3:13 —Damages and remedies
- § 3:14 Trade dress—Introduction
- § 3:15 —Functionality doctrine
- § 3:16 —Inherent distinctiveness and secondary meaning
- § 3:17 —Likelihood of confusion
- § 3:18 False advertising—Introduction
- § 3:19 —Standing
- § 3:20 —Timing
- § 3:21 —Elements of a claim
- § 3:22 — —Commercial advertising or promotion

- § 3:23 — —Relating to “goods, services, or commercial activities”
- § 3:24 — —Explicit or literally false statements
- § 3:25 — —Deceptive or misleading statements
- § 3:26 — —Presumptions
- § 3:27 — —False designation of origin
- § 3:28 — —Implied affiliation or sponsorship
- § 3:29 — —Copycat products
- § 3:30 — —Geographic origin
- § 3:31 — —Damages/injunctive relief/attorneys’ fees
- § 3:32 Trademark dilution—Introduction
- § 3:33 — —Requirements for a “famous” mark
- § 3:34 — —Commercial use
- § 3:35 — —Theories of dilution
- § 3:36 — —Tarnishment
- § 3:37 — —Blurring
- § 3:38 — —Exceptions under the FTDA
- § 3:39 — —Remedies
- § 3:40 Monitoring trademark usage in advertising
- § 3:41 — —Trademark watch services
- § 3:42 — —Cease-and-desist letters
- § 3:43 — —Proceedings before the PTO
- § 3:44 — —Protecting trademarks from becoming generic
- § 3:45 — —Abandonment of a trademark
- § 3:46 — —The defense of laches
- § 3:47 — —Implementing a trademark audit program
- § 3:48 — —Trademark registration
- § 3:49 — —Quality control
- § 3:50 — —Assignments and licenses
- § 3:51 — —Enforcing trademark rights
- § 3:52 — —The internet

CHAPTER 4. ADVERTISING TO CHILDREN

- § 4:1 Introduction
- § 4:2 Children’s advertising review unit guidelines
- § 4:3 The Children’s Online Privacy Protection Act
- § 4:4 — —To whom does the Children’s Online Privacy Protection Act of 1998 apply?
- § 4:5 — —Sound recordings
- § 4:6 — —Complying with the Children’s Online Privacy Protection Act of 1998—Privacy notice
- § 4:7 — —Parental consent
- § 4:8 — —Security measures
- § 4:9 — —Safe harbor provision

TABLE OF CONTENTS

- § 4:10 —Enforcement
- § 4:11 —Preemption
- § 4:12 900 number advertising—General requirements: FTC
900 number rule
- § 4:13 —Specific requirements for advertising 900 number
services to children
- § 4:14 FTC enforcement
- § 4:15 Conclusion
- Appendix 4-A. Children’s Online Privacy Protection Rule: A
Six-Step Compliance Plan for Your Business
(June 2017)
- Appendix 4-B. Complying with COPPA: Frequently Asked
Questions (Federal Trade Commission—July
2020)

CHAPTER 5. [Reserved]

CHAPTER 6. FEDERAL REGULATION OF ADVERTISING

- § 6:1 Introduction
- § 6:2 Direct enforcement
- § 6:3 —Food and Drug Administration
- § 6:4 —Federal Reserve System Board of Governors
- § 6:5 —Consumer Product Safety Commission
- § 6:6 Indirect enforcement
- § 6:7 —Obscenity
- § 6:8 —Facsimile transmissions
- § 6:9 —Underwriting public broadcasting
- § 6:10 —Commercial volume
- § 6:11 —Children’s programming
- § 6:12 —Lotteries
- § 6:13 —Product placement
- § 6:14 —Preemption
- § 6:15 Constitutionality of advertising regulation
- § 6:16 Conclusion

CHAPTER 7. INSURANCE COVERAGE FOR ADVERTISING INJURY

- § 7:1 Introduction
- § 7:2 What is advertising injury?—Trademark or trade dress
infringement—Cases holding that trademark and
trade dress infringement are not covered
- § 7:3 — —Cases holding that trademark and trade dress
infringement are covered

- § 7:4 —Violations of the Telephone Consumer Protection Act’s facsimile advertisement rules
- § 7:5 —Patent infringement can be an advertising injury
- § 7:6 What is advertising injury—Comparative advertising
- § 7:7 How much dissemination is needed for “advertising activity”?
- § 7:8 The requirement of a “nexus” between the liability and advertising injury
- § 7:9 Deductibles
- § 7:10 Exclusions
- § 7:11 —State law
- § 7:12 Notice to the insurer

CHAPTER 8. ADVERTISING ALLOWANCES UNDER THE ROBINSON-PATMAN ACT

- § 8:1 Introduction
 - § 8:2 The basic rules—Per se offenses
 - § 8:3 —The scope of § 2(d) and (e)
 - § 8:4 — —Promotional and advertising activities
 - § 8:5 — —“In connection with the resale by the buyer”
 - § 8:6 — —Additional restrictions
 - § 8:7 Establishing elements of a discriminatory advertising allowances claim—Standing to assert the claim
 - § 8:8 —Competing customers
 - § 8:9 — —Customers of wholesalers versus direct-buying retailers
 - § 8:10 — —Geographic and functional competition
 - § 8:11 —The “resale” requirement
 - § 8:12 —Availability on proportionally equal terms
 - § 8:13 —The “service or facility” requirement
 - § 8:14 —Interaction with other Robinson-Patman claims
 - § 8:15 —Slotting fees
 - § 8:16 Conclusion
- Appendix 8-A. Guide for Advertising Allowances and Other Merchandising Payments and Services—16 C.F.R. Part 240

CHAPTER 9. ADVERTISING ON THE INTERNET

- § 9:1 Introduction
- § 9:2 FTC regulations—General applicability
- § 9:3 —Disclosures
- § 9:4 Privacy issues
- § 9:5 —Contents of a privacy policy

TABLE OF CONTENTS

- § 9:6 —Online preference marketing
- § 9:7 —Available tools/models for drafting a policy
- § 9:8 —Enforcement of privacy policies
- § 9:9 Domain names
- § 9:10 Use of trademarks in internet advertising
- § 9:11 —Initial interest confusion
- § 9:12 —Keying/banner advertisements
- § 9:13 —Pop-up advertisements
- § 9:14 —Click fraud
- § 9:15 Linking/framing—Linking
- § 9:16 —Framing
- § 9:17 Metatags
- § 9:18 Online reviews
- § 9:19 Platform provider liability
- § 9:20 Conclusion
- Appendix 9-A. .com Disclosures—How to Make Effective Disclosures in Digital Advertising (Federal Trade Commission—March 2013)
- Appendix 9-B. Advertising and Marketing on the Internet: Rules of the Road (Federal Trade Commission—December 2000)
- Appendix 9-C. Native Advertising: A Guide for Businesses (Federal Trade Commission—2015)
- Appendix 9-D. Disclosures 101 for Social Media Influencers (Federal Trade Commission—November 2019)

CHAPTER 10. TORT LAW CONSIDERATIONS IN ADVERTISING

- § 10:1 Introduction
- § 10:2 Palming off
- § 10:3 Product disparagement—Introduction
- § 10:4 —Product comparisons
- § 10:5 —Special damages
- § 10:6 —Lanham Act
- § 10:7 Invasion of privacy
- § 10:8 Defamation
- § 10:9 Product liability
- § 10:10 Actions sounding in fraud

CHAPTER 11. WARRANTIES AND ADVERTISING

- § 11:1 Introduction

- § 11:2 Creation of warranties
- § 11:3 —Express warranties
- § 11:4 — —Affirmations
- § 11:5 — — —Certification mark
- § 11:6 — — —Puffing
- § 11:7 — —Pass-through warranties
- § 11:8 — —Communication to the public
- § 11:9 —Contract issues
- § 11:10 — —Basis of the bargain
- § 11:11 — —Privity
- § 11:12 Warranty requirements under the Magnuson-Moss
Warranty Act
- § 11:13 —Scope
- § 11:14 —Compliance standards
- § 11:15 — —Required acts
- § 11:16 — — —Full or limited
- § 11:17 — — —Clear disclosure
- § 11:18 — — —Presale availability
- § 11:19 — —Prohibited acts—Disclaimer or modification of
implied warranties
- § 11:20 — — —“Tie-in sales” provisions
- § 11:21 — — —Deceptive warranty terms
- § 11:22 Conclusion

Appendix 11-A. Businessperson’s Guide to Federal Warranty
Law (Federal Trade Commission—Updated
May 2018)

CHAPTER 12. RIGHT OF PUBLICITY

- § 12:1 Introduction
- § 12:2 Types of right of publicity claims
- § 12:3 —State statutory and common-law right of publicity
claims
- § 12:4 — —The persona
- § 12:5 — —Use without permission
- § 12:6 — — —Releases
- § 12:7 — —Commercial purpose
- § 12:8 —Right of publicity claims under the Lanham Act
- § 12:9 Preemption
- § 12:10 Types of damages awarded
- § 12:11 The First Amendment defense

CHAPTER 13. ADVERTISING AND UNSOLICITED COMMERCIAL E-MAIL

- § 13:1 Introduction

TABLE OF CONTENTS

- § 13:2 CAN-SPAM Act—General requirements
- § 13:3 —Preemption of state laws
- § 13:4 —UCE and wireless subscribers
- § 13:5 —Enforcement/penalties
- § 13:6 State spam laws
- § 13:7 Litigation/enforcement
- § 13:8 —Trespass to chattel, constitutional claims, and other theories
- § 13:9 —Litigation involving internet service providers
- § 13:10 —State enforcement
- § 13:11 Best practices for online marketers sending unsolicited commercial e-mail
- § 13:12 Counseling suggestions
- § 13:13 Conclusion
- Appendix 13-A. Candid Answers to CAN-SPAM Questions (Federal Trade Commission—2015)
- Appendix 13-B. The CAN-SPAM Act: A Compliance Guide for Business (September 2009)

CHAPTER 14. ADVERTISING AND UNSOLICITED FACSIMILES

- § 14:1 Overview
- § 14:2 Prior express invitation or permission—EBRs under the 2003 FCC rule amendments
- § 14:3 —Trade association memberships under the 2003 FCC rule amendments
- § 14:4 The Junk Fax Prevention Act of 2005—EBR exception
- § 14:5 —Opt-out notice requirement
- § 14:6 —Determining what qualifies as an advertisement
- § 14:7 Standing
- § 14:8 Sender
- § 14:9 —Strict liability
- § 14:10 Fax broadcasters
- § 14:11 Fax servers
- § 14:12 Statute of limitation
- § 14:13 Penalties for violations of the TCPA fax provisions
- § 14:14 Insurance coverage for TCPA fax provision violations

CHAPTER 15. UNSOLICITED TELEPHONE CALLS

- § 15:1 Introduction to the Telephone Consumer Protection Act of 1991

ADVERTISING LAW AND AGREEMENTS

- § 15:2 —FCC rules—Enforcement
- § 15:3 2003 FCC rules implementing the TCPA—Overview
- § 15:4 —The national do-not-call list
- § 15:5 —Company do-not-call lists
- § 15:6 —Established business relationship exception
- § 15:7 —Tax-exempt nonprofit organization exemption
- § 15:8 —Automated telephone dialing equipment
- § 15:9 — —Predictive dialers
- § 15:10 — —War dialing
- § 15:11 —Artificial or prerecorded voice messages
- § 15:12 — —Consent
- § 15:13 — —Called party
- § 15:14 — —Making a call
- § 15:15 — —Telephone solicitation
- § 15:16 — —Content of message
- § 15:17 — —Free offers
- § 15:18 — —Identification requirements
- § 15:19 — —Dual-purpose calls
- § 15:20 — —Calls by radio and television stations
- § 15:21 — —Political calls
- § 15:22 —Abandoned calls
- § 15:23 —Wireless telephone numbers
- § 15:24 — —Revocation of consent
- § 15:25 — —Call resulting in charge
- § 15:26 — —Type of service
- § 15:27 —Caller identification
- § 15:28 2005 FCC rules implementing the TCPA
- § 15:29 —Debt collection calls and prerecorded messages
rules
- § 15:30 —Common carrier notifications
- § 15:31 —The EBR exemption
- § 15:32 —Company-specific do-not-call lists
- § 15:33 2008 FCC rules implementing the TCPA—Debt
collection—Number provided during transaction
- § 15:34 — — —Entity to which number is provided
- § 15:35 2015 FCC rules implementing the TCPA—Automatic
telephone dialing systems
- § 15:36 Vicarious liability
- § 15:37 Jurisdiction
- § 15:38 Standing
- § 15:39 Penalties for violations of the TCPA
- § 15:40 State do-not-call lists
- § 15:41 Conclusion

Appendix 15-A. In the Matter of Rules and Regulations

TABLE OF CONTENTS

Implementing the Telephone Consumer
Protection Act of 1991 (FCC Declaratory
Ruling and Order-Released July 10, 2015)
(Excerpted)

CHAPTER 16. SPYWARE

- § 16:1 Introduction
- § 16:2 State spyware legislation
- § 16:3 Federal legislation
- § 16:4 Litigation/enforcement—FTC actions
- § 16:5 —Litigation
- § 16:6 —State actions
- § 16:7 —European Union

Appendix 16-A. California Spyware Law—Consumer
Protection against Computer Spyware Act

CHAPTER 17. *[Reserved]*

CHAPTER 18. *[Reserved]*

CHAPTER 19. *[Reserved]*

**CHAPTER 20. ADVERTISING REGULATION
IN THE EUROPEAN UNION**

- § 20:1 Introduction
- § 20:2 Misleading and comparative advertising
- § 20:3 Other directives—Foods
- § 20:4 —Broadcast advertising
- § 20:5 E-commerce directive on processing of personal data
and protection of privacy in the electronic
communications sector
- § 20:6 —User preference tracking (“cookies”)
- § 20:7 World Intellectual Property Organization
- § 20:8 Conclusion

Appendix 20-A. Council Directive 84/450/EEC of September
10, 1984, Relating to the Approximation of
the Laws, Regulations, and Administrative
Provisions of the Member States
Concerning Misleading Advertising

Appendix 20-B. Directive 97/55/EC of European Parliament
and the Council of October 6, 1997,
Amending Directive 84/450/EEC

- Concerning Misleading Advertising So as to
Include Comparative Advertising
- Appendix 20-C. Directive 2005/29/EC of European Parliament
and the Council of May 11, 2005,
Concerning Unfair Business-to-Consumer
Commercial Practices in the Internal
Market
- Appendix 20-D. Directive 2006/114/EC of The European
Parliament and of the Council of 12
December 2006 Concerning Misleading and
Comparative Advertising
- APPENDIX 20-E. Directive 2009/136/EC of The European
Parliament and of the Council of 25
November 2009 Amending Directive 2002/
22/EC on Universal Service and Users'
Rights Relating to Electronic
Communications Networks and Services,
Directive 2002/58/EC Concerning the
Processing of Personal Data and the
Protection of Privacy in the Electronic
Communications Sector and Regulation
(EC) No 2006/2004 on Cooperation between
National Authorities Responsible for the
Enforcement of Consumer Protection Laws
- Appendix 20-F. Electronic Commerce: Selling Internationally
A Guide for Businesses (Federal Trade
Commission—March 2000)

CHAPTER 21. *[Reserved]*

CHAPTER 22. *[Reserved]*

CHAPTER 23. *[Reserved]*

CHAPTER 24. *[Reserved]*

CHAPTER 25. *[Reserved]*

CHAPTER 26. *[Reserved]*

CHAPTER 27. *[Reserved]*

CHAPTER 28. *[Reserved]*

TABLE OF CONTENTS

CHAPTER 29. [Reserved]

CHAPTER 30. [Reserved]

CHAPTER 31. ADVERTISING AGENCY CHECKLIST

- § 31:1 What is the main reason the company has chosen this agency?
- § 31:2 What are the basic services the agency will perform?
- § 31:3 Is any standard of performance appropriate?
- § 31:4 What is the term of the agreement?
- § 31:5 Exactly how will the relationship work?
- § 31:6 How will legal requirements be handled?
- § 31:7 How is the money handled?
- § 31:8 How will the company verify charges and expenses?
- § 31:9 Ownership
- § 31:10 Confidentiality
- § 31:11 Exclusivity
- § 31:12 Term and termination
- § 31:13 Insurance
- § 31:14 Indemnification
- § 31:15 Trademarks
- § 31:16 Codes of conduct and ethics
- § 31:17 Relationship of the parties
- § 31:18 Property disposal
- § 31:19 Miscellaneous

PART II. FORMS

CHAPTER 32. ADVERTISING AGENCY AGREEMENTS

- § 32:1 Illustrative agreement with an advertising agency
- § 32:2 Call advertising program agreement between Dex Media, Inc. and Marchex Sales, LLC
- § 32:3 Independent contractor agreement between Wise Savings, LLC and Wise Sales, Inc
- § 32:4 VOS International Inc.'s public relations/sales and marketing agreement

CHAPTER 33. ONLINE MARKETING/ADVERTISING AGREEMENTS

- § 33:1 Amended and restated online advertising sales

- representation agreement between Trans-High Corporation and Green Rush Daily LLC
- § 33:2 Advertising placement and sponsored content agreement between Bio Cup Canada Music Festival Ltd. and Hightimes Holding Corp.
- § 33:3 Amendment No. 1 to master services and license agreement between MDNH, Inc. and YellowPages.com, LLC
- §§ 33:4 to 33:9 *[Reserved]*
- § 33:10 Ask Jeeves, Inc.’s advertising services agreement
- § 33:11 Ask Jeeves, Inc.’s amendment one to the advertising services agreement
- § 33:12 Internet advertising agreement between Nexlore Corporation and WDT World Discount Telecommunications Company

CHAPTER 34. PROMOTION, DISTRIBUTION, AND MARKETING AGREEMENTS

- § 34:1 Promotion agreement by and between Exact Science Corporation and Pfizer Inc.
- § 34:2 Endorsement agreement between Papa John’s Marketing Fund, Inc. and ABG-Shaq, LLC
- § 34:3 Endorsement agreement between Jupiter Wellness, Inc. and Tee-2-Green Enterprises Limited
- § 34:4 Branding agreement between Good Hemp, Inc. and Spire Holdings, LLC
- § 34:5 Amendment RE: COVID-19 to branding agreement between Good Hemp, Inc. and Spire Holdings, LLC
- § 34:6 Joint marketing agreement between AbSci, LLC and KBI Biopharma, Inc.
- § 34:7 Communications & Advertising Services Agreement (brooqLy Inc.)
- § 34:8 Advertising-service provider cooperation agreement (Haoxi Health Technology Ltd.)
- § 34:9 Advertising service framework agreement (Haoxi Health Technology Ltd.)
- § 34:10 Advertising & Promotional Agreement—Karbon-X Corp. (2024)
- § 34:11 Advertising Association Documents—El Pollo Loco Holdings Inc. (2024)
- § 34:12 Trademark License Agreement—Solstice Advanced Materials Inc. (2025)

APPENDIX

Appendix A. Sample Forms Available on EDGAR

TABLE OF CONTENTS

Bibliography

Table of Laws and Rules

Table of Cases