

**ANA’s Legislative, Regulatory, and Legal Tracking System  
For the 113<sup>th</sup> Congress (2013-2015)**

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## Privacy Legislation

Privacy issues have been extremely active in recent years. In past Congresses, numerous privacy bills have been introduced. In the Senate, Senators Dianne Feinstein (D-CA) and Richard Shelby (R-AL) have long called for wide-ranging privacy legislation. In the House, former Energy and Commerce Committee Chairman Joe Barton (R-TX) has strong views on this issue. In recent years, legislation has transitioned from general privacy issues to more specific issues such as data security and behavioral advertising.

The FTC is also active in this area. It recently urged action on behavioral advertising practices. ANA has met frequently with the FTC to urge self-regulation and enforcement of existing laws and regulations rather than the enactment of new laws. We have developed a self-regulatory program for online behavioral advertising, which promotes transparency, notice and choice for consumers. More information on the program can be viewed at <http://www.aboutads.info>.

### Privacy Legislation in the 113<sup>th</sup> Congress: Senate

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 21</a>	Cybersecurity and American Cyber Competitiveness Act of 2013
<i>Sponsor</i>	<i>Description</i>
<b>Rockefeller (D-WV)</b>	This bill finds it the sense of Congress that Congress should enact bipartisan legislation to secure the United States against cyber attack and to protect the sensitive information and identities of American citizens by maintaining robust online privacy protections.
<i>Cosponsors</i>	<i>History</i>
<b>7 (Carper (D-DE); Coons (D-DE); Feinstein (D-CA); Levin (D-MI); Menendez (D-NJ); Mikulski (D-MD); Whitehouse (D-RI))</b>	1/22/2013: Bill Introduced 1/22/2013: Referred to Senate Committee on Homeland Security and Government Affairs

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 418</a>	Do-Not-Track Online Act of 2013
<i>Sponsor</i>	<i>Description</i>
<b>Rockefeller (D-WV)</b>	This bill would require the FTC to establish regulations setting standards for the implementation of a mechanism by which an individual can simply and easily indicate whether they prefer to have personal information collected by providers of online (including mobile) services. In issuing rules, the FTC can take into account technical issues and mechanisms that have been developed or used before the act takes effect. Enforcement is shared by the FTC and state attorneys general with maximum civil penalties of \$15,000,000.
<i>Cosponsors</i>	<i>History</i>
<b>1 (Blumenthal, D-CT)</b>	2/28/2013: Bill Introduced 2/28/2013: Referred to Senate Committee on Commerce, Science and Transportation 4/24/2013: Hearing held

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 639</a>	Geolocational Privacy and Surveillance Act (GPS Act)
<i>Sponsor</i>	<i>Description</i>
<b>Wyden (D-OR)</b>	This bill would prohibit the interception, disclosure and use of geolocation information (information concerning the location of a wireless device) pertaining to another person. There are exceptions for information acquired in the normal course of business, information acquired with prior consumer consent, for emergency information. Provisions are included for recovery of civil damages up to \$10,000 and criminal penalties including imprisonment up to five years.
<i>Cosponsors</i>	<i>History</i>
<b>1 (Kirk, R-IL)</b>	3/21/2013: Bill Introduced 3/21/2013: Referred to Senate Committee on the Judiciary Related Bill: H.R. 1312

### **Privacy Legislation in the 113<sup>th</sup> Congress: House of Representatives**

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 1121</a>	Cyber Privacy Fortification Act of 2013
<i>Sponsor</i>	<i>Description</i>
<b>Conyers (D-MI/13)</b>	This bill imposes criminal and civil penalties for the failure to provide notice of a security breach involving sensitive personally identifiable information (including name and address in combination with: a full Social Security number or other federal or state identification number, mother's maiden name and date of birth or biometric data; or a financial account number or credit/debit card number along with access code). Enforcement is shared by the Justice Department and state attorneys general. Fines of up to \$500,000 can be imposed (and up to \$1,000,000 for intentional disclosures) and injunctive relief may be sought.
<i>Cosponsors</i>	<i>History</i>
<b>2 (Johnson, D-GA/4; Scott, D-VA/3)</b>	3/13/2013: Bill Introduced 3/13/2013: Referred to the House Committee on the Judiciary 4/15/2013: Referred to Subcommittee on Crime, Terrorism, Homeland Security and Investigations

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 1312</a>	Geolocational Privacy and Surveillance Act (GPS Act)
<i>Sponsor</i>	<i>Description</i>
<b>Chaffetz (R-UT/3)</b>	This bill would prohibit the interception, disclosure and use of geolocation information (information concerning the location of a wireless device) pertaining to another person. There are exceptions for information acquired in the normal course of business, information acquired with prior consumer consent, for emergency information. Provisions are included for recovery of civil damages up to \$10,000 and criminal penalties including imprisonment up to five years.
<i>Cosponsors</i>	<i>History</i>
<b>15</b>	3/21/2013: Bill Introduced 3/21/2013: Referred to the House Committee on the Judiciary and the House Committee on Intelligence (Permanent Select) 4/15/2013: Referred to Subcommittee on Crime, Terrorism, Homeland Security

	and Investigations Related Bill: S. 639
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<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 1468</a>	Strengthening and Enhancing Cybersecurity by Using Research, Education, Information and Technology Act of 2013 (SECURE IT)
<i>Sponsor</i>	<i>Description</i>
<b>Blackburn (R-TN/7)</b>	Title I of this bill authorizes private entities to disclose cyber threat information and to use countermeasures to obtain such information. Title III sets criminal penalties for fraud and related activities in connection with computers. Title V sets notice and disclosure requirements in the event of a security breach for entities owning or licensing data containing personal information, including for third parties. Entities are required to report to the Secret Service or FBI security breaches involving the personal information over 10,000 individuals. Enforcement is given to the FTC with maximum civil penalties of \$500,000 and no private cause of action.
<i>Cosponsors</i>	<i>History</i>
<b>None</b>	4/10/2013: Bill Introduced 4/10/2013: Referred to the House Committee on Science, Space, and Technology, and in addition to the Committees on Oversight and Government Reform, the Judiciary, Armed Services, Intelligence (Permanent Select), and Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. 4/12/2013: Referred to Subcommittee on Commerce, Manufacturing and Trade (Energy and Commerce) 4/19/2013: Referred to Subcommittee on Intelligence, Emerging Threats & Capabilities (Armed Services)

## Media Content and Child Protection Legislation

A number of high profile incidents over the past few years have increased Congressional attention on both indecency and violent entertainment. In 2006, Congress passed legislation to increase indecency fines ten-fold to \$325,000 per violation. In addition, some members of Congress have sought to limit violent programming by giving the Federal Communications Commission regulatory authority to ban it if measures such as the ratings system and v-chip are found to be ineffective.

ANA opposes any restrictions on violent programming that limit the First Amendment rights of broadcasters. We have also been instrumental in the creation of the Alliance for Family Entertainment, a proactive group of 45 major national advertisers. (See the [Alliance for Family Entertainment](#) section on the ANA web site).

### Media Content and Child Protection Legislation in the 113<sup>th</sup> Congress: Senate

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 2</a>	Sandy Hook Elementary School Violence Reduction Act
<i>Sponsor</i>	<i>Description</i>
Reid (D-NV)	This bill expresses the sense of the Senate that Congress should, among other things, examine whether there is a connection between violent media and violent behavior.
<i>Cosponsors</i>	<i>History</i>
16	1/22/2013: Bill Introduced 1/22/2013: Referred to Senate Committee on the Judiciary

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 134</a>	Violent Content Research Act of 2013
<i>Sponsor</i>	<i>Description</i>
Rockefeller (D-WV)	This bill calls on the FTC, FCC and DHHS to work with the National Academy of Sciences to conduct a study and investigation into whether there is a link between exposure to violent video games and violent programming and harmful effects (such as causing aggressive behavior) on children.
<i>Cosponsors</i>	<i>History</i>
5 (Blumenthal (D-CT); Coburn (R-OK); Heller (R-NV); Johanns (R-NE); Klobuchar (D-MN))	1/24/2013: Bill Introduced 1/24/2013: Referred to Senate Committee on Commerce, Science and Transportation

### Media Content and Child Protection Legislation in the 113<sup>th</sup> Congress: House of Representatives

None yet introduced.

## Direct-to-Consumer Prescription Drug Advertising Legislation

Numerous surveys have shown that direct-to-consumer prescription drug advertising imparts important benefits to consumers. However, some in Congress want to limit this category of advertising, either through moratoriums or limitations on the tax deductibility of the cost of advertising. ANA has lobbied key Congressional committees in support of DTC pharmaceutical advertising, provided key witnesses for hearings and distributed economic research in support of DTC advertising to key members of Congress.

ANA supports prescription drug advertising and opposes any attempts to limit it. In this effort, ANA works with our member companies and industry groups such as the Pharmaceutical Research and Manufacturers Association (PhRMA) to protect the right of pharmaceutical manufacturers to communicate directly and effectively with consumers. We support PhRMA's Guiding Principles for Direct-to-Consumer Advertising, which can be viewed at [http://www.phrma.org/direct\\_to\\_consumer\\_advertising/](http://www.phrma.org/direct_to_consumer_advertising/).

### *Direct-to-Consumer Prescription Drug Advertising Legislation in the 113<sup>th</sup> Congress: Senate*

None yet introduced.

### *Direct-to-Consumer Prescription Drug Advertising Legislation in the 113<sup>th</sup> Congress: House of Representatives*

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 923</a>	Say No to Drug Ads Act
<i>Sponsor</i>	<i>Description</i>
<b>Nadler (D-NY/10)</b>	This bill would disallow the tax deductibility of any amount paid or incurred for a direct-to-consumer advertisement of a prescription drug.
<i>Cosponsors</i>	<i>History</i>
<b>None</b>	2/28/2013: Bill Introduced 2/28/2013: Referred to the House Committee on Ways and Means

## Obesity and Food Advertising Legislation

Obesity was identified in 2001 by the Surgeon General as the second leading cause of preventable death in the United States. In response, there have been a number of initiatives proposed in Congress to increase physical activity and improve nutrition, especially among young people. ANA is in favor of such legislation. Unfortunately, this has also led to attacks on the food industry's advertising and marketing of their products. ANA has been increasingly active in resisting any limitations on truthful, non-deceptive food advertising. Additionally, the Children's Advertising Review Unit (CARU) has undertaken a revision of its guidelines regarding children's advertising, which can be viewed at <http://www.bbb.org/us/caru-guidelines/>. The National Advertising Review Council has set up a Children's Food and Beverage Advertising Initiative, which includes 80% of all advertising directed to children 17 of the largest food advertisers, to ensure that advertising includes information about healthy food choices and healthy lifestyles. More information on the initiative can be viewed at <http://www.bbb.org/us/childrens-food-and-beverage-advertising-initiative/>.

### **Obesity and Food Advertising Legislation in the 113<sup>th</sup> Congress: Senate**

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 39</a>	Healthy Lifestyles and Prevention America Act (HeLP America Act)
<i>Sponsor</i>	<i>Description</i>
Harkin (D-IA)	This bill would provide resources for healthier foods and for physical activity programs in schools, provide tax benefits to employers to increase employee wellness and create a number of grant programs to provide funds to communities to develop community health programs such as community gardens. It would require DHHS to solicit comments on revised food labeling on front of packaging. It also would restore FTC rulemaking authority over unfairness in advertising to children and would grant notice and comment (otherwise known as APA) rulemaking authority to the FTC regarding advertising to children. Finally, it would reinstate the Interagency Working Group on Food Marketed to Children and require it to report to Congress its findings and recommendations by July 14, 2014.  For more on this bill, please see the section on Tobacco Advertising Legislation.
<i>Cosponsors</i>	<i>History</i>
None	1/22/2013: Bill Introduced 1/22/2013: Referred to Senate Committee on Finance

### **Obesity and Food Advertising Legislation in the 113<sup>th</sup> Congress: House of Representatives**

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 1572</a>	Stopping Taxpayer Outlays for Propaganda Act (STOP Act)
<i>Sponsor</i>	<i>Description</i>
Schock (R-IL/18)	This bill prohibits federal money from being used for print, radio, television, or any other media advertisement, campaign, or form of publicity against the use of a food or non-alcoholic beverage that is lawfully marketed under the Federal Food, Drug and Cosmetic Act.
<i>Cosponsors</i>	<i>History</i>
2 (Barr, R-KY/6; Hudson, R-NC/8)	4/15/2013: Bill Introduced 4/15/2013: Referred to the House Committee on Energy and Commerce

	4/19/2013: Referred to the Subcommittee on Communications and Technology
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## Alcohol Beverage Advertising Legislation

ANA monitors Congressional, regulatory and judicial activities impacting alcohol beverages. We actively lobby in opposition to legislative or regulatory proposals that would infringe on the right to carry out truthful and nondeceptive advertising of legal products directed to legal audiences. The Ad Council (<http://www.adcouncil.org/>) and the Century Council (<http://www.centurycouncil.org/>) also have carried out extensive public service advertising in regard to anti-alcohol abuse campaigns.

### ***Alcohol Beverage Advertising Legislation in the 113<sup>th</sup> Congress: Senate***

None yet introduced.

### ***Alcohol Beverage Advertising Legislation in the 113<sup>th</sup> Congress: House of Representatives***

<b><i>Bill Number</i></b>	<b><i>Bill Title</i></b>
<a href="#">H.R. 498</a>	Sober Truth on Preventing Underage Drinking Reauthorization Act (STOP Act)
<b><i>Sponsor</i></b>	<b><i>Description</i></b>
<b>Roybal-Allard (D-CA/40)</b>	This bill would create an interagency coordinating committee on the prevention of underage drinking which would be required to issue an annual report that examines federal policy designed to prevent and reduce underage drinking and to also measure the exposure of underage populations to messages regarding alcohol in advertising and the entertainment media. It would also require reporting on states have laws and policies to reduce alcohol advertising messages attractive to youth and youth exposure to alcohol advertising and marketing.
<b><i>Cosponsors</i></b>	<b><i>History</i></b>
<b>40 (lead co-sponsors are DeLauro (D-CT/3) and Wolf (R-VA/10))</b>	2/5/2013: Bill Introduced 2/5/2013: Referred to the House Committee on Energy and Commerce 2/8/2013: Referred to Subcommittee on Health

## Tobacco Advertising Legislation

ANA opposes any attempts to restrict the advertising of tobacco products, which remain legal for those over the age of 18.

### *Tobacco Advertising Legislation in the 113<sup>th</sup> Congress: Senate*

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 39</a>	Healthy Lifestyles and Prevention America Act (HeLP America Act)
<i>Sponsor</i>	<i>Description</i>
<b>Harkin (D-IA)</b>	This bill would disallow the deductibility as a business expense any sums expended for the advertising of tobacco products. For more on this bill, please see the section on Obesity and Food Advertising Legislation.
<i>Cosponsors</i>	<i>History</i>
<b>None</b>	1/22/2013: Bill Introduced 1/22/2013: Referred to Senate Committee on Finance

### *Tobacco Advertising Legislation in the 113<sup>th</sup> Congress: House of Representatives*

None yet introduced.

## For-Profit College Legislation

Recently, for-profit colleges have come under scrutiny for their recruitment and marketing practices. These bills would prohibit the use of federal educational assistance funds for marketing and advertising.

### *For-Profit College Legislation in the 113<sup>th</sup> Congress: Senate*

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">S. 528</a>	Protecting Financial Aid for Students and Taxpayers Act
<i>Sponsor</i>	<i>Description</i>
<b>Hagan (D-NC)</b>	This bill would prohibit institutions of higher education or other postsecondary educational institution from using revenues derived from federal educational assistance funds for recruiting or marketing activities, including advertising and promotional activity.
<i>Cosponsors</i>	<i>History</i>
<b>2 (Franken, D-MN; Harkin, D-IA)</b>	3/12/2013: Bill Introduced 3/12/2013: Referred to Senate Committee on Health, Education, Labor and Pensions Related Bill: H.R. 340 (below)

### *For-Profit College Legislation in the 113<sup>th</sup> Congress: House of Representatives*

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 340</a>	Protecting Financial Aid for Students and Taxpayers Act
<i>Sponsor</i>	<i>Description</i>
<b>Grijalva (D-AZ/3)</b>	This bill would prohibit institutions of higher education or postsecondary education from using revenue derived from federal education assistance funds for advertising and marketing activities.
<i>Cosponsors</i>	<i>History</i>
<b>2 (Conyers, D-MI/13; Cummings, D-MD/7)</b>	1/22/2013: Bill Introduced 1/22/2013: Referred to the House Committee on Education and the Workforce Related Bill: S. 528 (above)

## “Patent Trolls” Legislation

Non-practicing entities (NPEs), also known as “patent trolls,” purchase patents created by others on the open market and then profit from those patents by suing those using the patented technology for infringement. Patent trolls are a growing problem for the advertising industry.

### “Patent Trolls” Legislation in the 113<sup>th</sup> Congress: Senate

None yet introduced.

### “Patent Trolls” Legislation in the 113<sup>th</sup> Congress: House of Representatives

<i>Bill Number</i>	<i>Bill Title</i>
<a href="#">H.R. 845</a>	Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013 (SHIELD Act)
<i>Sponsor</i>	<i>Description</i>
DeFazio (D-OR/4)	This bill would allow for the recovery of the costs of litigation by anyone that can prove they were wrongly sued for patent infringement.
<i>Cosponsors</i>	<i>History</i>
4 (main co-sponsor is Chaffetz (R-UT/3))	2/27/2013: Bill Introduced 2/27/2013: Referred to the House Committee on the Judiciary. 4/8/2013: Referred to the Subcommittee on Courts, Intellectual Property and the Internet

## Key Pending and Recently Decided Court Cases

The First Amendment protections for commercial speech are the ultimate safety net for all advertisers. As an ever-widening range of advertising becomes controversial, the courts become an even more crucial battleground for advertisers. ANA has played an active role in almost every major commercial speech case over the past twenty years, through “friend-of-the-court” briefs or by supporting parties in critical lawsuits.

These efforts have been successful. In a number of recent cases, the U.S. Supreme Court has ratcheted up the level of First Amendment protection for commercial speech. In its decision in *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), the Supreme Court cited ANA’s brief for its articulation of the position that truthful, non-misleading commercial speech should be protected by a strict scrutiny standard instead of the current *Central Hudson* test. While the Supreme Court has not yet gone that far, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), a commercial speech case, Justice Sandra Day O’Connor wrote that “if the First Amendment means anything, it means that regulating speech must be a last – not first – resort.” ANA continues its active efforts in the courts to protect the First Amendment rights of marketers to communicate with consumers.

Following is a summary of some important pending and recently decided advertising cases.

## Currently Pending Cases

### ***American Snuff Company, LLC et al v. United States of America***

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act into law, giving the Food and Drug Administration for the first time authority over tobacco products and their marketing and advertising. Soon after, a challenge against the advertising provisions contained in the law was initiated by six major tobacco companies in the U.S. District Court for the Western District of Kentucky (as *Commonwealth Brands, Inc. v. United States of America*). These provisions, that were under review were the most stringent ever passed into law by Congress. They include bans on color and graphics in ads, mandated warning text and images, and a ban on outdoor advertising and point-of-sale communications. The suit contends that the government goes too far in restricting speech directed at a legal audience in advancing its legitimate interest in reducing youth tobacco use, and is thus unconstitutionally restricting speech.

ANA joined in a “friend-of-the-court” brief with the 4As and AAF. We believe if allowed to stand, these restrictions would serve as a template for limiting many other controversial categories of advertising. Our brief argued that Congress overlooked a number of less restrictive alternatives that could have achieved the objectives of discouraging smoking and protecting minors without restricting speech – and that these alternatives would in fact be more effective. Our brief is available at <http://www.ana.net/advocacy/getfile/15431>.

The District Court held that the ban on colors and images in ads was too broad and unconstitutional. However, the court upheld other speech restrictions, including those on sponsorships, outdoor advertising, and the language and graphics required in warning labels. Both sides in this case cross-appealed to the U.S. Court of Appeals for the Sixth Circuit. We filed a further “friend-of-the-court” brief in this case, which argued that the lower court seriously erred in upholding most of the Act's marketing restrictions. We contended that the District Court should have struck down all of the marketing restrictions as overly broad and unconstitutional. This brief can be read at <http://www.ana.net/getfile/15753>.

In March 2012, the Sixth Circuit handed down a 2-1 decision (in *Discount Tobacco City & Lottery, Inc. v. United States of America*), largely agreeing with the lower court. It found some of the FDA's new regulatory authority over the marketing of tobacco products to be constitutional. Specifically, the court ruled that the provisions requiring new graphic warning labels on products and advertising, as well as those banning sponsorships, were constitutional. Conversely, the court struck down the provisions banning the use of colors or pictures in tobacco advertisements featured in media that have underage youth comprising 15% or more of their audiences. The ruling is available at <http://www.ana.net/getfile/17386>.

The Sixth Circuit denied a rehearing by the full court in May. On October 26, 2012, the tobacco companies filed a petition for a writ of certiorari with the U.S. Supreme Court. On November 27, 2012, ANA, along with the 4As and AAF, filed an amicus brief with the U.S. Supreme Court urging them to hear the appeal. Our brief is available at <http://www.ana.net/getfile/18097>.

On April 22, 2013, the Supreme Court decided not to hear the case, leaving the decision of the 6th circuit in place.

## Recently Decided and Other Important Cases

### ***R.J. Reynolds Tobacco Company v. FDA***

In a case related to the one above, five tobacco companies filed suit in the U.S. District Court for the District of Columbia seeking an injunction and summary judgment against the Food and Drug Administration's rules enacting the warning label provisions of the Family Smoking Prevention and Tobacco Control Act. The FDA's rules, issued on June 21, 2011, required graphic, grisly images to accompany the warning text on tobacco packages and advertisements. In November 2011, a preliminary injunction was issued by the court, finding that requiring the labels may be "unconstitutionally compelled speech." ANA filed a "friend of the court" brief in that case which can be read at <http://www.ana.net/getfile/16958>.

The motion for summary judgment was heard by the court in February 2012, with Judge Richard Leon granting the plaintiff's motion, finding that the warning labels violated the First Amendment to the U.S. Constitution. Judge Leon wrote that "the Government...may not force others...to serve as its unwilling mouthpiece" and that the rule was insufficiently tailored to meet the government's interest to warrant compelling speech in such a manner. The court's decision can be viewed at <http://www.ana.net/getfile/17278>.

The Court of Appeals for the District of Columbia Circuit heard oral arguments on appeal of both the preliminary injunction and summary judgment in April 2012. ANA filed a "friend of the court" brief during the court's consideration of the case, which can be read at <http://www.ana.net/getfile/17890>. In August 2012, the court released its opinion, which vacated the FDA rule. The court held that the rule would turn product packages and ads into miniature billboards for the government's preferred message, going far beyond purely factual and accurate commercial disclosures. The court noted there are many other less intrusive alternatives the government can use to reduce smoking, but compelling speech is a step too far under the Constitution. Additionally, the FDA failed to provide "any evidence" that requiring the graphic warnings would accomplish its stated goal of reducing smoking rates, which it must do to justify any resection on speech under the U.S. Supreme Court's *Central Hudson* decision. The court's decision can be read at <http://www.ana.net/getfile/17889>.

In December 2012, the D.C. Circuit denied rehearing of the case. The FDA decided not to appeal to the U.S. Supreme Court in March 2013 and will now have to conduct a new rulemaking to implement the requirements of the act.

### *FCC v. Fox Television Stations*

In 2004, the Federal Communications Commission changed its policies regarding so-called “fleeting expletives,” making any broadcast of an expletive, even inadvertent, a violation of its indecency rules. Up until this change, the FCC had followed the policy it adopted after the Supreme Court’s landmark *Pacifica* ruling (the famous “seven dirty words” case), and issued fines against broadcasters only for repeated indecency violations. The FCC then proceeded to levy substantial fines against broadcasters that had aired live events where such fleeting expletives were used. However, the Second Circuit Court of Appeals overturned these fines and raised questions about the FCC’s indecency actions as they relate to the First Amendment.

The Commission appealed to the U.S. Supreme Court, and in a fractured 5-4 decision, it reversed the Second Circuit. However, the case was decided on other grounds and did not reach the First Amendment issues raised by the FCC’s order. The Court instead remanded it back to the appeals court for consideration of those issues, which struck down the fleeting expletives policy again in July, finding them too vague to withstand First Amendment scrutiny. The FCC appealed to the full Second Circuit, which agreed with the panel decision in November 2010.

The case returned to the Supreme Court in its 2011 term. On June 21, 2012, it vacated the Second Circuit’s opinion in a [unanimous decision](#) (with Justice Sotomayor not participating). The court held that the FCC failed to give Fox or ABC fair notice prior to the broadcast that fleeting expletives and momentary nudity would be indecent, so the Commission’s standards as applied to these broadcasts were vague. The Court reached its decision under the due process clause, so it did not address the First Amendment issues or the constitutionality of FCC policy. The FCC has the freedom to modify its policy in light of public interest and legal requirements.



### ***Schwarzenegger v. Entertainment Merchants Association et al***

California passed a law in 2005 that prohibited the sale or rental of “violent video game[s]” to persons under 18 years of age. A “violent video game” is defined in the law as a game including killing, maiming, dismembering or sexually assaulting an image of a person, if depicted in a way that a reasonable person would find appeals to a morbid interest to minors, is offensive to prevailing community standards, or causes the game to lack serious literary, artistic, political or scientific value for minors. Parents and guardians were still permitted to rent or purchase games on a minor’s behalf. Suit was filed in the U.S. District Court for the Northern District of California alleging the law violated the First Amendment and seeking an injunction against enforcement.

The District Court found that the law did violate the First Amendment. The court held that while the government has a compelling interest in protecting minors, it did not prove that video games were any different from other media or that they led to violent behavior, which was the main justification propounded for the law. The U.S. Court of Appeals for the Ninth Circuit agreed, and California filed a petition for cert with the U.S. Supreme Court. The Supreme Court heard oral arguments in the case on November 2, 2010.

ANA joined a “friend-of-the-court” brief filed in conjunction with various publishers and recording groups to the Supreme Court. The brief argued that the Supreme Court has long refused to carve out a distinction under the First Amendment for violent materials and discussed the long history of textual and visual depictions of violence in art and literature. The brief, which can be viewed at <http://www.ana.net/getfile/15862>, contended that the justifications California made for the law are not sufficient to withstand Constitutional scrutiny.

On June 27, 2011, in one of the last decisions released in the 2010 term, the Court held 7-2 that the law violated the First Amendment. Justice Antonin Scalia, writing for the court, held that the state’s responsibility to protect children from harm “does not include a free-floating power to restrict the ideas to which children may be exposed. . . Even where the protection of children is the object, the constitutional limits on governmental action apply.” In his opinion, Justice Scalia discussed many of same examples from art and literature throughout history that our friend-of-the-court brief cited.

### IMS Health cases

Vermont, New Hampshire and Maine passed similar legislation banning the use of physician histories for commercial purposes, including their use in marketing prescription drugs to doctors, which is known as “detailing.” New Hampshire, which passed its law first, claimed in response to a challenge to the law in federal court (*IMS Health v. Ayotte*) that the law did not regulate speech, and even if a court determined that it did, the state has an interest in promoting public health and protecting patient privacy. The U.S. District Court for the District of New Hampshire disagreed, finding the law violated the First Amendment under the U.S. Supreme Court’s *Central Hudson* test. New Hampshire appealed to the U.S. Court of Appeals for the First Circuit, which held in late 2008 that the law was constitutional as it regulated “conduct” and not “speech,” and thus the higher level of scrutiny given commercial speech restrictions under *Central Hudson* did not apply. Under the lowest level of constitutional scrutiny, known as rational basis, the state merely needed to show its actions were rationally related to a legitimate government interest, and the court would be required to uphold the law.

The U.S. Supreme Court declined to hear the case in 2009. ANA previously had filed a brief with the Supreme Court arguing that whole categories of speech would be found to be impermissible if judged under the lesser level of scrutiny used by the First Circuit in *Ayotte* and that defining speech activity as conduct severely undermines First Amendment values. Our brief can be viewed at <http://www.ana.net/advocacy/getfile/15130>. The First Circuit also upheld the challenge to the Maine law (*IMS Health v. Mills*) on similar grounds.

In the Vermont case (*IMS Health v. Sorrell*), the U.S. District Court for the District of Vermont held that the law violated the First Amendment. The U.S. Court of Appeals for the Second Circuit heard arguments on October 13, 2009, and upheld the lower court’s decision in November 2010, finding the law violated the *Central Hudson* test. Vermont appealed to the U.S. Supreme Court, which agreed to take the case in January 2011, most likely due to the split between the First and Second Circuits.

In a 6-3 decision on June 24, 2011, the U.S. Supreme Court agreed with the Second Circuit and found that the Vermont law violated the First Amendment (and effectively reversing the First Circuit). In doing so, it rejected the First Circuit’s finding that it regulated conduct and not speech, with Justice Anthony Kennedy writing that “the creation and dissemination of information are speech within the meaning of the First Amendment. . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.” In doing so, the Court found that Vermont’s restrictions on speech were subject to “heightened scrutiny” but found it unnecessary to decide whether to apply the traditional test for regulating commercial speech. It said the result would be the same whether it conducted a commercial speech inquiry or applied a stricter form of judicial scrutiny. The state’s asserted purpose, in preventing doctors from receiving more effective pitches from marketers, did not justify a restriction on speech.

This case sets a strong, positive precedent for marketers that wish to target their message to consumers.

### ***Educational Media Co. v. Swecker***

The Fourth Circuit Court of Appeals recently reversed a lower court ruling in this case dealing with Virginia's ban on alcohol beverage ads in college newspapers. The court, in a 2-1 decision, held that the law did not violate the First Amendment. Using the test articulated in the U.S. Supreme Court's landmark *Central Hudson* case, the court held that the law materially advanced the government's interest in decreasing demand for alcohol among college students and preventing underage drinking. It also found that the law was sufficiently narrow in that it was limited to certain types of ads for beer, wine and mixed beverages and applied only to student-run publications targeted at a readership under 21 years old.

The college newspapers asked the U.S. Supreme Court to hear the case. ANA, along with the 4A's and AAF, submitted an amicus brief asking the court to grant cert. Our brief can be viewed at <http://www.ana.net/getfile/15868>. However, despite a split between this court and a decision issued by Judge (now Supreme Court Justice) Samuel Alito while on the Third Circuit Court of Appeals in 2004, which found a similar law in Pennsylvania violated the First Amendment, the U.S. Supreme Court declined to hear the case.

If you have any questions about the status or importance of any of these cases, please contact Daniel L. Jaffe in ANA's Washington, D.C. office at (202) 296-1883 or [djaffe@ana.net](mailto:djaffe@ana.net).