

Have Women in Advertising Really Come a Long Way, Baby?

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I. Introduction

Despite increasing cracks in the glass ceilings of boardrooms across the world, have the images of women in advertising progressed beyond the stereotypical or overly sexualized? Women's bodies are still used to sell everything from cosmetics to cars, bags to beverages, diapers to denim. Many of these advertisements depict the female "ideal," an identity to which all women are taught to aspire. But what happens when this "ideal" is actually inhuman? We ask this question not from the perspective of what this does to women's self-esteem, confidence or world view, but instead from a legal lens.

Is there something deceptive about showing a perfectly-airbrushed face in a foundation ad? Is it misleading to show a flawless, but photoshopped, body in a pair of jeans? Is it unfair by encouraging dangerous behavior to show an emaciated model in a demeaning position in a perfume ad when it's a physical impossibility for 95% of women to be that thin? And even if some answer this question in the affirmative, should issues of how women are portrayed in such advertisements be an enforcement priority for the government, or is the way in which women are portrayed by marketers simply matters of taste and decency that are better left to the market to regulate through self-regulation? This paper presents some issues to consider and different regulatory approaches to think about in the world of advertising female ideals.

II. History of Women in US Ads

We all know that sex, and sometimes *sexism*, sells. Just over a hundred years ago, as the women's suffrage movement was gaining momentum in the United States, Nebo cigarettes ran an ad gently reminding women of their position in American society. The ad read, "If a Suffragette sasses you, don't answer back. Gently light a Nebo ... [and] hear her sigh "I wish I were a man." In the decades that followed, ads portrayed women as being under the control and influence of their husbands; women were shown using feminine products to help impress (and keep) their men and ads for just about everything referenced the benefits of a women staying in the kitchen. A popular Schlitz ad from the 1952, for example, featured a woman holding a smoking frying pan, crying on her husband's shoulder as he reassured her "Don't worry darling, you didn't burn the beer!" In another ad from 1955, a woman is shown lying on the floor at the foot of a vacuum cleaner, looking dreamily at the machine, with the copy "Christmas morning she'll be happier with a Hoover." In an ad for Mr. Leggs dress pants in 1964, a woman's head is attached to a tiger-skin rug. A man in a business suit is shown triumphantly placing his shoe on the woman's head with the tagline "It's nice to have a girl around the house." The ad goes on to read, "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!"

It's easy to look back at advertisements like these and believe that we, as a society, have made progress. In fact, advertisers in 1968 capitalized on growth of the women's rights movement when Virginia Slims launched its thinner, female-driven cigarette with the tagline "You've got your own cigarette now baby, you've come a long, long way." Despite whatever progress had been made, ads throughout the 1960s and 70s continued to portray women as little more than flirtatious sex objects. A Continental Airlines campaign advertised attractive stewardess with the tagline "We really move our tail for you." A 1974 ad for Weyenberg Massagic shoes a nude woman on the floor, at the heel of a shoe, with the line "Keep her where she belongs..."

By the late 1970s and early 80s, though, advertising entered the era of the so-called "superwoman," a career-minded female who does it all. Enjoli perfume ads told us that an Enjoli woman "can bring home the bacon, and fry it up in a pan but never ever let you forget you're a man." Later in the decade, nothing came between Brooke Shields (then 14 years old) and her Calvin's; by 1992, Kate Moss was pioneering the androgynous "heroin chic" look that heralded the arrival of waiflike supermodels. In the oughts, Carl's Jr. made headlines when it ran an ad featuring Paris Hilton in a skin-tight swimsuit soaping up a Bentley and crawling all over it before taking a big bite out of a hamburger. Most recently, Burger King launched an ad for its "super seven incher" sandwich that angles the phallic submarine directly into a young girl's open mouth with the line "IT'LL BLOW...your mind away." Nice.

When looking at these ads, it's easy to wonder if there has been any progress at all. In many ways, one could argue that advertisements featuring female images have gotten worse as technology has developed. The ideal image of beauty today is more tyrannical (and impossible) than ever. In our era of photoshopping, advertising flawlessness has become the standard, albeit an illusion created by makeup artists, photographers, and photo retouchers. Images of women are painstakingly worked over; teeth and eyeballs are bleached white, blemishes, wrinkles, stray hairs, and pores are airbrushed away. In some cases, the pictures we see are actually amalgams of body parts of several different models -- a mouth from one, arms from another one, and legs from a third. Children are increasingly sexualized in advertising and young girls get the message early on that they should be sexy in addition to being flawlessly beautiful and incredibly thin.

With respect to women's weight in advertising, fashion models are, on average, now twenty percent underweight (a criterion for diagnosing anorexia is being fifteen percent underweight). The average BMI for a model is 17.1, the average BMI for an American woman is 26.5. Less than five percent of women in the United States have BMIs below 18.5. Could a case be made that using extremely thin models to demonstrate how the clothing will appear under normal consumer use -- that is, for over ninety-five percent of the female U.S. population -- is false and misleading? Or could promoting an unattainable body weight as the female ideal be unfair as encouraging dangerous and excessive diet and exercise habits? (Of course men are also typically portrayed in ads as perfect muscled specimens but not unnaturally thin, but we expect

there is nothing inherently dangerous if a male consumer viewer sought to attain a fitter physique.)

III. The U.S. System

In the United States, advertising is regulated on a national level by both the government and the advertisers themselves. Specifically, the Federal Trade Commission (“FTC” or the “Commission”) investigates and enforces federal advertising laws and regulations, and the National Advertising Division (“NAD”) is a self-regulating body of advertisers whose mission is to maintain truthfulness in advertising. Advertising in the U.S. can also be regulated by trade associations (through various codes of conduct for members) and a company’s internal corporate policies governing its marketing and advertising practices.

A. Federal Trade Commission

Section Five of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹ Its language has been interpreted to encompass various acts and practices and is used to attack advertising that presents a likelihood of consumer harm. In order for the FTC to find that an ad is deceptive, it must contain a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment. Under this standard, deceptive claims are actionable only if they are material to consumers’ decisions to buy or use the product; however, the FTC does not have to prove actual injury to consumers.² On the other hand, an advertisement is unfair if it causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers. “In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”³ Does this mandate give the FTC the authority to regulate advertisements that portray women as flawless (vis-à-vis airbrushing, etc.) and/or models who are impossibly thin?

Under its unfairness doctrine, the FTC has previously ordered advertisements to be discontinued that showed adolescents riding bikes in unsafe conditions; the Commission reasoned that these advertisements depicting kids riding on rough, uneven roads and into streets without looking for oncoming cars should be banned to prevent consumers from imitating this

¹ 15 U.S.C. § 45.

² Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), cited with approval in *Kraft, Inc. v. FTC*, 970 F.2d 314 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993).

³ Unfairness Policy Statement, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n).

behavior.⁴ In that case, the FTC also ordered the bicycle manufacturer to produce bike safety messages to counteract the harm that may have already been caused by their unfair ads.

Similarly, in 1999, Beck's North America, Inc. entered into a consent agreement with the FTC for an advertisement that showed people drinking Beck's beer while boating, including standing at the bow without life jackets. The FTC asserted that the conduct was inconsistent with the Beer Institute's own Advertising and Marketing Code and may also violate federal and state boating safety laws. The FTC stated that the ad was an unfair because Beck's "depiction of this activity in its advertisements is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers." The Commission's theory was similar to the child's bike case: the Beck's ads would cause some consumers to emulate these activities – *i.e.*, drinking on boats without thinking about the risks – while unaware of how dangerous this behavior could be.

On the deception side, the FTC famously charged Campbell's soup company and its advertising agency with deceiving consumers by placing clear marbles in the bottom of a bowl of vegetable soup, allegedly making the soup appear chunkier than it really was.⁵ After that, food companies and advertising agencies reacted by issuing detailed guidelines for food photography so that no special techniques, lenses, or angles were used to exaggerate or give a product extra features that do not exist in reality.

With this precedent, could the same logic apply to advertisements featuring models having BMIs below 18.5 or whose bodies are manipulated by airbrushing or other means? Does extreme thinness and the unnatural appearance of models present an unsafe practice that could harm consumers? Studies have shown that women are engaging in dangerous behavior to be thinner, and perhaps, one could argue that ads encourage this kind of unsafe behavior. A recent study conducted by the London School of Economics concluded that governments would be justified in using the law to prevent modeling agencies from using very skinny women on catwalks and to stop magazines from printing images of extreme thinness.⁶ The economists concluded that:

[G]overnment intervention to adjust individual biases in self-image would be justified to curb the spread of a potential epidemic of food disorders. The distorted self-perception of women with food disorders and the importance of the peer effects may prompt governments to take action to influence role models and compensate for social pressure on women driving the trade-off between ideal weight and health.

⁴ See Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952 n.69 (2000).

⁵ *In re: Campbell's Soup Co.*, 77 FTC 664 (1970).

⁶ Joan Costa-Font and Mireia Jofre-Bonet, *Anorexia, Body Image and Peer Effects: Evidence from a Sample of European Women*, London School of Economics, Centre for Economic Performance, November, 2011.

If women tend to be judged, and judge themselves, against the artificial standard created by the weight of women in advertisements, making failure inevitable, is it appropriate for the FTC step in? What about in ads for beauty products that are photoshopped? Is the act of digitally manipulating pores, wrinkles, and eyelashes the same kind of thing as adding marbles to the bottom of a bowl of soup? Or even if the images are enhanced, are any reasonable consumers misled to their detriment? When shown copies of the new Dior ads featuring actress Jennifer Lawrence on the red carpet of the Oscars recently, the award winner purportedly laughed and said “I love photoshop! Of course it’s photoshopped. People don’t look like that!”

Complicating the question, of course, are the protections given by the First Amendment to the United States Constitution. The First Amendment limits the government from making any law or regulation that would ban or indirectly tend to suppress – that is, “chill” – speech or expression.⁷ The First Amendment has been broadly interpreted to protect individuals from government attempts to suppress political, ideological, or scientific ideas or information, and to defend against government incursions on freedom of expression in art, literature, movies, and music. Though the Supreme Court generally has viewed advertising for consumer products as “commercial speech” without full First Amendment protection, however the FTC must always consider the “chilling” effect its enforcement actions may have.

The closest example we have found was from a speech from the 1970's Perchuck Commission Bureau of Consumer Protection Director Tracy Weston. This was during the Kid Vid era when the aggressive FTC was dubbed the “National Nanny.” Weston spoke of a Geritol campaign in which a husband is extolling his partner's many virtues including her tendency to take her vitamins regularly with the tagline “My wife -- I think I'll keep her.” He suggested this ad included a likely unsubstantiated promise of marital bliss. But even Weston did not pursue such an investigation.

B. National Advertising Division

The First Amendment does not apply to private activity such as industry self-regulation brought through or on behalf of the NAD. As a result, the NAD is not open to the same Constitutional arguments as the FTC and the NAD needn’t worry that the effect of its ruling would “chill” an advertiser’s free speech rights. That said, the NAD categorically does not address issues of decency in its rulings; their policies specifically prohibit complaints regarding questions of taste and morality.⁸ The NAD is limited to deciding cases on the grounds of truth and accuracy of the advertisement.

To that end, in 2011, the NAD brought a monitoring case against Cover Girl mascara ads featuring Taylor Swift. The ads claimed the mascara would provide 2x more volume than bare

⁷ U.S. Const. amend. I.

⁸ ASRC, Policies and Procedures by the Advertising Self-Regulatory Council, amended September 24, 2012 at p. 5.

lashes and was 20% lighter than the most expensive mascara. The ad also included a disclosure below the photo that “lashes enhanced post production.” The NAD requested substantiation for the implied claims that consumers who use the product will get lashes like those depicted in the photo and that the lashes in the photo were achieved solely by using the mascara. Cover Girl instead notified the NAD that it was discontinuing the ad and claims. After its decision, Andrea Levine, NAD’s director stated, “You can’t use a photograph to demonstrate how a cosmetic will look after it is applied to a woman’s face and then -- in the mice type -- have a disclosure that says ‘okay, not really.’” The NAD expressly stated that in its Cover Girl mascara decision, it was following the lead of the Advertising Standards Authority (“ASA”) makeup cases in the United Kingdom.

The cases the NAD was referring to were two UK decisions involving foundation advertisements (featuring Julia Roberts and Christy Turlington) where the UK’s regulatory body, the ASA, was concerned that consumers would not understand the ladies were touched up following the shoot. The ASA stated that the digitally manipulated images of the two women, who are both in their early 40s, wearing L’Oreal and Maybelline foundation products, gave readers an unrealistic idea of what they can achieve by using the makeup. The ASA stated that “on the basis of the evidence we had received we could not conclude that the ad image accurately illustrated what effect the product could achieve and that the image had not been exaggerated by digital post-production techniques.” Both ads were pulled.

C. Trade Associations and Corporate Policies

Trade associations and corporate policies also play an important role in regulation. For example, the Distilled Spirits Council of the United States (“DISCUS”), the national trade association representing nearly 70% of all distilled spirits brands sold in the United States, issues a Code of Responsible Practices for all of its members to follow. The Code provides guidance, standards and enforcement procedures that members are held to regarding their advertising and marketing practices. Like the NAD, DISCUS is not subject to the First Amendment, however unlike the NAD, DISCUS does regulate and enforce “generally accepted contemporary standards of good taste.” These standards of standard of “good taste” of course, have changed over the last few decades and this progress has (fortunately) been built into the DISCUS Code. For example, in November 1958, the Code read “In no instance, may women be shown holding a drink in an advertisement” but by November 1987, the prohibition was lifted and women could be shown imbibing alcohol along with their male counterparts.

Certain companies also have corporate policies regarding how they will and will not depict women and other groups as a matter of good corporate citizenship. Kellogg’s, for example, holds itself to the company’s internal Worldwide Marketing & Communication Guidelines that require Kellogg’s to “avoid negative gender stereotyping (*i.e.*, the female seductress, the dumb male jock, the female characters in subservient roles to the male characters” in its advertising and marketing materials.

IV. International Approaches to Regulation

Advertising law in the European Union varies greatly among Member States, and many nations have one or more advertising self-regulatory bodies roughly equivalent to the NAD in the United States. Many of these entities have a broader mandate than the NAD – for example, safeguarding taste and decency in advertisements in addition to truthfulness.

Taste and decency, of course, are highly subjective: What is bad taste to some is perfectly acceptable to others, and such norms vary greatly country to country. As a result, different countries have taken different approaches to regulating a model's weight in advertisements for example, and different jurisdictions give different treatment to the same advertisement based on particular tolerances. By way of example, in Spain, the government began requiring models to have a BMI of at least 18 in order to participate in Madrid's Fashion Week. Italy followed suit, and now requires models to have a BMI of at least 18.5 and models under age sixteen are banned from fashion shows in Milan. Most recently, Israel joined the fray and now models must prove that their BMI is 18.5 to work professionally in the country.

With respect to other ways women are portrayed in advertisements, many countries' self-regulatory bodies handle consumer and competitor challenges to these depictions. In the UK, the ASA deals not only with misleading advertising, but also "unacceptable products and services," "political and controversial issues," "harm and offence" and other related issues.

In France, the Jury de Déontologie Publicitaire ("JDP") decides which advertisements violate the country's public decency standards. Last March, the JDP decided that two posters promoting the French movie "*Les Infidèles*" ("The unfaithful") violated the code. The ads showed a business man on his cell phone with a woman kneeling before him in a pose that promised imminent fellatio. The copy above the man translates to "we are going to get cut off, I'm about to enter a tunnel". The JDP ruled that even though sexual intercourse was not depicted in the ad, and the woman did not appear naked, the posters conveyed the outmoded stereotype presenting women as a sex fantasy.

In Costa Rica, a Halls ad was banned because it showed women in bikinis hanging around a pool with a "disinhibited attitude towards sex to promote the product." On the appeal, the advertiser argued that the ad was context-appropriate (the ad showed a pool party so the women were expected to be in swimsuits) and there was not an abusive portrayal of women because all the women were adults and in control of their actions. The self-regulatory council rejected these arguments, pulled the ad and noted that the commercial was unfair and discriminatory to the ugly because it only showed beautiful people.

In Sweden, the Ethical Council in Advertising ("ERK") recently banned a Lavazza ad that showed a woman looking suggestively at the camera, wearing an unbuttoned pilot's uniform, as she puts an espresso spoon into her mouth. The ERK said that the ad is an example of advertising where women are used as attention-grabbing image of a sexual nature without having a connection to the product advertised. The ad was held as being insulting to women in general and therefore in violation of the country's advertising guidelines.

Sometimes, countries' self-regulatory boards disagree on the appropriateness, offensiveness, taste, and legality of the same ad. For example, a famous 2004 Gucci advertisement showed the letter 'G' shaved into the pubic hair of a female model as a kneeling man faces the 'G' head-on. Italy banned the ad as indecent, but the ASA in the UK investigated the ad after receiving a number of complaints and decided to keep the ad on the market. The ASA accepted Gucci's argument that the advertisement appeared in magazines targeted at "modern, fashion-conscious and sophisticated adults" -- not children. The ASA said that the ad "had been carefully targeted and that its sexual nature was unlikely to offend the fashion conscious readership," adding that even if it would be considered tasteless by some readers it was "unlikely to cause serious or widespread offence."

V. Power of the Consumer

Of all the regulatory forces governing advertising, consumers arguably have the loudest voice. If consumers don't like the ad, they won't buy the product. When Dove's "Real Beauty" campaign launched in 2004 that enlisted "real women" models, the company raised women's self-esteem and their sales increased. Advertisers and agencies also pay attention to activities from consumer groups. For example, Calvin Klein ads were attacked by the Boycott Anorexic Marketing group; a Nike ad starring Porky Pig was protested by the National Stuttering Project; and an animated public service spot from Aetna Insurance drew complaints from a witches' rights group. The power of the consumer to organize and vote individually with his or her pocketbook is a powerful tool. Further, many progressive companies have adopted policies that they will not show images that stereotype a particular group or reflect poor taste.

VI. Conclusion

Though the United States cannot prohibit the portrayal of women as sex objects in the media without violating the constitutional right to free speech, regulatory action on overly thin or photoshopped models might be possible. From a consumer protection standpoint, one path forward to minimize deception would be to add disclaimers to advertisements that have been airbrushed, photoshopped or altered. Alternatively, the FTC and/or the NAD could begin to bring enforcement actions against companies that depict a kind of artificial perfection produced through digital retouching rather than as a result of the advertised product. Similarly, regulators could take the position that clothing ads featuring models with a BMI of under 18.5 is unfair or misleading because the clothes will not appear as shown on over ninety-five percent of the female population in the United States. The issue could also be left for the advertisers and companies to handle on their own; we the people could chose to support their commercial message (or not) with our wallets. Only time will tell what the right balance will be, but in the meantime, it seems clear that advertisements featuring women still have a long way to go, baby.