

“Truth or Consequences: The FTC Approach to Advertising”¹

Remarks of Commissioner Jon Leibowitz

National Advertising Division – Annual Conference

September 24, 2007

Good morning. I’ll focus my remarks this morning on just a few topics: first, food marketing and children’s obesity; second, adware and spyware; and third, targeted Internet advertising.

FTC Overview

Let me begin by saying a little about the agency and its mission. When most people think of the FTC, they probably think of the Do Not Call Registry, which has been unbelievably successful in preserving the dinner hour for all Americans. But we do a lot more. We are a wonderful little independent agency with a broad consumer protection and antitrust mandate. I will not talk about the antitrust side much today, but you may have heard that we recently went to court – unsuccessfully – to try to stop the Whole Foods/Wild Oats merger. We can’t win every time, but don’t blame us if the price of tofu really goes up.

The Commission is headed by five Commissioners. One of the joys of working at the FTC is that we are less politicized than many other agencies. We do disagree from time to time, but we are also committed to collegiality, consensus building, and collectively solving problems.

Food Marketing and Obesity

Let me turn first to food advertising and marketing to kids. We all hope that the BBB self-regulatory initiative headed by Elaine Kolish will change the way foods are marketed to children. To some extent, it already has.

Garrison Keillor talks about a place where all the children are “above average.” As far as our children’s weight goes, at least, that’s certainly where we seem to be headed. The proportion of overweight children ages six to 11 has increased almost fivefold in a generation, from four percent in the early 1970s to 19 percent in 2004. Even with the world’s best medical system, the United States is no longer in the first tier of countries in

¹ The views expressed here are my own and do not necessarily represent the views of the Federal Trade Commission or of any other Commissioner.

terms of longevity – we’re 42nd in the world, behind Guam and Jordan – but this “obesity crisis” threatens to give us the first generation of American children with shorter life spans than their parents. I won’t go through the litany of health problems associated with children’s obesity, but it is disturbing that obesity has caused more and more children to have disease conditions that used to be found only in adults, like type II diabetes and high blood pressure.

Childhood obesity is a complex issue with a variety of causes. Children are spending more time engaging in sedentary activities like watching TV, playing video games, or going on the computer. More and more parents are working and don’t have time to make home-cooked meals, so we’ve migrated to restaurants, take-out, and quick-preparation processed foods. A recent study even showed a social link to obesity: people with obese friends are more likely to be obese, which is not a factor that many of us would have thought of.

We as a society have to move forward on many fronts, not just marketing. But it’s no surprise that there has been a big spotlight on food marketing to children – both as a possible cause and as a partial cure.

There are people with strong feelings on both sides of this controversy who tend to talk past each other, and facts aren’t always a part of the debate. At the FTC, though, we’re trying to generate thoughtful research about advertising to kids in a couple of ways. First, the FTC staff released a report in June that answered the question, “Are kids seeing more TV ads now than they used to?” The study compared data from 2004 with data from 1977 – before the dramatic rise in childhood obesity. Back then, the agency was considering banning TV advertising to kids, and let me assure you, we’re not going down that road again.

The staff study’s results were of the “good news, bad news – and more bad news” variety. Compared to 1977, today’s children are seeing somewhat fewer paid ads, somewhat fewer food ads, and somewhat fewer total minutes of advertising on TV. But kids still see *a lot* of commercials – children ages two to 11 saw on average more than 25,000 TV ads annually – including about 5,500 food ads, mostly for “junk food.” And of course, TV represents just a portion of kids’ screen time – there are also movie screens, video game screens, cell phone screens, and computer screens, each a venue for advertising.

More troubling, while the number of TV ads kids see has gone down, twice as many food commercials are now targeted to them on children's shows. Just about any day part, any day of the week, is "Saturday morning" if you're looking to find a high percentage of children in the TV audience. Our study did not evaluate the content of advertising, or whether ads with content designed to appeal to children are more effective than ads for a general audience. But it just seems common sense that ads tailored to children are more likely to influence their product preferences, purchase requests, and eating habits. Put differently, the advertisers and ad agencies that many of you represent are darn good at their jobs.

Second, as many of you know, we have sent out subpoenas to forty four food and beverage marketers and quick service food chains. At the direction of Congress we are doing a comprehensive study of all types of food and beverage marketing targeted to children. What's the time frame for completion? Well, responses to the subpoenas are due on November 1 – so, as Winston Churchill once said, we're not at the end, or the beginning of the end, more like the end of the beginning of the study.

Meanwhile, you in the audience can have a real impact on reducing children's obesity. Reformulating foods so they're healthier is a critical step. From the advertising side, we need to see more advertising for healthier foods; more advertising that encourages kids to get off their duffs and exercise; and less advertising for junk food. A lot of groups and initiatives are moving in that direction; the Children's Food and Beverage Advertising initiative is perhaps the most ambitious. I'm glad to hear that Burger King has joined, as the second quick service chain along with McDonald's. I'd like to see other marketers doing more, too, whether through this Initiative or on their own.

The Commission will be monitoring the market as these changes are implemented. The real yardstick will be, what will advertising on children's television shows look like by next year?

For the companies that have started to change the way they advertise to kids, I know these types of commitments can have an impact on the bottom line and I know that many

companies are choosing to make changes because they want to “do the right thing.” At this point, almost all of us prefer industry self-regulation. But as you all know, there’s strong, bipartisan interest in this issue on Capitol Hill and from the presidential candidates – the campaigns just held a forum last week on obesity at George Washington University – so if kids’ obesity rates continue to rise there will be mounting pressure for government to intervene.

Spyware & Adware

The second topic is spyware and adware. At one end of the spectrum you have hard core spyware – like a keylogger – that collects personal information such as passwords and bank account numbers for theft. On the other side is nuisance adware, which infects consumers’ computers without giving them adequate notice or meaningful consent in order to deliver ads.

Nuisance adware often generates a barrage of pop up ads and slows down the user’s computer, and is often hard, if not impossible, to uninstall. The harm from nuisance adware may not seem so significant but it can be enormous in aggregate. The latest Consumer Reports State of the Net survey indicates that the spyware and adware problem is not quite as bad as it used to be – good news. To temper that, the study found that the number of consumers who had junked their computer in the previous six months went from a million last year to 850,000 this year. Just last week humorist Gene Weingarten of the Washington Post wrote about junking his computer after it had turned “into a vending machine for pop-up ads on behalf of casinos, personal enlargement devices, ladies who would like to make my acquaintance and, of course, protection against pop-up ads.”

So what are we doing? Aside from a healthy dose of consumer education, we’ve brought about a dozen spyware cases in the past two years. Our first case was particularly interesting – the defendants’ software changed people’s home pages without notice and consent and bombarded them with pop-up ads, which is not all that unusual. I mention it because there was a twist: the company also advertised – for \$40 a pop – an anti-spyware product that would remove its own software. Our Director of Consumer Protection called it the essence of cyber-chutzpah.

There are criminals distributing spyware who do not care what law enforcement does – at least until they’re caught. But for companies that do want to run a legitimate adware business, our consent orders with Direct Revenue and Zango – the latter alone the source of 6.9 billion pop-ups – should have a tremendous impact. Those orders are a blueprint for adware companies to follow. If you’re a responsible adware distributor, you need to keep three things in mind:

- 1. You have got to respect that consumers have dominion over their own computers; they get to choose what software goes on their computer.**
- 2. You cannot bury very important information in an End User License Agreement.**
- 3. You have got to make it easy and straightforward for the consumer to find and uninstall your software.**

I’ve been concerned about the “demand side” of the nuisance adware problem. The dirty little secret about nuisance adware has been that legitimate companies – even a few Fortune 500 companies – have fueled the problem by buying Internet ads without knowing (or wanting to know) how their ads reached consumers. A couple of years ago I said that if we didn’t see a change for the better on the adware front, I’d urge the Commission to “name names”– that is, announce the names of the companies whose ads were distributed via nuisance adware. I continue to believe that a little shaming may go a long way to protect consumers. But we’re seeing progress, so I don’t think we need to take that step. You should know, though, that we have sent out letters to companies that advertised via nuisance adware – maybe without knowing it – to make sure they know how their ads were being delivered so it won’t happen again.

Even if I weren’t here in New York, I’d give a lot of credit to Eliot Spitzer and Andrew Cuomo for their leadership on this issue. Earlier this year Attorney General Cuomo announced settlements against three major advertisers – Travelocity, Priceline, and Cingular – who allegedly spent hundreds of thousands of dollars to advertise through Direct Revenue, when they knew or should have known that the software had been downloaded without adequate notice and consent. In addition to a fine, those orders require the companies to monitor their ads downstream.

Now, I don't mean to sound gloomy about spyware and adware. Some trade associations, like the Direct Marketing Association, have developed adware guidelines. Many companies already go out of their way to avoid advertising via nuisance adware – either directly or through affiliates. They recognize that if they don't know where their ads are going, they risk alienating customers who will associate their brand with annoying pop-up ads, not to mention the types of content on the Web that is often paired with it. There are now initiatives that can help advertisers steer clear of problems. Stopbadware.org, for example, has done a lot of work to identify problematic software so everyone, including advertisers, can avoid it.

So we're moving in the right direction. But if I can leave you with one message, it's this: please, police your chain of distribution so that you know who's serving your ads and how.

Targeted Internet Advertising

Third, turning to targeted Internet advertising – or behavioral marketing – some of you may know that we're holding a workshop on November 1st and 2nd to take a fresh look at this area. Possibly sparked by the numerous mergers and acquisitions in this space, especially Google's proposed acquisition of Doubleclick, there's been increased attention to the resulting aggregation of information. And we've received petitions from privacy advocates such as EPIC, the Center for Digital Democracy, and US PIRG, which expressed concern about more persistent, pervasive tracking that becomes more possible as bigger and bigger companies collect more information to provide more services.

We all bring different privacy expectations to the table. It doesn't bother me, for example, that Amazon keeps track of the books I've ordered and recommends new ones; that's targeted advertising. But I am concerned about when my personal information can be sold and whether information that companies have about me is secure from breaches or inadvertent release. For example, the search records that AOL released were not linked to personal information per se, but you could identify a few individuals, with somewhat embarrassing results.

The purpose of our "town hall meeting" is to get a broad spectrum of experts together

from industry, consumer groups, and academia to examine how the advertising community is using information, how it is collected and maintained, and how information could be misused too. I hope that you will attend – or even participate – in the town hall meeting. Many of you in this audience work with these issues on a daily basis and you’ve given them a tremendous amount of thought. One of the reasons that some people distrust information collection is that they don’t have a clear understanding how their information is being used or why it is unlikely to be misused. You can help to bring the discussion out of the abstract into the realistic and explain who’s doing what and how and why.

One promising development is the growing competition among search engines on privacy. Major search companies including Yahoo, Google, and Microsoft have announced more limited data retention policies. At least one search engine, Ask, announced that consumers can choose that their search information will not be retained. The idea that companies would compete in terms of privacy motivated the Commission’s push for privacy policies in the first place, and it is great to see this competition expanding – it is the quintessential free market solution. Let’s hope we see that type of competition in the targeting space, with consumers in the driver’s seat choosing between providers on the basis of the level of privacy protection they expect.

National Advertising Division – Conclusion

Finally, let me end by talking about the NAD. All of us at the FTC appreciate the NAD’s advertising review work – it is more important today than it has ever been. The advertising reviews that the NAD has tackled in the last few months include names like Starbucks; Panasonic; Schering-Plough; Tylenol maker McNeil; and Bayer (who recently settled an action with the Commission over ads for its One-A-Day Weightsmart product, which included a \$3.2 million civil penalty). You’re talking about major, global companies. I am curious about one review that came out last week – the NAD found claims for “gravity defying” shoes to be substantiated. I’ve got to get me a pair of those!

If you look back at the published volumes of FTC administrative decisions – back in the day – you’ll find that we used to bring a lot of cases against responsible corporate citizens who just went a little too far in their ads and were told to cease and desist. Now, because of

the NAD's work, we can do more in other areas, such as advertising for dietary supplements. It really helps to have an alternative procedure that is quick, fair, and well-respected. There is a high degree of compliance from the vast majority of companies that have a paramount interest in protecting their brands. For those who don't, of course, there is always the referral process....

Even aside from referrals, we have not and will not cede the field here. The Commission has continued to bring advertising cases against national advertisers – the Tropicana and Bayer cases are a couple of examples. Another is the FTC's lawsuit in federal court against national infomercial advertiser Telebrands relating to its false and unsubstantiated ads for the Ab Force ab belt, whose electrical pulses were supposed to make your excess pounds turn to muscle without diet or exercise. For the first time since the early 1990s, the Commission filed an action under Section 19b of the FTC Act, which allows the agency to seek monetary remedies for dishonest and fraudulent acts or practices, following an administrative action by the Commission.

More than anything, the NAD is a crucial complement to the FTC's enforcement – and vice-versa. Thank you.