

It's Not Your Father's Oldsmobile

Rethinking How We Counsel About Advertising Today

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Remember the
Oldsmobile?

Remember the Oldsmobile?

Oldsmobile was the **first mass-produced car**. In 1910, the Oldsmobile Limited cost more than a typical three-bedroom house and came with goatskin upholstery and running boards. The speedometer and windshield were optional features.

In the 1970s, Oldsmobile sold more than 1 million cars per year. In 1976, the Cutlass Supreme was the **top-selling car** in North America. But, faced with competition from premium imports, Oldsmobile sales plummeted in the late 80s.

Hoping to reinvigorate the brand in the minds of a new generation of consumers, Oldsmobile offered the world's first satellite navigation system and an advertising campaign promising, **“It's not your father's Oldsmobile.”**



It couldn't change with the times

In late 2000, General Motors announced that it planned to stop production of the Oldsmobile. The last car was produced in 2004.

During the company's storied 100-year history, it sold more than 35 million cars. But no matter what Oldsmobile did, it couldn't change how people thought about the brand.





How do we
think about
advertising today?

How do we interpret advertising?

“The cardinal factor is the **probable effect** which the advertiser’s handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The **entire mosaic** should be viewed rather than each tile separately.”





POP CORN

To Butter.

I like my pop corn with butter. I mean what's pop corn without the flavor of real butter? And JOLLY TIME Microwave Pop Corn is the only microwave pop corn on the grocer's shelf flavored with real butter, not artificial flavoring. It's definitely the best pop corn. Anyone can taste that.

Or Not.

I prefer my pop corn with a natural flavor. But I guess I've always been a purist. This Natural Flavor Microwave Pop Corn from JOLLY TIME® is simply the best. It's the only microwave pop corn made with extra tender white pop corn. That's the connoisseur's choice. Mine, too.

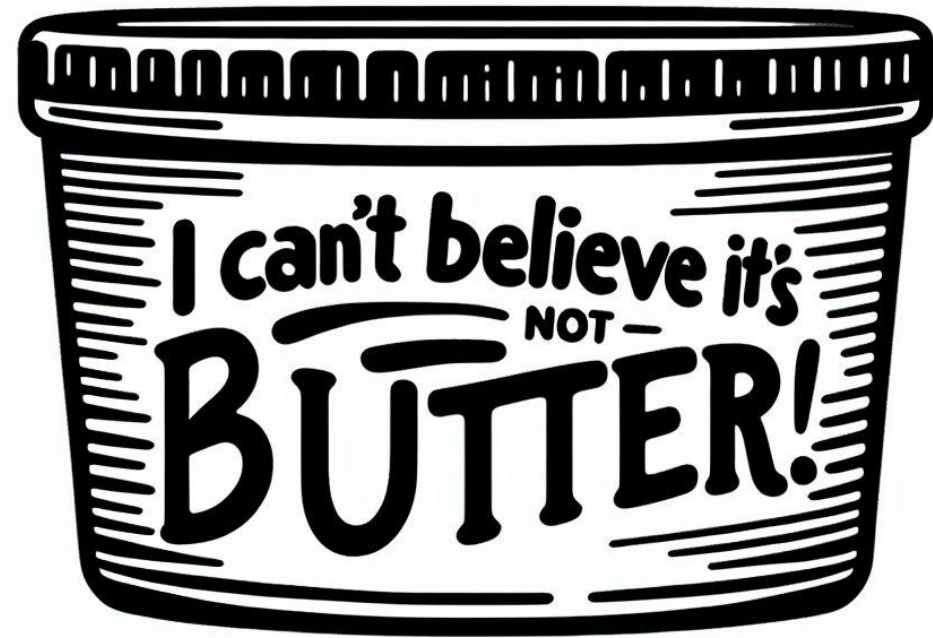


Jolly Time
Pop Corn. It's Our Only Business.™

American Pop Corn Co. (NAD)

- Advertising for Jolly Time Microwave Pop Corn
- A competitor challenged the claim, “the only microwave pop corn on the grocer’s shelf flavored with **real butter**”
 - The butter flavoring mix used on the popcorn is only one-third butter
 - The rest is butter flavoring and vegetable oil
- NAD recommended that the advertising be modified to accurately reflect the amount of butter that is included (7/87)





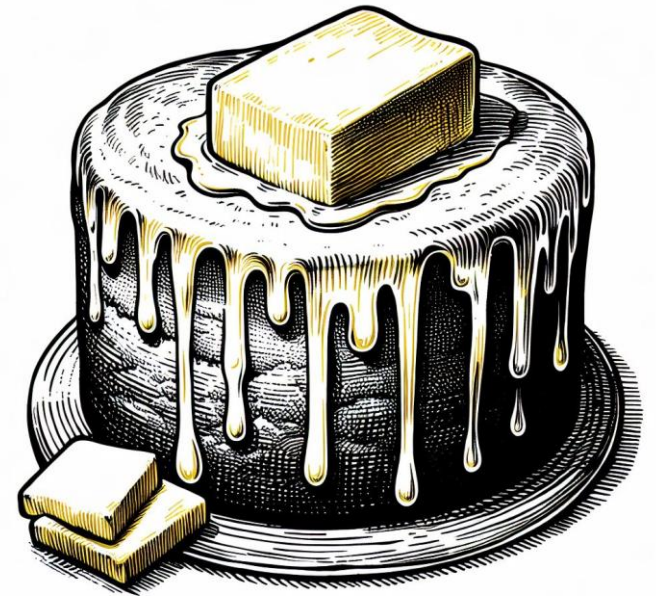
Ellison-Robbins v. Bimbo Bakeries

- A consumer sued, alleging that the name “all butter loaf cake” is misleading
 - The cake also has non-butter shortening ingredients and artificial flavors which contribute to the butter flavor
- Court agrees that the “all butter” claim is confusing
 - “It is not easy to determine what a reasonable consumer would understand ‘All Butter Loaf Cake’ to mean in the context of the label at issue in this case”
- But why is it confusing?



Ellison-Robbins v. Bimbo Bakeries

- First, the name could suggest that **the cake is made entirely of butter**
 - “a la state-fair-style type butter sculptures”
- The court says that’s not a reasonable interpretation
 - The packaging depicts slices of cake
 - The packing has a window that allows consumers to see the product
 - Since the product is called a “loaf cake,” reasonable consumers would “no doubt” expect that the product contains other ingredients as well



Ellison-Robbins v. Bimbo Bakeries

- Second, the name clearly communicates that **butter** is one of the ingredients in the “all butter loaf cake”
 - “Seeing that the product is a cake and that its name is ‘All Butter Loaf Cake,’ a reasonable consumer would no doubt expect the cake’s ingredients to include butter”
- The court reasons, then, that since it’s not a butter sculpture, and since butter is one of the ingredients, that there must be other ingredients in the cake as well



Ellison-Robbins v. Bimbo Bakeries

- Third, after all that, there's **not enough information on the label** for a consumer to draw any conclusion about what “all butter” means
- It's “implausible” that the “all butter” claim means that butter is the only source of butter flavor
- Holding that the claim is “ambiguous,” the court dismisses the case
 - If the claim is ambiguous, consumers can review the ingredient label
- What about the “mosaic”?





Takari International (2015)



Kamara v. Pepperidge Farm (2021)

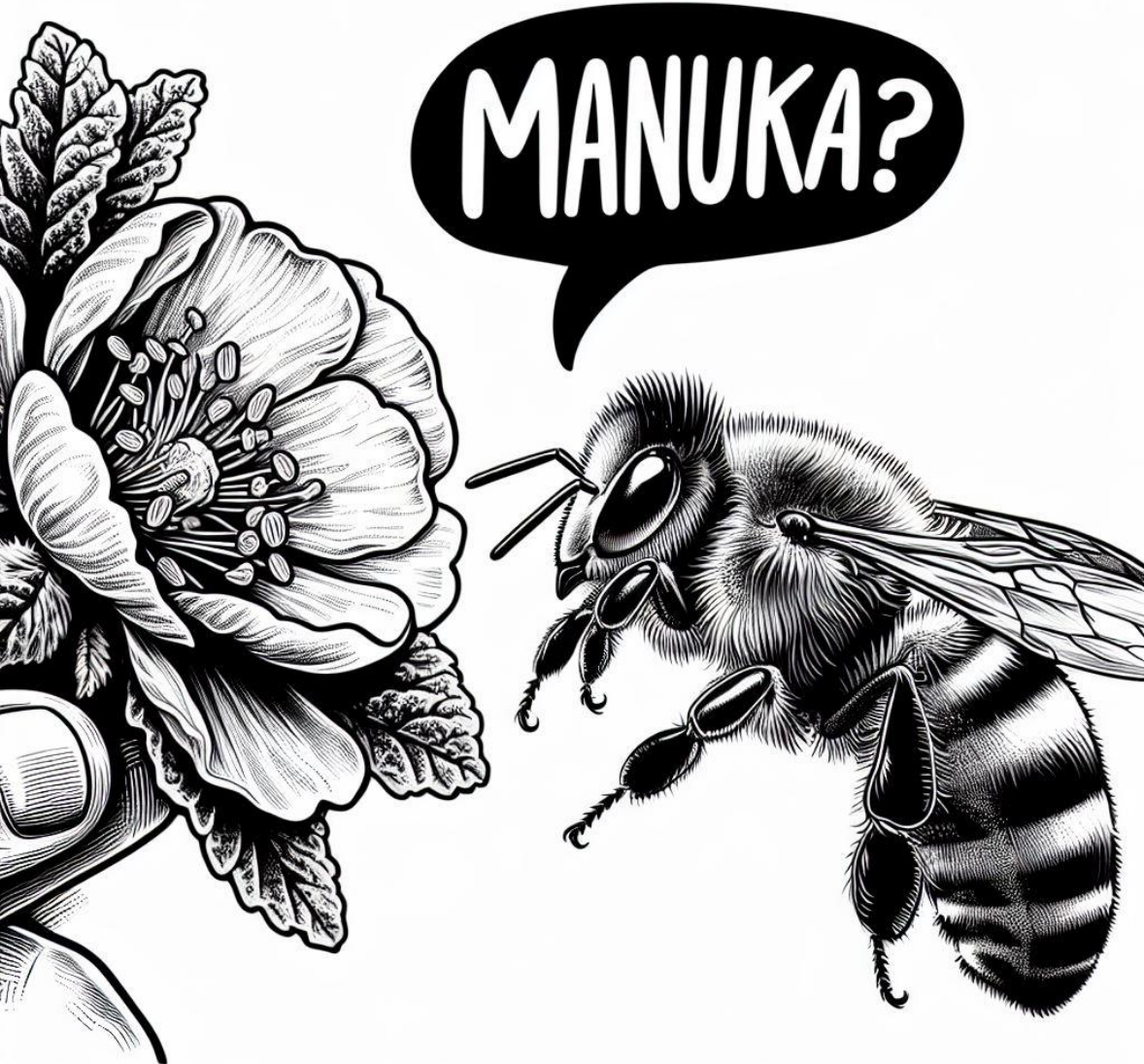


Bell v. Publix (2020)



Moore v. Trader Joe's (2019)

“[D]eceptive advertising claims should take into account
all the information available to consumers and the
context in which that information is provided and used”




“Given the foraging nature of bees, a **reasonable honey consumer** would know that it is impossible to produce honey that is derived from a **single floral source**”

What are the new rules of the road?

- When considering the entire mosaic, don't assume that all the elements of your advertising will actually be taken into account
- Consider the larger context in which your advertising may be viewed and how that may affect consumers' understanding of your claims





Do we use
consistent
standards?

The Goal

“Substantiation standards may be set by laws, guidance documents, or industry organizations...The goal is to provide recommendations that harmonize with legal standards and principles so that it is not difficult for an advertiser to comply.”

The National Advertising Division

“The proposed rule may also provide a benefit to firms in the form of harmonized, nationwide compliance requirements. In the absence of the proposed rule, individual states may pursue enforcement actions against firms...Such regulations could vary from state to state, and firms would incur greater costs to ensure simultaneous compliance with this patchwork of regulations. A single rule at the federal level would reduce the need for regulations at the state level and provide a simpler regulatory framework for firms.”

The Federal Trade Commission



FTC v. Plaskolite (1983)

- FTC requires “up to” claims (e.g., consumers will save “up to” a certain amount of money or achieve energy savings “up to” a certain amount) to be substantiated with competent and reliable evidence showing that **an appreciable number of consumers** are likely to achieve the maximum savings claimed

Save up to 88% of heat loss through windows
and dramatically lower energy bills.

Install In-Sider® storm windows.
The do-it-yourself windows that go on inside,
insulate far better than outside storm windows.

| City | Year of Installation | Cost of Installation | Annual Energy Savings | Payback Period | Annual Energy Savings | Payback Period |
|------------|----------------------|----------------------|-----------------------|----------------|-----------------------|----------------|
| Wash DC | Double-pane, 1980 | \$1100 | \$100 | 11 years | \$1000 | 11 years |
| Chi. Ill. | Double-pane, 1980 | \$1000 | \$100 | 10 years | \$1000 | 10 years |
| Phila. Pa. | Double-pane, 1980 | \$1000 | \$100 | 10 years | \$1000 | 10 years |
| Phila. Pa. | Double-pane, 1980 | \$1000 | \$100 | 10 years | \$1000 | 10 years |

Even if you already have storm windows, the In-Sider can save you plenty by sealing against your leaks and drafts. And the In-Sider:

- Costs less than \$15 for the average-size window.
- Takes less than 30 minutes to install.
- Installs easily inside, in any weather.
- Is a clear, high-grade, frost-free plastic.

• Costs less than \$15 for the average-size window.- Takes less than 30 minutes to install.
- Installs easily inside, in any weather.
- Is a clear, high-grade, frost-free plastic.

For the name of your nearest dealer, write Plaskolite, Inc., P.O. Box 1487, Columbus, OH 43216.

In-Sider® Storm Window

plaskolite, inc.

FTC v. Plaskolite, Inc.

FTC v. Gorrell et al. (2012)

- FTC requires “up to” claims to be substantiated with competent and reliable evidence showing that **all or almost all** consumers are likely to achieve the maximum savings claimed
- FTC Report: “Many Consumers Believe ‘Up To’ Claims Promise Maximum Results”



Guaranteed to reduce your heating and cooling use by up to 49%*. When you replace all of your old windows with SeriousWindows 600 Series, you'll not only improve your living comfort and your home's value, but you can significantly lower your heating and cooling consumption. If you spend \$300 a month in heating and cooling, with Quantum2 windows you can potentially save up to 49%, that's a savings of over \$14,400 in a decade. That's why we say SeriousWindows 600 products are an annuity, because they will pay for themselves over time.

Energy savings may vary and depends on numerous factors and variables pertaining to your windows and dwelling. Cost savings in this example does not include any energy cost increases.

FTC v. Lyft & Arise (2024)

- FTC requires “up to” claims to be substantiated with competent and reliable evidence showing that it is **typical** for consumers to achieve the maximum savings claimed

Ad · <https://sign-up.ariseworkfromhome.com/>

Register Today - Arise Work From Home - Up to \$18/Hour

Set your own hours and choose the brands you want to support. The **Arise®** Platform has hundreds of opportunities for customer service agents. Sign up now. Flexible Schedule. Income You Control. Run Your Own Company. 25+ Years in Business. Better Than a Job.

Sponsored

sign-up.ariseworkfromhome.com
https://sign-up.ariseworkfromhome.com

Arise Work From Home - Flexible Working Schedule

Earn extra income and provide customer support for brands you love on the Arise® Platform. Provide customer support for Fortune 500 brands. No experience required. Register today. Join the Arise® Platform. Work From Home Today. Be Your Own Boss. Run Your Own Company.

[Explore Opportunities](#)

[How It Works](#)

[Up To \\$18 Per Hour](#)

[Home Business Opportunity](#)

[Work From Home - Register](#)

Ad · <https://sign-up.ariseworkfromhome.com/>

Arise Work From Home - Up to \$18/Hour

The **Arise®** Platform has hundreds of opportunities for customer service agents. Sign up now. Earn extra income and provide customer support for brands you love on the **Arise®** Platform. Run Your Own Company. Income You Control. Flexible Schedule.

How It Works

Do the work you want to do. No office, no boss, your schedule.

Explore Opportunities

Check out the latest virtual opportunities with brands you love.

Up To \$18 Per Hour

Use the Arise® Platform to earn extra income on a flexible basis.

Home Business Opportunity

Starting A Micro Call Center Is Easier Than You Think.



lyft Drive with Lyft Sponsored

Lyft drivers are in demand in San Francisco right now - Earn up to \$44/hour today. Ready to drive?

Start driving and earn up to \$44/hour

lyft

lyft.com Drivers Earn Up to \$44/hr in San Francisco [Apply now](#)

Like Comment Share

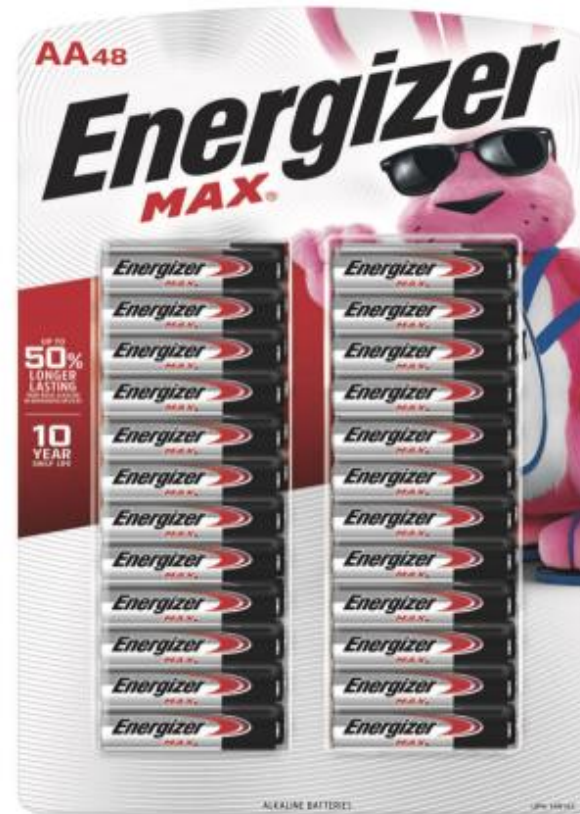
Then there is the NAD

- “An advertiser must show that an appreciable number of consumers will achieve the maximum savings conveyed in a claim”
- “Appreciable number” is at least 10%



And the courts...

- 9th Circuit (6/24)
 - “Up to” means:
 - “to the point of”
 - an “upper limit”





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Made in USA Standards

- FTC “Enforcement Policy Statement on U.S. Origin Claims”
 - “All or virtually all” standard
 - All significant parts and processing must be of U.S.-origin
 - Last substantially transformed in the U.S.



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

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Complying with the Made in USA Standard

I Dig Texas v. Creager


- I Dig Texas promoted its products by claiming that they were American-made and that Creager’s products were made in China ⁽²⁰²⁴⁾
- Creager sued, alleging false advertising under the Lanham Act (among other things) since some of the I Dig Texas product components were sourced from outside of the United States but assembled here
- 10th Circuit didn’t think that an American-made claim necessarily communicates that a product and all components were made here
- Court said “The term ‘make’ could refer either to the origin of the components or to the assembly of the product itself”



What are the new rules of the road?

- You can always apply the strictest standard
- Context is king
 - Consider the type of claim being made - how impactful?
 - Consider the nature of the product or service at issue
 - Consider *who* is most likely to challenge
 - Consider your substantiation





Is this approach
sustainable?

Is this approach sustainable?

- Does our approach to thinking about environmental marketing gives us any clues about how we will interpret advertising in the future?
- What's a claim?
 - A representation that is likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment
- What's not a claim?
 - Subjective statements and opinions
 - Obviously exaggerated or puffing statements
- How do we apply these rules in green marketing?



Bush v. Rust-Oleum

- What is **puffery**?
- Green Guides say that general environmental benefit claims are claims requiring substantiation
- Krud Kutter was advertised as “earth friendly”
 - Plaintiff sues, alleging that the product includes chemicals that cause harm to humans and the environment
- Court denies motion to dismiss ^(1/24)
 - It’s not “so general or nonspecific as to make it extremely unlikely that a consumer would not rely on it”



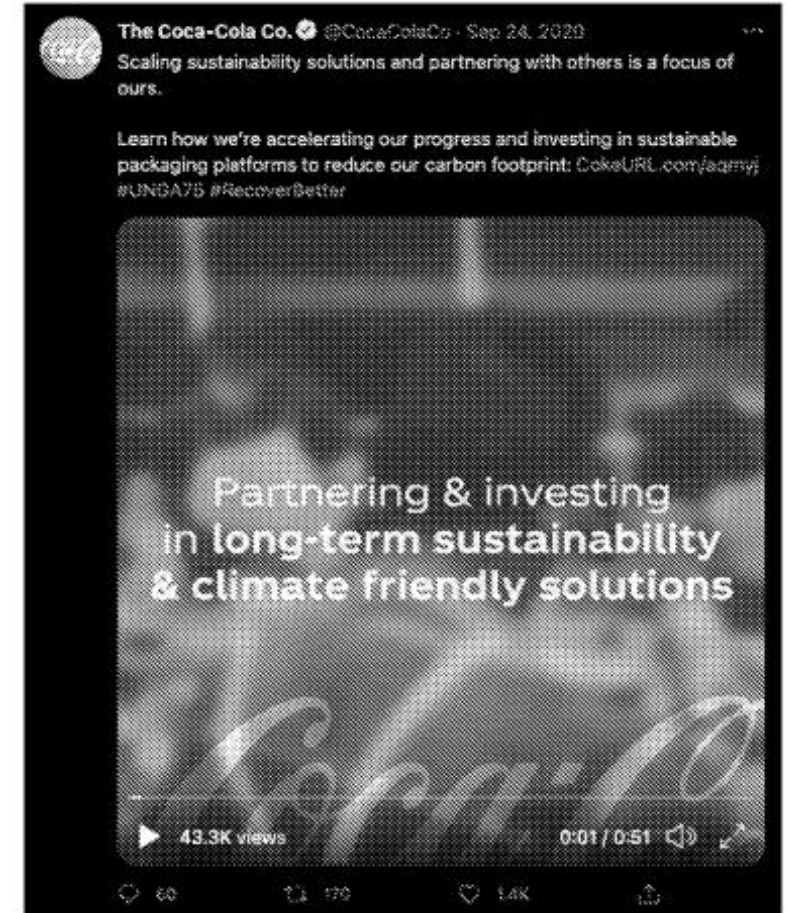
Rawson v. ALDI

- Is “sustainable” puffery?
- Consumers sued ALDI over its “sustainable” Atlantic salmon claim, arguing that large industrial fish farms aren’t sustainable
- Court allows the case to continue (6/22)
 - Court holds that the “sustainable” claim isn’t puffery
 - It communicates some sort of benefit



Earth Island v. Coke

- Are **aspirational claims** puffery?
- Earth Island sued Coke, alleging that Coke's aspirational claims are false and misleading
- Coke's aspirational claims
 - “We act in ways to create a more sustainable and better shared future”
 - “Make 100% of our packaging recyclable globally by 2025”



Earth Island v. Coke

- D.C. trial court **dismissed** the case
 - Aspirational statements about a company's future goals are not actionable
 - These statements are about the company's ethos, not its products
- D.C. Court of Appeals **reversed** (8/24)
 - Earth Island plausibly alleged that Coke is misleading consumers
 - Consumers could be misled if Coke isn't making a meaningful difference or if it isn't serious about achieving its announced goals
 - “It is akin to **cigarette manufacturers** marketing light or low tar cigarettes as if they were healthier”

Earth Island v. Coke

- What about Coke's more general aspirational goals?
 - “We do not presume to know what reasonable consumers understand a company to mean when it claims that it is working to be ‘more sustainable’ or the like. For all we know, reasonable consumers would immediately dismiss that type of speech as vacuous corporate jargon, not to be relied on.”
 - “But that is not obviously true; the concerted efforts that companies like Coca-Cola make to cultivate an image of being environmentally friendly strongly suggests that even their vague assurances have a real impact on consumers.”

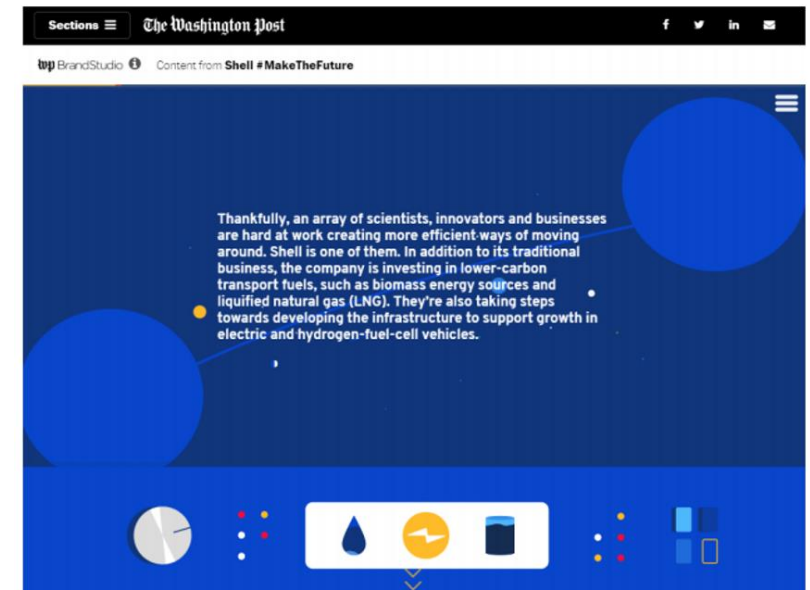
Is this approach sustainable?

- General environmental benefit claims aren't puffery – so they should be qualified with the specific benefits being provided
- Aspirational claims aren't puffery either – so you'd better be able to back them up with what you're actually doing
- If you've got environmental benefits to promote, the answer is just to be specific, right?



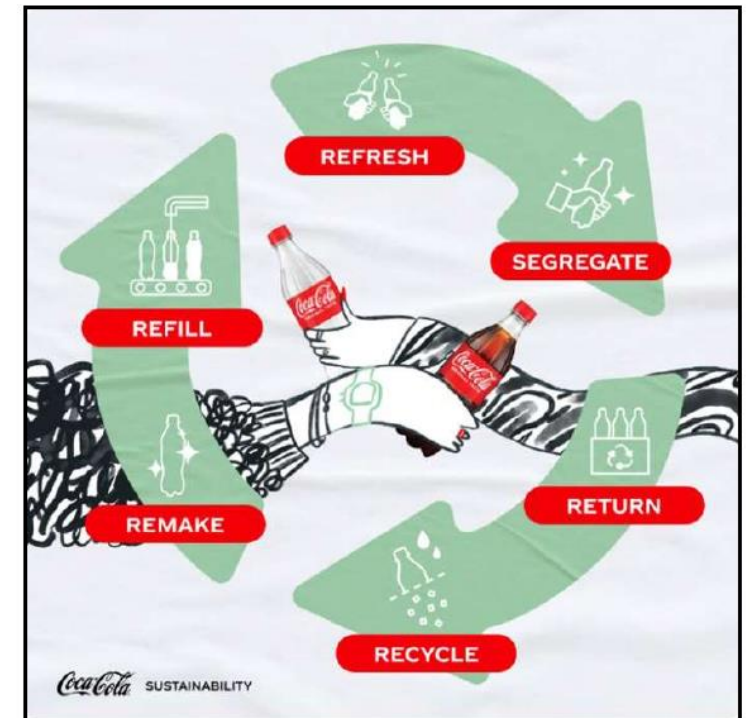
Lawsuits Against Fossil Fuel Companies

- Regulators across the country are suing fossil fuel companies
 - Their sustainability-focused marketing misleads consumers about the actual adverse impact that they are causing
 - For example, don't promote incremental improvements you are making, when, overall, you are causing enormous consumer harm
 - California AG Rob Bonta: “Oil and gas companies have privately known the truth for decades – that the burning of fossil fuels leads to climate change – but have fed us lies and mistruths to further their record-breaking profits at the expense of our environment.”



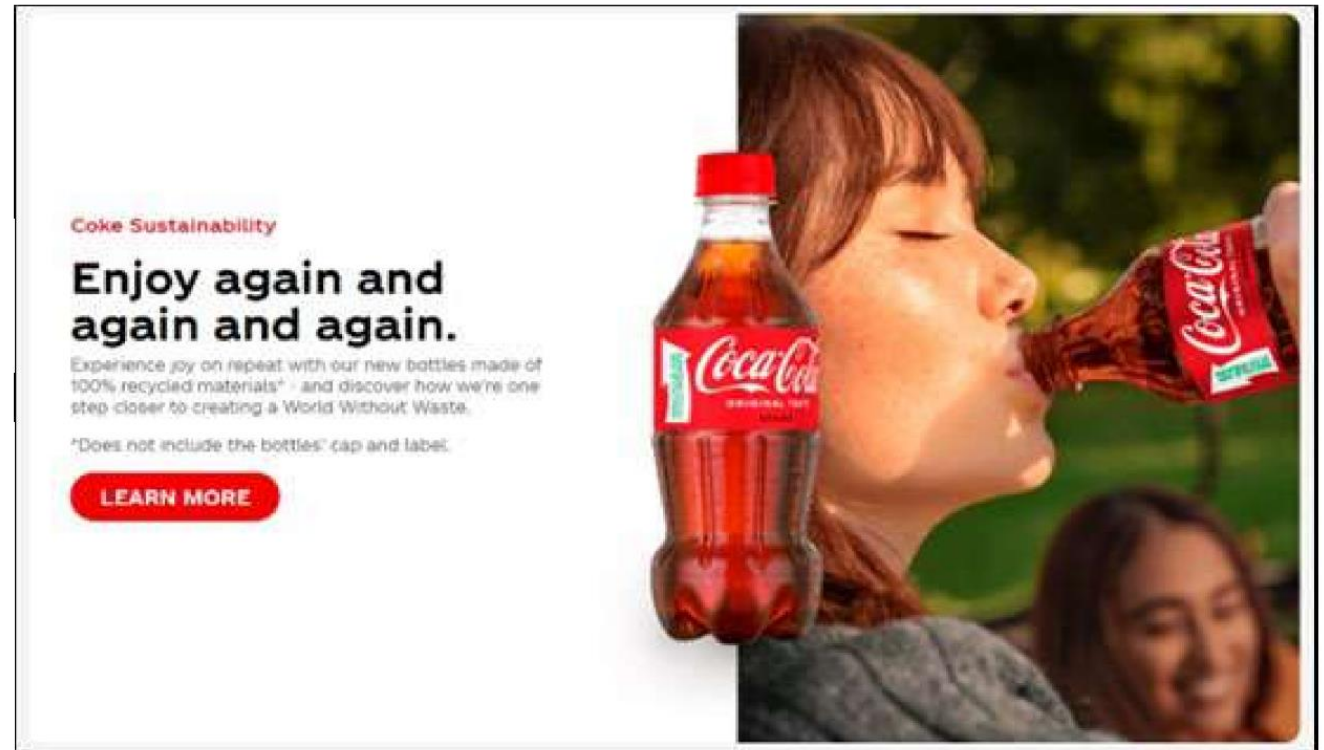
LA County v. Coca Cola

- LA County sued Coca Cola and others for false advertising (and other claims) arising out of Coke's marketing of products in single-use plastic containers (10/24)
- What's the issue?
 - LA County alleged that its advertising misleads consumers into believing that purchasing “single-use plastics is an environmentally responsible choice”
 - Because plastics don't naturally biodegrade, they break into microplastics, polluting the environment
 - Coke “has consistently been one of the world's top plastic polluters”



LA County v. Coca Cola

- Coke's promotion of recycling efforts misleads consumers about the effectiveness of recycling
 - A small amount is recycled
 - Not all plastic can be recycled
 - Plastic can only be recycled once
 - “Recycling simply cannot keep pace with Defendants’ plastic production – or their false promises”



LA County v. Coca Cola

- Coke's promotion of its "100% recycled" plastic bottles is also deceptive
- It misleads consumers into believing that all – or a substantial share – of Coke's bottles are made from recycled plastic



LA County v. Coca Cola

- Coke's advertising of its plastic bottles is also misleading because of what it fails to disclose
 - Presence of microplastics
 - The harm that microplastics cause to the environment and human health



New York v. PepsiCo


- NYAG brought a similar lawsuit against Pepsi in 2023
 - Failed to warn consumers about the risks of plastics
 - It's aspirational statements about its recycling efforts are misleading
- A New York court just dismissed the case, saying it “**strains the bounds of credulity**”
 - There's no legal obligation to provide warnings
 - Aspirational claims are not misrepresentations of fact



What are the new rules of the road?

- With expanding ideas about what constitutes a “claim,” don’t assume that your general, unspecific statements, or your goals for the future, will be “puffery”
- When you truthfully promote the benefits of your products, you may need to put those benefits in context
- Don’t ignore the impact that your product category may have on how your claims are viewed





Have our
conceptions of
harm changed?

Manipulation in marketing is not new

“The idea that you can manipulate an environment to channel behavior has a long pedigree.”

- Ryan Calo

“For decades, unscrupulous direct mail marketers and brick-and-mortar retailers have relied on design tricks and psychological tactics...to get consumers to part with their money or data.”

– Federal Trade Commission





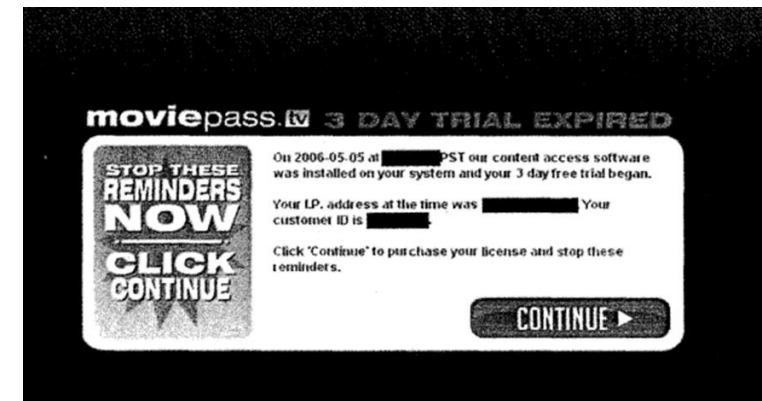
Does the internet change things?

“When you move from a brick-and-mortar environment to a digital environment, there’s more aspects of the environment you can manipulate. You can jettison physics at one level...importantly, you can also collect and leverage information about consumers.”

Ryan Calo

FTC v. moviepass.tv (2007)

- FTC sued operators of movieland.com, moviepass.tv, and popcorn.net for installing uncloseable, minute-long pop-ups demanding up to \$99 to stop
- Alleged consumers unknowingly entered a “free trial” but didn’t cancel before it expired
- Only way to stop pop-ups was to pay defendants or hire a technician
- Consent order ⁽²⁰⁰⁷⁾
 - Injunction
 - \$500,000+ in consumer redress



And now...Dark Patterns

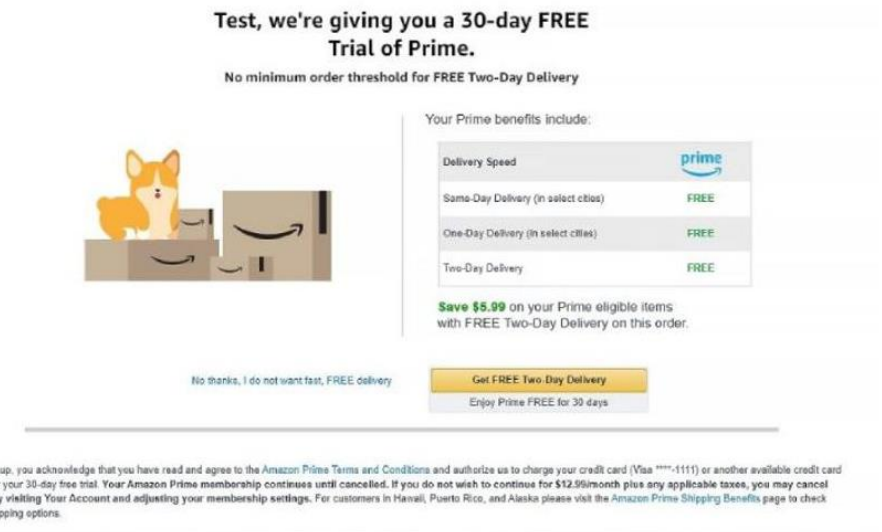
- “Design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm”
- FTC holds “*Bringing Dark Patterns to Light: An FTC Workshop*” (4/21)
- FTC issued a staff report, “*Bringing Dark Patterns to Light*” (9/22)
- Examples include:

- Hiding the fact that a free trial automatically converts to a paid subscription
- Confirm shaming
- Sneaking or hiding Information
- Deceptively formatted ads

- Drip pricing
- Scarcity and urgency
- Obstruction
- Interface interference
- Coerced action
- Asymmetric choice

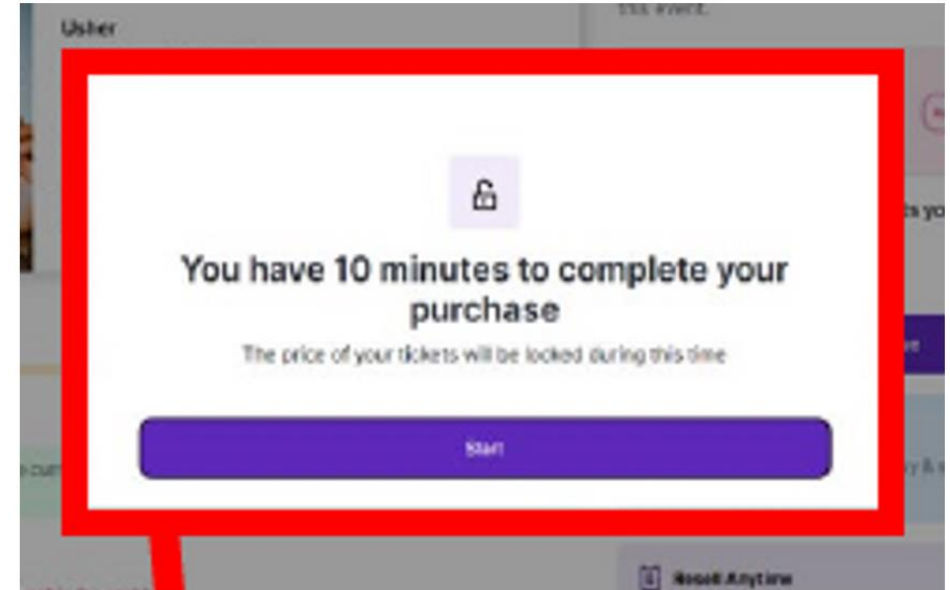
FTC v. Amazon

- FTC sued Amazon for marketing of “Amazon Prime”
 - Embedding in the **purchase flow** the upsell for the Amazon Prime subscription
 - Design **contrast** between the choice to subscribe and to decline the offer
 - If consumers click to subscribe, failing to give them a chance to **confirm** this is what they intended to do
 - Burying the subscription terms in **fine print**
 - Hiding the cancellation option and “**Iliad Flow**” cancellation process, requiring consumers to navigate a four-page, six-click, fifteen-option cancellation process
- Amazon moved to dismiss, but court allows case to proceed (6/24)



D.C. v. StubHub

- D.C. AG sued StubHub over ticket pricing practices based on general consumer protection law, not a specific “junk fees” law
 - Burdensome purchasing experience
 - Advertising a deceptively low price up front that doesn’t include all fees or even that there will be fees added
 - Countdown clock pressures consumers to complete the purchase fast
 - Consumers forced to navigate through unnecessary web pages, increasing the time pressure
 - False impression that tickets are scarce
 - Consumers must input their personal information before learning full price
 - At the end, fees are added, which can increase the price by up to 40%



What Are The New Rules of the Road?

- Value user time: Time lost is itself a harm - streamline actions like purchases, sign-ups and cancellations
- Enable true choice: Allow consumers to make decisions without manipulation
- Embrace full transparency: Adopt an “all-in” pricing model where possible
- Design for trust, not traps: Move away from tricks like false urgency or scarcity towards straightforward journeys that build credibility and avoid exploiting users’ emotions





Have our
conceptions of
harm *broadened*?

**Keep her where
she belongs...**



Frankfurt Kurnit Klein + Selz PC



Blow in her face and she'll follow you anywhere.

Hit her with tangy Tipalet Cherry. Or rich, grape-y Tipalet Burgundy. Or luscious Tipalet Blueberry. It's Wild! Tipalet. It's new. Different. Delicious in taste and in aroma. A puff in her direction and she'll follow you, anywhere. Oh yes... you get smoking satisfaction without inhaling smoke.

| | | | |
|--|--|--|--|
|  |  |  |  |
|--|--|--|--|

Smokers of America, do yourself a flavor. Make your next cigarette a **Tipalet.**

New from Muriel. About 5 for 25¢.

It's nice to have a girl around the house.

Though she was a tiger lady, our hero didn't have to fire a shot to floor her. After one look at his **Mr. Leggs** slacks, she was ready to have him walk all over her. That noble styling sure soothes the savage heart! If you'd like your own doll to

doll carpeting, hunt up a pair of these he-man **Mr. Leggs** slacks. Such as our new automatic wash-wear blend of 65% "Dacron"™ and 35% rayon—incomparably wrinkle-resistant. About **\$12.95** at plush-carpeted stores.

Dacron™ for *you!*

Get yourself a new pair of **Mr. Leggs**™

©1970 Hanes Company

HANES COMPANY, 1200 Avenue of the Americas, New York 10, N. Y.

Frankfurt Kurnit Klein + Selz PC

If your husband ever finds out

you're not "store-testing" for fresher coffee...



... if he discovers you're still taking chances on getting flat, stale coffee ... we'll take you!

For today there's a sure and certain way to test for freshness before you buy

Here's how easy it is to be sure of fresher coffee



Look for the "Three Top" Can of Chase & Sanborn. The top, rounded together at its packed under pressure, holds down the steam.

Just do this:

Press your thumb against the dome top before you buy. If it's firm, it's fresh. If it's soft, it's stale. It's the sure way to get the freshest coffee ever packed.

No other can lets you test!

You can't see an ordinary flat top can. There are "Rippers" that have let us in to steal freshness that all flat top cans lock up. You can't tell which are good and which are stale.

Here's the payoff!

Here as you pour a cup, they'll want more! For Chase & Sanborn is a glassful thick of more genuine coffee. . . brought to you just as the wonder Chase & Sanborn pays a flavor decided you won't find in any other coffee!



"PRESSURE PACKED"

Chase & Sanborn

LADIES' DEPT.

What she looks for—

- ✓ COMFORT AND ROOMINESS
- ✓ SMART GAY COLOURS
- ✓ REALLY LARGE LUGGAGE TRUNK
- ✓ EASILY ADJUSTABLE SEAT
- ✓ SENSIBLE DOORS—safe for children
- ✓ EASY GEAR CHANGE

MAINLY FOR MEN

What he insists on—

- MORE MILES PER GALLON—up to 36 m.p.g.*
- GOOD ACCELERATION—0.70 m.p.h. in 45 sec.*
- SAFE BRAKING—no doubt about that!
- VISIBILITY—Excellent. Good demister too
- EFFICIENT SPRINGING—superb!
- HANDLING—what a joy!

* The Autocar 28.10.57



Together
you'll choose a



"QUALITY FIRST"
MORRIS
OXFORD

PRICES FROM £589 (Plus £285.17.0 Purchase Tax)

Remember, too, Morris quality protects your investment—your Morris is always worth more in re-sale value. TWELVE MONTHS' WARRANTY—and backed by B.M.C. Services, the most comprehensive in Europe. Morris Owners planning a Continental Tour are invited to see their Morris dealers for details of a free service to save foreign currency.

MORRIS MOTORS LTD., COWLEY, OXFORD. London Distributors: Morris House, Berkeley Square, W.1. Overseas Business: Nuffield Exports Ltd., Oxford, and 41-46, Piccadilly, London, W. 8/72C

Where we are today

Article 2 – Social and environmental responsibility

Marketing communications should respect human dignity and should not incite or condone any form of discrimination, including that based upon ethnic or national origin, religion, gender, age, physical attributes, mental health, disability, or sexual orientation. Marketers are encouraged to be mindful of diversity and inclusion² and seek to avoid stereotypes and objectification³.



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[Business solutions](#)

The ICC Advertising and Marketing Communications Code

Where we are today

- 2022: NAD announced amendment to its procedures to include in its purview advertising that encourages harmful stereotyping
- NAD can now resolve “complaints or questions concerning national advertising that is misleading or inaccurate due to its encouragement of harmful social stereotyping, prejudice, or discrimination”

THE ADVERTISING INDUSTRY’S PROCESS OF VOLUNTARY SELF-REGULATION

Policies and Procedures by:
BBB National Programs

Procedures for:

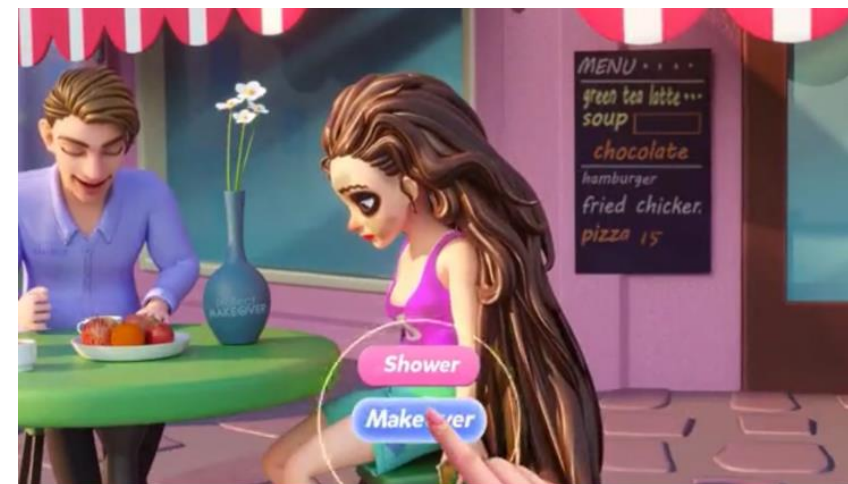
**The National Advertising Division
(NAD)**

**The National Advertising Review Board
(NARB)**



Magic Tavern (Project Makeover)

- NAD claimed ads depicted harmful stereotypes: “ugly” women rejected, “pretty” women approved
- NAD found ads misleading, implying women must look a certain way for fair treatment
- NAD determined ads used a “deceptive door opener,” exploiting stereotypes not present in gameplay (7/23)



FTC v. Discrimination

FTC, State of Arizona Take Action Against Coulter Motor Company for Deceptive Pricing and Discriminatory Practices

FTC and Arizona AG charged dealership and key employee with using bogus online pricing to entice consumers, tacking on thousands in junk fees, and charging Latino consumers extra

FTC v. Discrimination



“The fact that harmful conduct may be subject to other legal or regulatory regimes does not in itself limit (or lessen) the FTC’s responsibility to use all of our available authorities to target such conduct.”

Lina Khan, Chair,
Federal Trade Commission

Kids too

Advertising should be respectful of human dignity and diversity. Advertising should not portray or encourage negative social stereotyping, prejudice, or discrimination.



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Newsroom > Children's Advertising Review Unit Issues Revised Guidelines for Responsible Advertising to Children


Children's Advertising Review Unit Issues Revised Guidelines for Responsible Advertising to Children


For Immediate Release
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In the new year, CARU will begin monitoring under its revised Guidelines, which for the first time address in-app advertising, influencers, and diversity and inclusion.

McLean, VA – July 29, 2021 – BBB National Programs' [Children's Advertising Review Unit](#) (CARU) today announced the issuance of the revised CARU Advertising Guidelines, widely recognized industry standards to assure that advertising directed to children is not deceptive, unfair, or inappropriate for its intended audience.

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Moose Toys (Fail Fix Total Makeover Doll)


- CARU challenged Moose Toys' Fail Fix Doll and related ads
- Ads featured phrases like, "I look CRAZY!" and "I can't be seen like this!" reinforcing unrealistic beauty standards for young girls
- Dolls reinforced racial stereotypes with Asian doll linked to anime, Black doll to hip-hop, and light-skinned doll to academic success
- CARU recommended Moose Toys better align with principles of diversity and inclusivity in future campaigns



What Are The New Rules of the Road?

- Conduct a Discrimination Audit
 - Review ad practices and content for treatment that may reinforce discrimination based on gender, race, age, etc.
 - Create policies to address these issues
- Prioritize Diverse Voices in the Creative Process
 - Encourage diverse team representation in creative and decision-making stages
 - Consider forming advisory panels with diversity and inclusion experts to review campaigns pre-launch
- Think of this as a legal issue, not just a PR issue
 - Establish a review process involving legal and diversity-focused perspectives to ensure compliance and sensitivity

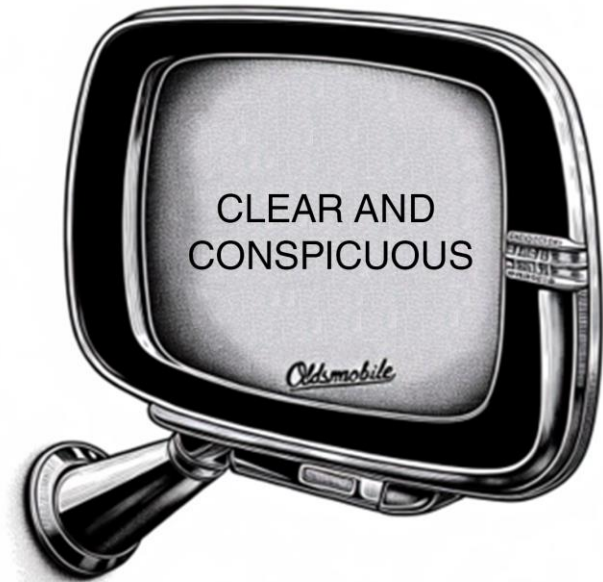




What role do
disclosures
play?

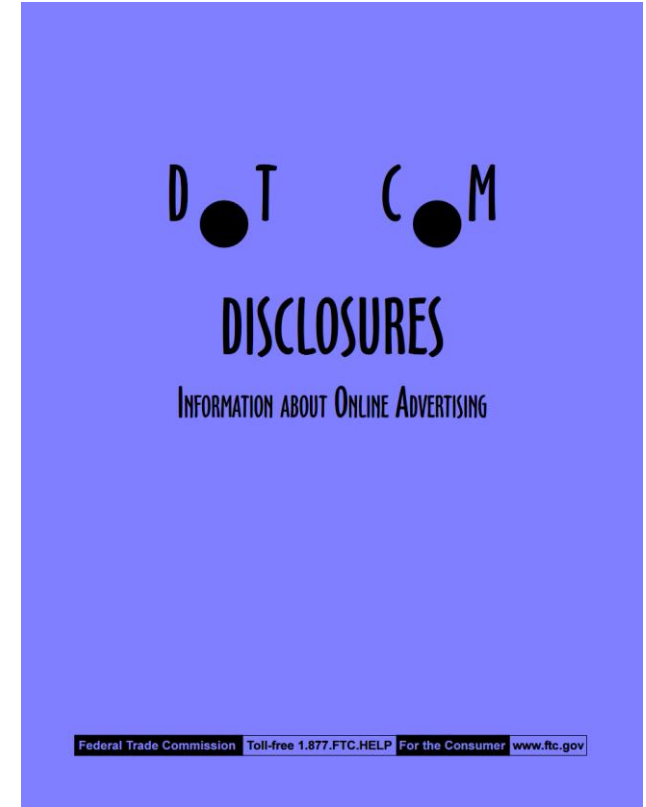
What role do disclosures play?

- If qualifying information is needed in order to prevent a claim from being misleading, the information must be disclosed in a “clear and conspicuous” manner
- But what does “clear and conspicuous” actually mean today?



Dot-Com Disclosures (2000)

- In 2000, the FTC released the business guidance, “Dot-Com Disclosures -- Information About Online Advertising”
- Provided guidance about how to make online disclosures “clear and conspicuous”
- Advertisers have the **flexibility** to be creative in designing their ads”



Dot-Com Disclosures (2000)

- Whether a disclosure is “clear and conspicuous” is measured by its performance -- how consumers understand the disclosure in the context of the entire ad
- “Making the disclosure available somewhere in the ad **so that consumers who are looking for the information** *might* find it doesn’t meet the clear and conspicuous standard”



What disclosure techniques work? (2000)

- Place disclosures near, and **when possible, on the same screen** as the claim
- Use textual or visual cues to encourage consumers to **scroll** down a Web page when it is necessary to review a disclosure
- Creatively incorporate disclosures in banner ads or disclose them clearly and conspicuously **on the page the banner links to**
- When **using hyperlinks**, make them obvious, place them near the claim, label them appropriately to convey their importance and relevance, and link directly to the disclosure

But do they? (2009)

- As part of the FTC's review of the Endorsement Guides, it conducted two studies on the effectiveness of disclaimers
- In one, it looked at whether a prominent disclaimer could effectively qualify a weight claim promoting atypical results



WEIGHTGUARD[®]
WEIGHTLOSS CENTERS
A New Way to Lose Weight

Satisfied users had this to say about our weight loss centers in unsolicited letters we have recently received *

With WeightGuard, I lowered my weight by 24 pounds in three months.
- Ted Flangers, San Diego CA

WeightGuard has made a difference. I have lost 36 pounds in the short time since I started.
- Victoria Thomas, Buffalo NY

I would personally like to thank WeightGuard for helping me to lower my weight by 30 pounds in just 90 days.
- Michelle Chin, Seattle WA

I wanted to get my weight down. Thanks to WeightGuard, I have lost 26 pounds.
- Sandra Rivera, Austin TX

Thank you, thank you, thank you! I have reduced my weight by 34 pounds in a few short months.
- Ruth Smith, Cairo IL

* The average WeightGuard user loses about 10 pounds in three months.

To visit one of our weight loss centers, please call 1-800-WTGUARD or visit our website at WWW.WEIGHTGUARD.COM

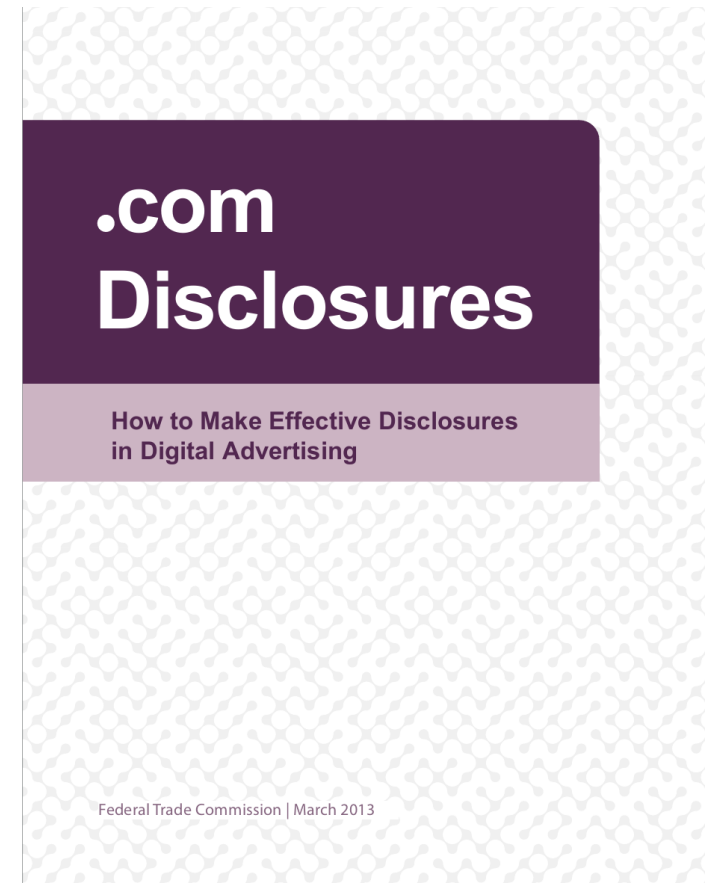


The FTC tested a red, bold disclaimer, in 14 point type, located in the middle of the ad.

The disclaimer many advertisers are using today looks more like this – and this disclaimer would normally appear at the bottom of the page.

Dot-Com Disclosures (2013)

- In 2013, the FTC released the second edition
- Updated guidance took into account the use of smart phones and the rise of social media marketing
- Continues with the FTC’s flexible standard – “there is **no litmus test** for determining whether a disclosure is clear and conspicuous”



What disclosure techniques work?

- 2000 -- “Making the disclosure available somewhere in the ad so that consumers **who are looking for the information** *might* find it doesn’t meet the clear and conspicuous standard”
- 2013 -- “Simply making the disclosure available somewhere in the ad, where some consumers might find it, does not meet the clear and conspicuous standard”

What disclosure techniques work? (2013)

- Disclosures should be placed **as close as possible** to the claim they qualify
 - It's no longer “near, or when possible, on the same screen”
- Design ads so that **no scrolling** is needed
 - It's no longer “use textual or visual cues to encourage consumers to scroll”
- **Incorporate disclosures** in space-constrained ads wherever possible
 - It's no longer just as good of an option to “disclose them clearly and conspicuously on the page the banner links to”
- Hyperlinks should be “**as close as possible**” to the claim
 - “Near” the claim is no longer enough

Revisiting the Dot-Com Guidelines (2022)

- In 2022, the FTC announced it was seeking public comment on how to modernize its dot-com disclosure guidelines
 - “Some companies are wrongly citing the guides to justify practices that mislead consumers online”
 - “For example, firms have claimed that they can avoid liability under the FTC Act by burying disclosures behind hyperlinks”
- FTC said it’s looking at issues disclosures on social media, the use of dark patterns, advertising on mobile devices, use of hyperlinks, and disclosures on websites
- No new guidance yet . . .

Revisiting the Native Advertising Guidance

- FTC’s “Enforcement Policy Statement on Deceptively Formatted Advertisement” (2015)
- “Any qualifying information necessary to prevent deception must be disclosed prominently and unambiguously to overcome any misleading impression created”
- FTC staff report, “Bringing Dark Patterns to Light” (2022)
- “And if an advertisement strongly resembles editorial content . . . it is unlikely disclaimers will overcome the deceptive net impression”

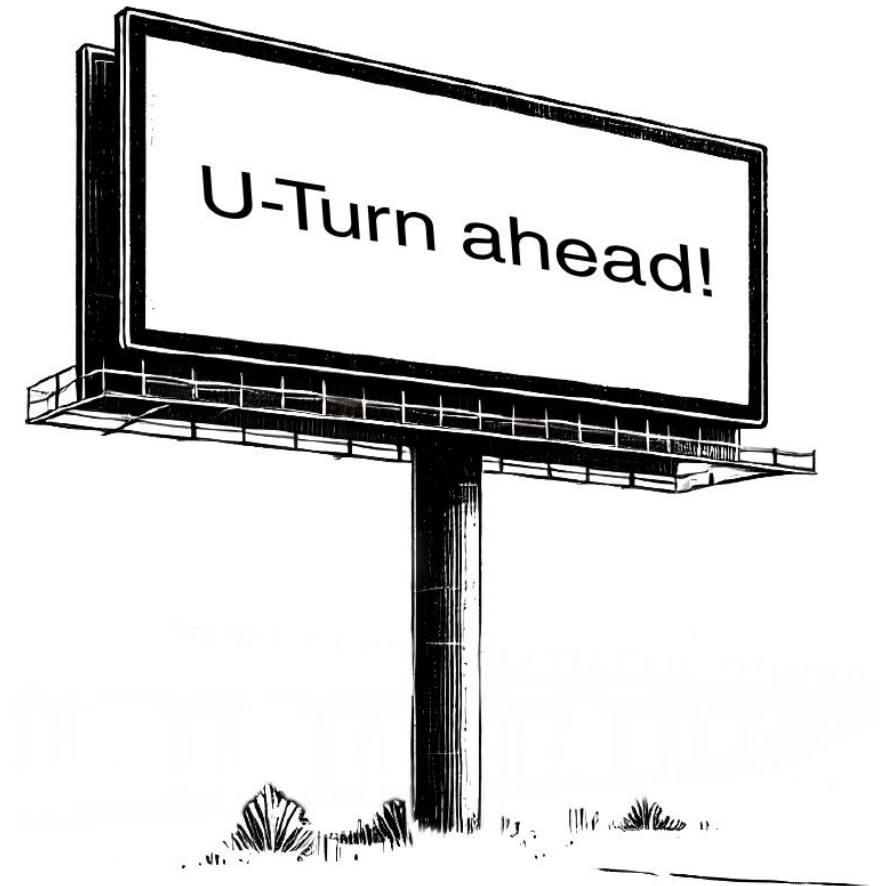
Where are we now?

- What does “clear and conspicuous” mean today to the FTC?
 - Generally, “[difficult to miss](#)”
 - For online disclosures, “[unavoidable](#)”
- Other views are evolving as well
 - Disclaimers that could reliably be relied on in the past are not so safe today
 - Inconsistent views from courts about what types of disclosures are effective



What are the new rules of the road?

- It's old news that modifying a claim is always going to be a more reliable solution
- The FTC thinks that the disclosure techniques that marketers have been using for decades are ineffective
- Are disclosures that are “difficult to miss” or “unavoidable” even really disclosures?



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FTC Open Meeting to Discuss New Reviews and Testimonials Rule and FTC's Inquiry Into Social Media and Video Streaming Services

Federal Trade Commission Chair Lina M.

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September 2, 2024

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September 13, 2024

Pencils, Dog Training Products, and Drywall Hanging Tools -- Made in USA?

The Federal Trade Commission continues

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September 9, 2024

DOT Launches Investigation Into Airline Reward Programs

Last week, the U.S. Department of Transportation launched an inquiry into

Thank you!

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