

SEEING IS DECEIVING: THE TACIT DEREGULATION OF DECEPTIVE ADVERTISING

Linda J. Demaine*

This Article reveals the central paradox in modern advertising law—that despite advertisers' nearly universal shift from linguistic claims to comparatively powerful visual imagery, the FTC and courts continue to scrutinize the more trivial linguistic elements of ads while leaving visual imagery mainly unregulated. As a result of this misplaced effort, the more pervasive and persuasive the form in which an advertiser makes its deceptive claims, the less subject to regulation the claims will be. The Article analyzes the causes of this paradox and offers preliminary suggestions for how the FTC and courts could effectively adapt the general framework they apply in deceptive advertising cases to the unique characteristics of visual imagery. It concludes by explaining that a more rigorous assessment of visual imagery would fulfill Congress's intent to protect consumers and business firms from deceptive advertising and comport with Supreme Court commercial speech jurisprudence, while avoiding the market inefficiencies and loss of social capital associated with widespread deception.

* Professor of Law and Affiliate Professor of Psychology, Arizona State University; J.D., University of Arizona; Ph.D., Social Psychology, Arizona State University. Thanks to Shari Diamond, Aaron X. Fellmeth, and Rebecca Tushnet for insightful comments on earlier versions of this work and to Beth DiFelice and Emily Jurmu for excellent research assistance.

TABLE OF CONTENTS

INTRODUCTION.....	720
I. THE POWER OF VISUAL PERSUASION.....	724
A. Tobacco Ads and Government-Mandated Warning Labels.....	727
B. How Visual Images Dominate.....	731
1. Visual Appeal and Attention.....	732
2. Ease of Processing	733
3. Believability	734
4. Emotionality	737
5. Salience in Mind	738
6. Summary	739
II. THE REGULATION OF VISUAL IMAGERY VERSUS LANGUAGE	739
A. Principles of Deceptive Advertising Law.....	740
1. The Reasonable Consumer	742
2. Types of Deceptive Claims.....	744
3. Likely to Mislead	745
4. Materiality	746
5. Summary	747
B. Selective Blindness to Visual Imagery.....	747
C. Analytical Evaluation.....	754
CONCLUSION	759

INTRODUCTION

The Supreme Court has made the informative nature of advertising the lynchpin of its commercial speech jurisprudence.¹ It views one of the First Amendment's key purposes as protecting consumer access to facts and opinions about products and services. Commercial speech, according to the Court, warrants First Amendment protection because the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."² The view that a person's commercial

1. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . ."); *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

2. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 763 (1976). Speech is generally deemed commercial if it does "no more than propose a commercial transaction," *id.* at 762, or is "related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 447 U.S. at 561. Clearly, some speech may be difficult to classify under this definitional scheme. See, e.g., *id.* at 579–80 (Stevens, J., concurring) (pointing out that the Court's definitions of commercial speech may be poorly calibrated, as some advertisements may be interpreted to stop short of proposing a commercial transaction, and some social discussions may rest on participants' economic interests). The present Article

interests may overshadow his political interests is hardly complimentary to democratic sensibilities, but it is empirically justified.³

The Court has also reasoned that society as a whole benefits from the unfettered dissemination of commercial information: “So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.”⁴ Protecting commercial speech from irrational restraints ensures that the information offered in advertising reaches the consuming public.

One may reasonably question whether advertising generally facilitates “intelligent and well informed” consumer decisions. The Court presumes that it does, however, and therefore refrains from serious inquiry on these dimensions. Rather, the Court distinguishes between protected and non-protected commercial speech using another dimension—whether the speech is deceptive. Deceptive commercial speech obviously imparts informational benefits to neither consumers nor society; on the contrary, it imposes economic and social costs on these parties as well as honest advertisers. The Court has, consequently, excluded commercial deception from the ambit of First Amendment protection.⁵

The Federal Trade Commission (“FTC”), the main government agency responsible for protecting consumers and business firms from unfair competition in the United States, has for the past 100 years labored to prevent deceptive advertising from reaching the public. Pursuant to a congressional mandate,⁶ the FTC has fashioned a regulatory scheme that provides business firms with great, but not unlimited, latitude in choosing the content of their ads. The federal courts, as the final arbiters of FTC decisions,⁷ also have shaped the legal framework that the FTC uses to distinguish deceptive from non-deceptive claims in advertising.

To further protect business firms and consumers from the harms of deceptive advertising, Congress has created a private cause of action under the

addresses deception in speech that the government considers advertising, however it arrives at that determination.

3. Whereas all Americans have commercial interests, fewer than two-thirds of eligible citizens vote in most elections. See *Voting and Registration Publications: Population Characteristics (P20) Reports and Detailed Tables*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/index.html> (last visited July 18, 2012).

4. *Va. Pharmacy Bd.*, 425 U.S. at 765.

5. *Id.* at 771–72; see also *id.* at 781 (Stewart, J., concurring) (stating that excepting deceptive advertising claims from constitutional protection “serves to promote the one facet of . . . advertising that warrants First Amendment protection[—]its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking”).

6. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

7. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (“[I]n the last analysis the words ‘deceptive practices’ set forth a legal standard and they must get their final meaning from judicial construction.”).

Lanham Trademark Act.⁸ This legislation permits business firms recourse to federal courts for the deceptive advertising of their competitors.

Together, the public and private mechanisms form a fairly uniform and stable body of law governing deceptive advertising. But does this *corpus juris* actually protect consumers and business firms from the most prevalent, insidious, and compelling forms of misleading suggestions and outright falsehoods in ads? During the FTC's long tenure, a revolution in communications technologies has taken place. The printed and spoken word, through which advertisers once urged consumers to purchase goods and services by touting their characteristics and benefits, has yielded almost entirely to the photograph, video sequence, and computer-generated image. Advertisers no longer explicitly assert that a deodorant is targeted at young, adventurous, athletic males; they instead depict a motorcyclist ripping off his shirt and applying the deodorant in mid-air during a death-defying stunt.⁹ They do not state that a candy bar will restore the consumer's energy and athletic prowess; rather, they portray her as an elderly woman who, after snacking on the bar, instantly transforms back into a virile competitor.¹⁰ Across products and services, business firms assert their claims mainly through the pictorial element. Imagery now dominates advertising to the point where language is often relegated to the mere recitation of a trademark, a memorable jingle, or an epigram that complements the main, visual attraction.

Virtually any claim that can be made through language can be conveyed by visual imagery. The opposite, however, is not true—visual imagery communicates to consumers in a manner impossible for language. Photography and television consequently revolutionized the advertising world by enabling business firms to sell products through visual appeal rather than cumbersome linguistic assertions or crude illustrations. Computer-generated and enhanced imagery (“CGI”) has heightened the realism of commercial images, creating greater persuasive disparity between visual imagery-based and language-based advertising claims. These advantages have convinced advertisers to greatly subordinate text and voice to pictures.

Despite the nearly universal paradigm shift from language to visual imagery in advertising, the FTC continues to focus its efforts on linguistic claims and leaves visual imagery almost entirely unregulated. The Lanham Act has proven to offer similarly barren ground for enforcing the law against deceptive advertising as it applies to visual imagery. FTC and Lanham Act deceptive advertising cases proceed essentially as though the visual imagery revolution never happened.¹¹

8. 15 U.S.C. § 1125(a) (2012).

9. Rs1Master, *Funny Axe Commercial*, YOUTUBE (May 2, 2009), <http://www.youtube.com/watch?v=QfvcMsmr0Pc>.

10. Ibjkobefan84, *Snickers Betty White Super Bowl Commercial 2010*, YOUTUBE (Feb. 7, 2010), <https://www.youtube.com/watch?v=NEH1omnG77c>.

11. State consumer protection statutes, while not the focus of this Article, are also ineffective mechanisms for regulating deceptive visual imagery insofar as they adopt the FTC's approach to deceptive advertising. For example, Arizona's statute suggests that

Thus, we arrive at the central paradox of modern advertising law: There is an inverse correlation between the frequency and destructiveness of the form of deception on one hand and the strictness of its regulation on the other. Regulators monitor linguistic claims relatively closely and pursue deceptive advertising actions based on verbal assertions regularly, while business firms publicize deceptive claims through the superior influence of visual imagery with impunity. Following suit, business firms rarely bring deceptive advertising actions against visual imagery under the Lanham Act.

Policy-makers, public interest groups, and scholars alike have overlooked this pathological dynamic,¹² which this Article reveals and explores. Part I reviews the evidence demonstrating important differences in the psychological effects of visual imagery versus linguistic statements. Empirical studies, conducted in a variety of contexts, provide converging support for the idea that visual imagery is more persuasive than language and therefore dominates consumer perceptions and decision-making about advertised products and services. The studies also reveal why visual imagery and text are differentially persuasive—namely, the two communicative devices elicit different cognitive and emotional reactions from viewers. These insights are essential to understanding why consumers are more susceptible to, and influenced by, deceptive advertising claims conveyed through visual imagery versus text.

Part II demonstrates that the FTC has failed to make any notable regulatory changes in response to the massive shift from linguistic to imagistic advertising. It further reveals that Lanham Act litigation has taken a similar course. Although advertisers seem to strategically employ visual imagery to assert or imply claims that would be punished as deceptive if reduced to words,¹³ the government regulates visual imagery far less than language. This Part discusses the source of this regulatory inertia and why it continues. The Part then contrasts the lax enforcement of deceptive advertising law to the more active self-regulatory regime overseen by the Advertising Self-Regulatory Council (“ASRC”). The

the state’s courts use FTC and federal court decisions interpreting the Federal Trade Commission Act’s deceptive advertising provisions when enforcing the state statute. ARIZ. REV. STAT. ANN. § 44-1522(C) (2012). *See generally Deceptive Trade Practices*, in 50 STATE STATUTORY SURVEYS: BUSINESS ORGANIZATIONS: CONSUMER PROTECTION (2007) 0015 SURVEYS 6 (Westlaw).

12. The main exception is Jef I. Richards & Richard D. Zakia, *Pictures: An Advertiser’s Expressway through FTC Regulation*, 16 GA. L. REV. 77, 106 (1981), which asserts that the FTC had not adapted its regulatory scheme to visual imagery contemporaneously with the FTC’s recognition of this fact; *see also infra* notes 24–26 and accompanying text.

13. *See, e.g., Westen Raps Lack of “Hard” Data in National Ads*, ADVERTISING AGE, Aug. 14, 1978, at 70 (citing Tracy Westen, then Deputy Director, FTC Bureau of Consumer Protection, noting that the FTC’s regulation of language-based, factual advertising claims may have led business firms to make claims less directly); *cf. Avery M. Abernethy & George R. Franke, FTC Regulatory Activity and the Information Content of Advertising*, 17 J. PUB. POL’Y & MARKETING 239 (1998) (finding that when the FTC imposed on business firms a requirement that they substantiate their advertising claims, business firms responded by decreasing the amount of objective information in their ads).

ASRC system is inherently weak because, *inter alia*, it has no effective enforcement mechanism. It does, however, suggest that business firms and the advertising industry understand that visual imagery should be monitored for deception. Further, the ASRC cases counterintuitively evidence a stricter view of deception than the FTC and courts have adopted. By assuming a more sophisticated view of deception that better captures false or misleading visual imagery, the ASRC cases provide clues as to how the FTC and courts might regain their relevance in the deceptive advertising realm.

The Article concludes by weighing the implications of unchecked deception in advertising for the marketplace and society. Visual imagery, as a nuanced and sophisticated form of communication, provides a more fertile ground for deception than the linguistic components of ads.¹⁴ Leaving regulation to the care of business firms withdraws an essential safeguard against degradation of the informational function of commercial speech that Congress sought to protect through the Federal Trade Commission Act (“FTCA”), and that the Supreme Court has deemed worthy of constitutional protection. Moreover, because of advertising’s influential imprint on ourselves and our cultural character, the effects of substantially uninhibited commercial deception may spread beyond the marketplace and undermine critical social capital.

I. THE POWER OF VISUAL PERSUASION

Consumer persuasion is advertisers’ *raison d’être*; it is their specialty and their livelihood. As the colossal U.S. advertising budget suggests,¹⁵ the industry possesses ample resources to develop extraordinary expertise in the most effective methods of persuasion. While some advertising is based on intuition rather than science, the methods that modern advertisers use and avoid generally reflect careful research and successful experiences in convincing consumers to buy their clients’ products and services.¹⁶ This expertise has led advertisers to pursue an increasingly visual approach to consumer persuasion. Before the discovery of

14. This is not to say that language-based claims may not be subject to differing interpretations that render their deceptiveness arguable. See Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007). However, suspected deceptions communicated through visual imagery present an additional level of complexity. Pictures are inherently ambiguous and subjective to a far greater degree than most language. See, e.g., PAUL MESSARIS, VISUAL PERSUASION: THE ROLE OF IMAGES IN ADVERTISING v, xi, xiii (1997) (observing that “visual communication does not have an explicit syntax for expressing analogies, contrasts, causal claims, and other kinds of propositions,” and that “this relative indeterminacy of visual syntax . . . is arguably one of its principal strengths”).

15. Business firms spend over \$100 billion annually on advertising. *Kantar Media Reports U.S. Advertising Expenditures Increased 6.5 Percent in 2010*, KANTAR MEDIA (Mar. 17, 2011), <http://kantarmediana.com/intelligence/press/us-advertising-expenditures-increased-65-percent-2010> (reporting an outlay of \$131.1 billion for 2010).

16. The activities of the following prestigious advertising firms are illustrative: NETWORKED INSIGHTS, <http://www.networkedinsights.com/> (last visited July 19, 2012); LEO BURNETT, <http://www.leoburnett.com/> (last visited July 19, 2012); and OGILVY & MATHER, <http://www.ogilvy.com/> (last visited July 19, 2012).

photography and television, business firms included pen-and-ink illustrations in their ads.¹⁷ When these modern techniques of visual imagery emerged, advertisers embraced them as a means of communicating product- and service-related claims to consumers. Studies of the layout of magazine ads during the twentieth century demonstrate marked growth in the percentage of ad space covered with photographs.¹⁸ Television, a natural medium for visual persuasion in advertising, is the paramount expenditure in ad industry budgets—more than \$60 billion annually.¹⁹

David Ogilvy, whom *Time Magazine* called “the most sought-after wizard” in advertising,²⁰ recounts the story of visual imagery’s ascension over language: “Before we had tv, we had radio. . . . Then came tv, and the people who wrote radio commercials started writing tv commercials, and what they wrote was words. And they tried to use words to sell. Then after a bit they discovered it wasn’t words that sold, it was pictures.”²¹ Indeed, Ogilvy postulated that effective commercials include exactly two words: “Watch this.”²² Other advertising icons likewise lauded the comparative persuasive advantage of visual imagery over language.²³ According to these industry experts, visual imagery, as relatively unsophisticated as it was in the mid-twentieth century, greatly influenced consumers; other parts of ads were mainly superfluous.

Government regulators responsible for protecting the public and business firms from deceptive advertising were also early believers in the comparative appeal of the visual. Earl Kintner, a former chairman of the FTC, wrote in the late 1970s: “The printed word speaks to the mind, it asks a potential customer to believe a claim. A picture ‘proves’ to the mind, through the eye, the validity of that claim.”²⁴ Tracy Westen, then Deputy Director of the FTC Bureau of Consumer

17. Benjamin Franklin is credited with introducing the illustration to American advertising in 1728. JULIANN SIVULKA, *SOAP, SEX, AND CIGARETTES: A CULTURAL HISTORY OF AMERICAN ADVERTISING* 10 (2d ed. 2012).

18. See, e.g., Richard W. Pollay, *The Subsiding Sizzle: A Descriptive History of Print Advertising, 1900–1980*, 49 *J. MARKETING* 24, 28–29 (1985) (noting the increasing use of photography over copy in magazine ads from 1900 to 1980); Edward F. McQuarrie & Barbara J. Phillips, *It’s Not Your Father’s Magazine Ad: Magnitude and Direction of Recent Changes in Advertising Style*, 37 *J. ADVERTISING* 95, 99 (2008) (finding a dramatic reversal from text-dominated to picture-dominated magazine ads occurring between the mid-1990s and 2002).

19. Edmund Lee, *Among Media, TV is Still on Top*, *ADVERTISING AGE* (Mar. 29, 2011), <http://adage.com/article/media/media-tv-top-ad-dollars-viewers/149613/>.

20. *U.S. Business: The Men on the Cover: Advertising*, *TIME* (Oct. 12, 1962), <http://www.time.com/time/magazine/article/0,9171,829288,00.html>.

21. DENIS HIGGINS, *THE ART OF WRITING ADVERTISING: CONVERSATIONS WITH MASTERS OF THE CRAFT* 90 (1965) (interview with David Ogilvy).

22. *Id.*

23. See, e.g., Stuart Ewen, *Leo Burnett: Sultan of Sell*, *TIME*, Dec. 7, 1998, at 166 (referring to Leo Burnett as one who “defined the industry” and recounting his belief in the immense selling power of visual imagery).

24. EARL W. KINTNER, *A PRIMER ON THE LAW OF DECEPTIVE PRACTICES: A GUIDE FOR BUSINESS* 158 (2d ed. 1978).

Protection, referred to the verbal portions of ads as “trivial throwaways” and doubted that “one person in 1,000 even stopped to read them.”²⁵ And contemporaneous social commentary reported that several key FTC staff members were concerned that, “by concentrating on the literal truth or falsity of advertising claims, the FTC has virtually ignored what has become the most important component of advertising—its visual imagery.”²⁶

In the seminal Supreme Court case dealing directly with the power of visual imagery in advertising, *FTC v. Colgate-Palmolive Co.*,²⁷ the majority echoed these views. The television ad at issue in *Colgate-Palmolive* depicted shaving cream being applied to sandpaper, after which the sandpaper was shaved clean with a razor.²⁸ Among the FTC’s objections was the fact that the “sandpaper” depicted in the commercial was actually just Plexiglas sprinkled with sand.²⁹ The defendant argued that its undisclosed use of the sand-covered Plexiglas did not deceive consumers, because the cream could successfully shave sandpaper (although not in the brief time depicted in the ad).³⁰ The Court refused to accept a surreptitious fictitious demonstration for the real event. In its view, the commercial was deceptive insofar as it falsely conveyed to viewers that they were seeing actual, objective proof of the company’s claim that the product could shave sandpaper. This was problematic because visually proving a claim is qualitatively different from merely stating the claim.³¹ The Court held that false visual confirmation unfairly substantiated the claim to unsuspecting consumers.³²

Advertisers, federal regulators, and the Supreme Court thus share faith in the superior persuasive qualities of visual imagery over language. The question remains, however, whether consumers are, in fact, more susceptible to visual than linguistic persuasion. Behavioral scientists have empirically researched this question by directly comparing the two modes of communication. In these studies—conducted on disparate aspects of human cognition, emotion, and memory—visual imagery consistently outperforms language. The remainder of this Part explains how visual imagery persuades more effectively than language in advertising. It introduces the visual-verbal distinction with a prominent policy issue centered on the relative persuasive capabilities of visual and verbal communications, namely, government warnings designed to counteract pro-tobacco advertising claims. It then explores the psychological mechanisms underlying visual versus linguistic persuasion.

25. *Westen Raps Lack of “Hard” Data in National Ads*, *supra* note 13, at 70.

26. Richard P. Adler, *Commercials: The Subtle Sell*, *AM. FILM MAG.*, Oct. 1979, at 14, 14.

27. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

28. *Id.* at 376.

29. *Id.*

30. *Id.* at 387 n.16.

31. *Id.* at 383.

32. The demonstration misrepresented that it provided “objective proof of a seller’s product claim over and above the seller’s word” and so “invite[d] the viewer to rely on his own perception, for demonstrative proof of the claim.” *Id.* at 388, 393.

A. Tobacco Ads and Government-Mandated Warning Labels

In 2009, Congress passed legislation that substantially changed the warnings tobacco companies must include on cigarette packages and advertisements.³³ For the first time in U.S. history, the warnings must cover a sizable portion of the packages and ads, and they must include not only congressionally mandated statements but vivid images.³⁴ The Food and Drug Administration (“FDA”) has published nine acceptable images, most of which depict the negative health consequences of tobacco. They include a man smoking a cigarette through a tracheotomy hole, a smoker wearing an oxygen mask, diseased lungs, a diseased mouth, and a corpse.³⁵ Congress and the FDA were motivated to change the traditional text warnings due to concerns that they were easily overlooked, inadequately conveyed the risks associated with smoking, and were unlikely to be recalled when consumers decided whether to purchase tobacco products.³⁶

The policymakers had good reason to believe in the effectiveness of pictorial warnings. A burgeoning set of field studies, conducted in other countries that have mandated similar graphic imagery,³⁷ provide empirical support for the superior potency of imagery in anti-smoking messages. The studies find that, compared to text-only warnings, pictorial warnings are more noticeable and memorable; evoke stronger emotional responses; generate greater awareness of, and thought about, health risks associated with smoking; increase smokers’ motivation and attempts to quit; and decrease smoking.³⁸

Laboratory studies, which permit a more controlled look at the effects of different warnings at the cost of some diminished realism, add convergent support

33. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776 (2009) (to be codified at 15 U.S.C. § 1333).

34. *Id.* For more than 25 years, the warnings have consisted of four small statements that cigarette companies alternate on their packages and ads. Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. §§ 1333–1341 (1988)).

35. *Overview: Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/TobaccoProducts/Labeling/ucm259214.htm#FDA_s_Authority_to_Issue_Required_Warnings (last modified Feb. 24, 2012).

36. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,631–32 (June 22, 2011) (codified as amended at 21 C.F.R. § 1141 (2012)).

37. By 2011, more than 30 countries had adopted a requirement to include health-warning imagery on cigarette advertising or packaging. *Id.* at 36,633.

38. *See, e.g.,* Ron Borland et al., *Impact of Graphic and Text Warnings on Cigarette Packs: Findings from Four Countries Over Five Years*, 18 TOBACCO CONTROL 358 (2009); Rob Cunningham, *Gruesome Photos on Cigarette Packages Reduce Tobacco Use*, 87 BULL. WORLD HEALTH ORG. 569 (2009); David Hammond et al., *Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study*, 32 AM. J. PREV. MED. 202 (2007); Victoria White et al., *Do Graphic Health Warning Labels Have an Impact on Adolescents’ Smoking-Related Beliefs and Behaviours?*, 103 ADDICTION 1562 (2008).

for the comparative persuasiveness of graphic imagery over text.³⁹ In one study, published in *The Journal of the American Medical Association* (“JAMA”), researchers investigated the degree to which adolescents viewing pro-tobacco advertising images in magazines pay attention to government-mandated textual warnings about the health dangers associated with tobacco use.⁴⁰ The ads, which were pulled from actual magazines, included such scenes as a rugged cowboy wrangling a herd of wild horses and beefy men arm wrestling while attractive people lounged in the background.⁴¹ Participants viewed the ads for as long as they desired, unaware that they would subsequently be asked about them.⁴² On average, participants viewed each ad for about nine seconds, of which they spent less than one second attending to the warning.⁴³ For almost half of the advertisements, participants overlooked the warning entirely.⁴⁴ For another 20% of the ads, participants looked at the warning but did not attend to it long enough to read any of it.⁴⁵ For the remaining 37% of the ads, participants attended to the warning long enough for a person of average reading speed to process about one-third of it.⁴⁶ Not once did a participant view the warning long enough to read it in its entirety.⁴⁷ Thus, with remarkable consistency, the textual warnings made a dismal showing against the more captivating pro-tobacco imagery.

In a subsequent laboratory experiment, researchers tested the effects of a text-only warning on a cigarette package, “WARNING: Smoking Causes Mouth Diseases,” versus this same text accompanied by a picture of a diseased mouth.⁴⁸ The severity of the disease depicted in the picture varied from low to moderate to high.⁴⁹ Participants (current smokers) who viewed the highly diseased mouth

39. Governments often enact other anti-smoking measures along with the graphic imagery, making it difficult to discern which regulatory efforts caused the results in field studies. Field study results can also be attributed to social influences—for example, changing norms or economic conditions—that co-occur with the graphic imagery. Researchers take steps in these studies, however, to isolate the various factors and identify the role of the imagery in the results. Laboratory studies permit researchers to rule out influences other than those under investigation but are conducted in a more artificial environment. Convergent results across studies using differing methodologies permit greater confidence that the results accurately reflect reality.

40. Paul M. Fischer et al., *Recall and Eye Tracking Study of Adolescents Viewing Tobacco Advertisements*, 261 JAMA 84 (1989).

41. *Id.* at 85–86.

42. *Id.* at 85.

43. *Id.* at 87.

44. *Id.*

45. *Id.*

46. The researchers point out that they used 0.1 second as the minimum amount of time for a participant to be designated as having read any part of the warning, which is a generous measure of reading speed. Had they used a more realistic criterion of 0.2 second, only 18% of the ads would fall in the category of the warning having been even partially read. *Id.* at 89.

47. *See id.* at 87.

48. Jeremy Kees et al., *Understanding How Graphic Pictorial Warnings Work on Cigarette Packaging*, 29 J. PUB. POL’Y & MARKETING 265, 268 (2010).

49. *Id.*

reported significantly greater intentions to quit smoking than those who viewed the moderately diseased mouth, and those who viewed the moderately diseased mouth reported significantly greater intentions to quit smoking than those shown either the minimally diseased mouth or only the text.⁵⁰ An ancillary measure indicated that the pictures of the moderately and highly diseased mouths decreased participants' ability to recall the textual warning.⁵¹ This finding indicates that the graphic imagery diverted participants' attention from the textual warning, similar to the *JAMA* study. An additional ancillary measure revealed that fear mediated the effect of the pictures on intentions to quit—participants experienced higher levels of fear when the mouth was more diseased, and this fear was significantly related to intentions to quit.⁵²

The effectiveness of graphic warnings, as illustrated by these studies, gives the tobacco industry powerful incentives to resist them. For more than 45 years, the companies acquiesced in the textual warnings, never once legally challenging them.⁵³ The new regulations, in contrast, provoked the tobacco industry to immediate attack on freedom of speech grounds. Five of the largest companies have vigorously contested the new imagery-based warnings in federal court.⁵⁴ They argue that the graphic imagery, unlike the historical text warnings, unconstitutionally forces the companies to advocate against the purchase of their products.⁵⁵ In their view, whereas the text warnings were permissible as “factual and uncontroversial information” on the risks of tobacco use,⁵⁶ the emotionally charged imagery transforms cigarette ads into anti-smoking messages.⁵⁷

As mentioned earlier, the Supreme Court has interpreted the First Amendment to protect non-deceptive commercial speech from government intrusion.⁵⁸ According to the Court, this right encompasses not only freedom from censorship but freedom from speaking against one's will.⁵⁹ However, the right is limited. The Court permits the government to compel a business firm to speak against its own interests when such speech is reasonably related to a legitimate government interest, such as countering information in an ad that would deceive consumers if presented without the mandated disclosure.⁶⁰ According to the

50. *Id.* at 270.

51. *Id.* at 271.

52. *Id.* at 270–71.

53. See Complaint ¶ 1, *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266 (D.D.C. 2012) (No. 1:11CV01482), 2011 WL 3611561.

54. *Id.*

55. *Id.* ¶ 3.

56. *Id.* (referring to the standard for warnings articulated by the U.S. Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

57. *Id.* ¶¶ 3–4.

58. See *supra* note 5 and accompanying text; see also *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

59. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion).

60. See *Zauderer*, 471 U.S. at 651; *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 527 (1992).

tobacco companies, this standard of review is insufficiently stringent for judging mandated graphic imagery, because the graphic imagery transcends disclosure to become the main message of the ad. They argue that courts should require the government to pass strict scrutiny review.⁶¹

The companies also claim that some of the field research is flawed—that graphic images have not been demonstrated in the attacked research to actually deter smoking.⁶² Without sound evidence that graphic images are effective, they argue, the FDA has no interest in requiring the companies to display them.⁶³ Consequently, the FDA's mandate should fail under any standard of review.⁶⁴

The tobacco industry's reaction to the new regulations presents an intriguing conundrum. Why would the companies commit hefty funds to fighting the imagery if it were as ineffective as they claim? They argue that allowing the new FDA regulations would set a precedent in favor of the government hijacking industry advertising and using it to the companies' own detriment.⁶⁵ But they could have made the same objection to the text warnings and did not. It is possible that the companies are fighting, in large part, the mandated increase in the size of the warnings. A more likely explanation for the current litigation, however, is that the companies know, from existing research and firsthand experience, the powerful persuasive effects of imagery.

For a long time, the tobacco industry stimulated demand for its products by showcasing compelling pro-smoking visual imagery—depicting smokers as independent, adventurous, sophisticated, glamorous, sexy, and popular.⁶⁶ The companies enjoyed broad freedom to use this imagery to its fullest effect for decades, until Congress banned televised cigarette ads, and a Master Settlement Agreement with many state governments severely curtailed the companies' ability to advertise in magazines and on outdoor displays.⁶⁷ Ironically, the industry is now

61. Complaint, *supra* note 53, ¶¶ 78–80.

62. *Id.* ¶¶ 41–54.

63. *Id.* ¶ 55(b).

64. *Id.* ¶ 5. These claims have produced mixed outcomes. A district court judge has ruled the government-mandated graphic imagery on cigarette packages unconstitutional on First Amendment grounds. *R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d at 277. In contrast, the Sixth Circuit has upheld the graphic imagery requirements. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 531 (6th Cir. 2012).

65. *Id.* ¶ 3.

66. See, e.g., Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8339–48 (July 2, 1964) (codified at 16 C.F.R. § 408 (2000)); RICHARD A. POLLAY, HOW CIGARETTE ADVERTISING WORKS: RICH IMAGERY AND POOR INFORMATION (2002), available at <http://www.smoke-free.ca/defacto/D057-Pollay-HowCigaretteAdvertisingWorks.pdf>; Daniel Romer & Patrick Jamieson, *Advertising, Smoker Imagery, and the Diffusion of Smoking Behavior*, in SMOKING: RISK, PERCEPTION, & POLICY 127 (Paul Slovic ed., 2001). A gallery of tobacco ads illustrating the strategic use of visual imagery is available at *Pollay-Ads*, TOBACCO.ORG, <http://archive.tobacco.org/ads/> (last visited Sept. 4, 2012)..

67. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1340 (1994)); MASTER SETTLEMENT

left with little but the bland and relatively feeble persuasive tools the government has traditionally employed in its own anti-smoking efforts while compelled to deploy its most powerful persuasive tools against itself.⁶⁸ Ultimately, some of the specific warning images selected by the FDA may prove ineffective, just as many advertisements miss their mark.⁶⁹ But the empirical evidence, the tobacco industry's historical preference for pro-smoking visual imagery, its complacent adherence to text warning requirements, and its vehement protest against the new graphic-imagery warning mandate strongly support the potency of graphic-imagery warnings relative to mere statements of smoking's deleterious effects on health.

B. How Visual Images Dominate

The tobacco industry's experience illustrates a general phenomenon that has caused visual imagery to dominate not only advertising but communication more broadly. Motion pictures increasingly rely on visual effects over well-crafted dialogue, original plots, and character development.⁷⁰ Video games offer highly absorbing virtual environments.⁷¹ Print news is succumbing to more visual news sources, such as television and the Internet.⁷² Whatever the supply-side explanations are for these developments, they reflect fundamental human psychological tendencies. This Part describes the causes of enhanced human interest in, and susceptibility to, visual imagery. It shows how imagery offers advertisers a unique and powerful tool to persuade and, when desired, deceive consumers.

AGREEMENT (1998), available at <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/>.

68. See Complaint, *supra* note 53, ¶ 25 (“The [Family Smoking Prevention and Tobacco Control] Act restricts (subject to extremely limited exceptions) cigarette advertising to black text on a white background.”).

69. See Steven Reinberg, *FDA Unveils Graphic Images for Cigarette Packs*, HEALTH.COM (June 21, 2011), <http://news.health.com/2011/06/21/fda-unveils-graphic-images-for-cigarette-packs/> (citing Dr. Jonathan Whiteson, director of the Cardiac and Pulmonary Wellness and Rehabilitation Program at NYU Langone Medical Center, who suggests that the images may be so powerful as to cause people to deny that such things could happen to them and that the images would be more effective if they portrayed smoking as uncool rather than a health risk).

70. Do not see, for example, AVATAR (Twentieth Century Fox 2009).

71. See Nicholas Jackson, *Infographic: Video Game Industry Statistics*, ATLANTIC (June 3, 2011, 2:32 PM), <http://www.theatlantic.com/technology/archive/2011/06/infographic-video-game-industry-statistics/239665/> (reporting the computer and video game industry's revenue for 2009 as \$10.5 billion).

72. See Frank Ahrens, *The Accelerating Decline of Newspapers*, WASH. POST (Oct. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html> (reporting that current daily newspaper purchasing is down 31% from 1940).

1. Visual Appeal and Attention

The human mind is equipped to focus on only one subject at a time. Although we may appear to attend to multiple subjects simultaneously, in reality, our attention alternates back and forth among them. As a result of this perceptual constraint, we fail to see much of what goes on in our environment. Drs. Dan Simons and Chris Chabris conducted a now classic experiment that demonstrates this concept, termed “inattention blindness.”⁷³ The psychologists showed participants a short video—about a minute in length—of two teams of people, each moving around and passing a basketball.⁷⁴ One team wore white shirts while the other team wore black shirts, and participants counted the number of times the players in the white shirts passed the ball to one another.⁷⁵ During the video, a person in a gorilla suit strolled from one side of the screen into the middle of the players, stopped to face the camera and thump its chest, and then exited the other side of the screen.⁷⁶ In total, the gorilla was on screen for about nine seconds.⁷⁷ To the researchers’ surprise, about half of the viewers failed to notice the gorilla.⁷⁸ Because their attention was focused on what the players were doing, they missed a remarkable element of the scene.

Psychologists have studied inattention blindness in other social contexts as well. It underlies, for example, the dangers of talking on a mobile phone while driving. Given the unitary nature of our attentional system, attention paid to calls necessarily detracts from attention paid to driving.⁷⁹ In essence, mobile phone conversations render cars and pedestrians invisible to the brain though seen with the eye.

The human ability to focus on only one item at a time means that consumers are unlikely to see all aspects of advertisements. The high cost of airing television commercials motivates business firms to keep them short. Magazine ads, billboards, and other stationary commercial media receive no more than a passing glance or cursory review, given the many other parts of the environment competing for our attention. Consequently, aspects of advertisements that readily capture our attention are often the only ones that we process. In the absence of a comprehensive processing approach to ads, which few consumers employ, less attention-grabbing parts are necessarily overlooked.

73. This study, originally conducted in 1999, is reviewed in CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* 5–6 (2010).

74. *Id.* at 5 (video available at www.theinvisiblegorilla.com).

75. *Id.*

76. *Id.* at 6.

77. *Id.*

78. *Id.*

79. See *id.* at 22–26; Ira E. Hyman Jr. et al., *Did You See the Unicycling Clown? Inattention Blindness While Walking and Talking on a Cell Phone*, 24 *APPL. COGNIT. PSYCHOL.* 597 (2010); David L. Strayer & Frank A. Drews, *Cell-Phone-Induced Driver Distraction*, 16 *CURRENT DIRECTIONS PSYCHOL. SCI.* 128 (2007).

Messages conveyed through visual imagery therefore possess a persuasive advantage, because the visual components of ads capture consumer attention more so than the textual elements.⁸⁰ The lure of visual imagery, combined with consumers' limited ability and inclination to process ads, often results in the ad text being neglected.

2. *Ease of Processing*

The human brain is better adapted to process visual imagery than language. As a result of thousands of years during which our ancestors communicated through pictographs, we process imagery with relative ease.⁸¹ That processing text requires greater effort and ability is evident from the comparative popularity and role of each activity in our society. People gravitate toward visual media—such as movies, television, and video games—for entertainment; less often do they choose to read in their leisure time.⁸² Imagery is fun, whereas linguistic communications are more mentally taxing. Consequently, when people are not highly motivated or able to comprehensively process a mixed pictorial and textual message, the text often goes unheeded, and the easily processed visual imagery prevails.

Consumers generally are not inclined to thoroughly contemplate ads, given the many and more compelling demands on their time and thought. Visual messages in ads thus exert greater influence on consumer attitudes and behaviors than their linguistic counterparts, because consumers process them more completely.

The relative ease with which people process imagery imbues its messages with other persuasive advantages as well. Consumers base their opinions of a product in part on how they feel about it. When an ad is easy to process,

80. See, e.g., Rik Pieters & Michel Wedel, *Attention Capture and Transfer in Advertising: Brand, Pictorial, and Text-Size Effects*, 68 *J. MARKETING* 36, 44 (2004); see also ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940*, at 153 (1986) (“[T]he intensified competition for a few seconds of the consumer’s attention gave primacy to the illustration. It was the picture that had to capture the reader’s fleeting glance and lead her toward the sales argument in the text.”).

81. See Keith Kenney & Linda M. Scott, *A Review of the Visual Rhetoric Literature*, in *PERSUASIVE IMAGERY: A CONSUMER RESPONSE PERSPECTIVE* 17, 20 (Linda M. Scott & Rajeev Batra eds., 2003) (“The Greek alphabet, invented around 750 B.C.E., was the first to encode speech using symbols for sounds. For at least three thousand years prior to that breakthrough, humanity had been writing with some adaptation of picturing, in the form of pictographies and syllabaries. . . . The full scope of human history shows pictures, not alphabetic words, as the primary mode of discourse.”); Stephen Jay Gould, *Evolution by Walking*, 104 *NAT. HIST.* 10 (1995) (“[W]e think best in pictorial or geometric terms. Words are an evolutionary afterthought.”).

82. See BUREAU OF LABOR STATISTICS, USDL-12-1246, *AMERICAN TIME USE SURVEY—2011 RESULTS* 25 tbl.11, available at www.bls.gov/news.release/pdf/atus.pdf (showing that persons 15 years of age and older watch an average of 2.57 hours of television daily on weekdays and 3.19 hours daily on weekends and holidays, but read merely 0.28 and 0.33 hour, respectively).

consumers experience more positive feelings toward the advertised product.⁸³ The opposite is also true—when an ad is difficult to process, consumers experience more negative emotions toward the product.⁸⁴ The comparatively easily processed visual imagery may thereby impart to advertised goods greater appeal unrelated to the content of the message or the inherent qualities of the products. Further, easily processed information is more often perceived as accurate.⁸⁵ Consumers are obviously inclined to base their purchasing behavior on apparently true versus apparently false information, rendering the more easily processed visual imagery more persuasive. Finally, visual imagery can communicate complex ideas succinctly. Concepts that would be cumbersome or impossible to convey linguistically can be communicated with relative ease through visual imagery—hence the popular adage: “A picture is worth a thousand words.”

3. *Believability*

Humans are visual creatures; we rely on, and place great confidence in, our visual perceptions.⁸⁶ This trait explains why trial-strategy books counsel attorneys to present their evidence visually in order to engage and convince jurors,⁸⁷ and trial consultants have developed advanced techniques for persuasive

83. Piotr Winkielman et al., *Cognitive and Affective Consequences of Visual Fluency: When Seeing is Easy on the Mind*, in PERSUASIVE IMAGERY: A CONSUMER RESPONSE PERSPECTIVE 75, 80–83 (Linda M. Scott & Rajeev Batra eds., 2003); Angela Y. Lee & Aparna A. Labroo, *The Effect of Conceptual and Perceptual Fluency on Brand Evaluation*, 41 JMR 151 (2004); Rolf Reber et al., *Effects of Perceptual Fluency on Affective Judgments*, 9 PSYCHOL. SCI. 45 (1998); Piotr Winkielman & John T. Cacioppo, *Mind at Ease Puts a Smile on the Face: Psychophysiological Evidence that Processing Facilitation Elicits Positive Affect*, 81 J. PERSONALITY & SOC. PSYCHOL. 989 (2001).

84. Hyejeung Cho et al., *Images and Preferences: A Feelings-as-Information Analysis*, in VISUAL MARKETING: FROM ATTENTION TO ACTION 259, 272 (Michel Wedel & Rik Pieters eds., 2008) (“Even very desirable product features will be less appreciated when the product description is difficult to process . . .”); Nader T. Tavassoli, *The Effect of Selecting and Ignoring on Liking*, in VISUAL MARKETING: FROM ATTENTION TO ACTION 73, 81 (Michel Wedel & Rik Pieters eds., 2008) (“[I]t appears to be a robust effect that *not being selected for visual attention* in a competitive stimulus environment has negative consequences on the evaluation of a visual object.” (emphasis in original)).

85. See, e.g., Matthew S. McGlone & Jessica Tofiqbakhsh, *Birds of a Feather Flock Conjointly?: Rhyme as Reason in Aphorisms*, 11 PSYCHOL. SCI. 424 (2000); Rolf Reber & Norbert Schwarz, *Effects of Perceptual Fluency on Judgments of Truth*, 8 CONSCIOUSNESS & COGNITION 338 (1999); Winkielman et al., *supra* note 83, at 79–80.

86. Jurors are greatly influenced by eyewitness testimony, for example. This evidence takes precedence over other credible evidence, such as fingerprint and handwriting analyses, or polygraph results. Elizabeth F. Loftus, *Psychological Aspects of Courtroom Testimony*, 347 ANNALS N.Y. ACAD. SCI. 27, 32–33 (1980). It carries such weight that it is the most common reason for wrongful convictions as demonstrated by exonerations following DNA analyses. Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892, 892–93 (2005).

87. STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 25 (2d ed. 1997) (“At every stage of the trial the impact of your case can be enhanced through the use of photographs, diagrams, charts, drawings, models, transparencies, enlargements,

visual depictions.⁸⁸ It also underlies judicial concern that visual evidence, such as computer-generated accident reenactments or photographs from crime scenes, will unduly prejudice jurors.⁸⁹ We may have grown more skeptical of photographs and other images in recent years as manipulation techniques have become increasingly common and widely discussed. Our evolutionarily induced response, however, is to believe what we see, and it is unlikely that this instinct is overcome by the knowledge that some images may have been manipulated in some ways. Rather, we accept images as accurate depictions of scenes unless something alerts us to the contrary.⁹⁰ Words, on the other hand, are more suspect—the cultural truism “talk is cheap” reflects our inherent distrust of linguistic assertions. Consequently, as the Supreme Court recognized in *Colgate-Palmolive*, pictures in advertising demonstrate the truth of asserted claims more forcefully than do mere statements. Consumers see no need to resist what they perceive to be true.⁹¹

Consumers are also less likely to argue successfully against visual imagery than text because pictures convey messages more subtly. When messages are subtle, our innate tendencies to question potentially biased or inaccurate content are not fully triggered. Consumers thus absorb them, often without awareness that their perceptions of the product or service have changed. The classic cigarette ads are illustrative. Through visual imagery, the ads associated smoking with youthfulness, health, and fun, rather than disease, decay, and

videotapes, and even computer-generated graphics. . . . [F]or the truly important points in your case, ask yourself, ‘How can this idea be illustrated?’”); THOMAS A. MAUET, TRIAL TECHNIQUES 219 (8th ed. 2010) (“This is the age of visual learning, so trials must become more visual as well. . . . [V]isual aids and exhibits are often dramatic, and seeing is usually more persuasive than hearing . . .”).

88. DECISIONQUEST, <http://www.decisionquest.com/Public/Home/index.cfm> (last visited Aug. 25, 2012); FOCAL POINT, <http://www.thefocalpoint.com> (last visited Aug. 25, 2012); JURIS PRODUCTIONS, <http://www.jurisproductions.com/index.html> (last visited Aug. 25, 2012).

89. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 212, at 368 (6th ed. 2006); see also *Clark v. Cantrell*, 504 S.E.2d 605, 612 (S.C. Ct. App. 1998) (recognizing video animation as “a powerful evidentiary tool [that] can have greater weight and longer-lasting impact than conventional testimony”); *State v. Farner*, 66 S.W.3d 188, 209 (Tenn. 2001) (“[T]he jury may be so persuaded by [computer recreation’s] life-like nature that it becomes unable to visualize an opposing or differing version of the event . . .”). Empirical research with mock jurors substantiates this judicial intuition. Kevin S. Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors’ Decisions in a Murder Trial: Probative or Prejudicial?*, 21 L. & HUM. BEHAV. 485 (1997); Saul M. Kassin & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 L. & HUM. BEHAV. 269 (1997).

90. Inbal Gurari et al., *Beauty in the “I” of the Beholder: Effects of Idealized Media Portrayals on Implicit Self-Image*, 28 BASIC & APP. SOC. PSYCHOL. 273 (2006); Duane A. Hargreaves & Marika Tiggemann, *Muscular Ideal Media Images and Men’s Body Image: Social Comparison Processing and Individual Vulnerability*, 10 PSYCHOL. MEN & MASCULINITY 109 (2009); Marika Tiggemann et al., *The Processing of Thin Ideals in Fashion Magazines: A Source of Social Comparison or Fantasy?*, 28 J. SOC. & CLINICAL PSYCHOL. 73 (2009).

91. See *supra* notes 27–32 and accompanying text.

mortality, without explicitly drawing the connections. Had the ads stated these messages in words, consumers likely would have considered them laughable and rejected them outright after research documented the health risks associated with smoking. But the imagery-driven campaigns increased cigarette sales.⁹²

More recent ads for a variety of products rely on similar presentations. Samsung, for example, aired a commercial during Super Bowl 2012 for its new mobile phone.⁹³ The “Thing Called Love” spot opens with a group of people standing in line, bored and dejected. A man shows up with Samsung’s latest phone, and, as its features captivate the group, a massive street party erupts. A rock musician sings in a brightly colored pink-and-white one-piece outfit. Samsung phones fall from the sky, freeing the crowd from their doldrums and inspiring them to sing and dance. One man emotionally exclaims, “Freedom!” More and more people join the celebration. A marching band enters the scene. Men hug. A skateboarder jumps a set of stairs. A gospel choir appears. A BMX cyclist completes a stunt jump. A man is shot from a cannon. People zipline. All in celebration of another new mobile phone.⁹⁴ Business firms pay millions of dollars to air ads during the Super Bowl and hire top advertisers to research the effectiveness of the ads before selecting them for this coveted time slot.⁹⁵ Visual masterpieces such as “Thing Called Love” undoubtedly test well, and better than they would had they relied on words to influence consumers. After all, words have to make sense.

A pair of traits magnifies consumers’ predisposition to believe visual imagery over words. First, consumers must translate visual imagery into words in order to consider what the imagery conveys before they can refute it in earnest. This translation is difficult for complex images, and all but the most determined consumers are likely to abandon the critique and accept in the main the advertiser’s message.⁹⁶ Second, when we visualize an event in our own minds, we more readily accept its potentiality and take measures to make it happen.⁹⁷ For example, if we can envision becoming more attractive through use of a cosmetic or improving our social status by driving a particular vehicle, as portrayed in ads, we

92. See *supra* note 66 and accompanying text.

93. Samsung, “Thing Called Love” 2012 Super Bowl Ad, ADWEEK (Feb. 5, 2012), <http://www.adweek.com/video/2012-super-bowl-ads/samsung-thing-called-love-2012-super-bowl-138067>.

94. *Id.*

95. Mike James, *A Social Media Gauge of Super Bowl Ad Winners*, L.A. TIMES (Feb. 10, 2012), http://latimesblogs.latimes.com/sports_blog/2012/02/a-social-media-gauge-of-super-bowl-ad-winners.html.

96. MARSHALL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 231 (MIT Press 1994) (1964) (“The unconscious depth-messages of ads are never attacked by the literate, because of their incapacity to notice or discuss nonverbal forms of arrangement and meaning. They have not the art to argue with pictures.”).

97. See, e.g., John S. Carroll, *The Effect of Imagining an Event on Expectations for the Event: An Interpretation in Terms of the Availability Heuristic*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 88 (1978); W. Larry Gregory et al., *Self-Relevant Scenarios as Mediators of Likelihood Estimates and Compliance: Does Imagining Make It So?*, 43 J. PERSONALITY & SOC. PSYCHOL. 89 (1982).

are more likely to embrace such claims and purchase the product. Visual imagery provides the mental imagery directly. Text, in contrast, requires consumers to generate the corresponding mental imagery, which takes a level of motivation and imagination many consumers lack.

4. *Emotionality*

Although the Supreme Court rests its commercial speech doctrine on the informational benefits of advertising, it does not require that advertisers appeal to consumers' rational side. On the contrary, ads often target consumers' emotions. These emotions play an important role in consumer decision-making, because consumers consult their feelings about products and services when deciding whether to purchase them.⁹⁸ Feelings are particularly influential when consumers are unmotivated or unable to consider thoroughly what the advertised product or service truly has to offer, which is often the case. In this situation, consumers' feelings naturally predominate, as they are the main source of information on which consumers base their decisions. Consumers' emotions also interplay with their cognitions. When consumers feel positively toward a product or service, they are more likely to contemplate its positive characteristics. These ruminations, in turn, increase their desire to acquire it.⁹⁹ Visual imagery is therefore more persuasive than text in part because it evokes greater emotion in the audience. Just as sad or joyous movies tend to move viewers more than textual descriptions of the story, advertising claims made through imagery are more emotionally evocative than their linguistic counterparts.¹⁰⁰

Akin to emotion, pictures can convey "the sense of some ineffable quality in the product."¹⁰¹ This quality underlies the U.S. government's periodic decisions to censor certain information in its visual form. To illustrate, after Navy SEALs killed Osama bin Laden, President Obama decided against releasing photographs of bin Laden's corpse.¹⁰² Obama and his top advisors reasoned that disseminating the images would create a national security risk by inciting further violence,¹⁰³ despite the fact that they were verbally described in detail in the media. A CBS News national security correspondent cautioned, for example: "bin Laden was shot twice at close range, once in the chest and once in the head, right above his left

98. See, e.g., Cho et al., *supra* note 84, at 260–61.

99. See, e.g., Leonie Huddy & Anna. H. Gunthorsdottir, *The Persuasive Effects of Emotive Visual Imagery: Superficial Manipulation or the Product of Passionate Reason?*, 21 *POLITICAL PSYCHOL.* 745 (2000).

100. Empirical support for the differential effects of imagery versus text on emotion, and ultimately judgments, appears, for example, in juror decision-making studies. See, e.g., Douglas et al., *supra* note 89, at 492 (finding that jurors who viewed photos of a crime victim reported feeling more anxious, anguished, disturbed, and shocked—and were almost twice as likely to find the defendant guilty—than jurors who merely read a transcript describing what the photos depicted).

101. MARCHAND, *supra* note 80, at 238.

102. Mark Landler & Mark Mazzetti, *Obama Says No on Death Photo; New Raid Detail*, N.Y. TIMES, May 5, 2011, at A1.

103. *Id.*

eye, and that bullet opened his skull, exposing the brain, and it also blew out his eye. So these are not going to be pictures for the squeamish.”¹⁰⁴ The photos of bin Laden’s body were deemed sufficiently more inflammatory than this graphic description to warrant withholding them from public consumption.

As a general matter, American journalists sometimes keep the public “one descriptive remove[d]” from disturbing events, meaning that they describe the events verbally but refrain from showing corresponding photos or footage.¹⁰⁵ These journalists view their stories narrowly, that is, as notice to the public that a particular event has occurred, which can be readily conveyed by language. Other journalists believe, however, that “the visceral unpleasantness of the image is part of its basic statement of fact,” making the image crucial to accurately and fully depicting the story.¹⁰⁶ In each case, the journalists acknowledge the comparatively powerful affective qualities of visual imagery. Similar concerns motivate litigants and families of crime or accident victims to petition courts to seal photographic or video evidence.¹⁰⁷ They adamantly believe that verbal testimony, although difficult to hear, is qualitatively different from visual documentation of the same scene. Underlying their claims that photographs and video coverage of the event are more emotionally distressing and constitute a greater invasion of privacy is a deep-seated concern about the superior communicative power of visual imagery over words.

5. *Salience in Mind*

Information exerts a greater influence on our decisions and behavior when it is more salient, or prominent, in our minds.¹⁰⁸ Consequently, if the

104. *Martin: Bin Laden Pictures Not for the Squeamish*, CBS NEWS (May 4, 2011, 12:34 PM), http://www.cbsnews.com/8301-503543_162-20059719-503543.html. A writer for *The New Yorker* voiced another reason for sealing the bin Laden photos: If the images were publicly disseminated, he surmised, it would “instantly supplant every other account of Sunday’s raid as the iconic representation of America’s moment of triumph over its most wanted enemy.” Philip Gourevitch, *Don’t Release the Photos*, NEW YORKER (May 3, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/05/dont-release-the-photos.html>. According to this view, despite the detailed written accounts of the events surrounding bin Laden’s death, a single photographic image may seize the public’s minds and constitute its collective memory. *Id.*

105. Philip Kennicott, *The Illustrated Horror of Conflict: Images Convey Facts That Are Hard to Face*, WASH. POST, Mar. 25, 2003, at C1.

106. *Id.*

107. For example, the family of Dawn Brancheau, a SeaWorld trainer who was killed by a whale at the park, argued that public release of the photographs and video would be severely painful to them, although written accounts of the events surrounding Brancheau’s death had been widely disseminated. Sarah Lundy, *Images of SeaWorld Death Remain Sealed*, L.A. TIMES (Mar. 25, 2010), <http://articles.latimes.com/2010/mar/25/nation/la-na-orca25-2010mar25>.

108. See, e.g., John A. Bargh et al., *The Additive Nature of Chronic and Temporary Sources of Construct Accessibility*, 50 J. PERSONALITY & SOC. PSYCHOL. 869 (1986); Valerie E. Jefferis & Russell H. Fazio, *Accessibility as Input: The Use of Construct Accessibility as Information to Guide Behavior*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1144

messages conveyed in advertisements are not highly accessible in consumers' minds, the ads' effects will be vitiated. Consumers will be less likely to harbor positive thoughts and feelings toward the product and to purchase it. Any part of an ad that renders the message more accessible, in contrast, provides the advertised commodity with a persuasive advantage. Not surprisingly, the pictorial elements of ads are generally more accessible than the text.¹⁰⁹ Visual imagery's enhanced magnetism, fluency, believability, and affectivity all increase the likelihood that claims made through this device will predominate over linguistically conveyed claims in consumers' minds.¹¹⁰

6. Summary

These advantages over text and speech make visual imagery a uniquely powerful communication tool. Like any tool, it can be used for good or ill. When employed to enlighten with accurate and useful information, visual imagery offers tremendous advantages to consumers and business firms. When deployed for deceptive purposes, the persuasiveness of visual imagery compounds the harm of the advertiser's underlying dishonest message by enhancing its power to manipulate. If concerns for consumer protection and fair competition among business firms justify regulating deceptive advertising at all, then the case for regulating imagery-based advertising is stronger than the case for regulating verbal advertising. Whereas a spoken lie about a product or service harms consumers and competing business firms, the visually "proved" lie is *a fortiori* detrimental and unfair to them.

II. THE REGULATION OF VISUAL IMAGERY VERSUS LANGUAGE

Considering that visual imagery has reigned as the monarch of advertising techniques for several decades, one might reasonably expect the FTC and courts to focus their regulatory efforts on protecting consumers from visually deceptive advertising. That expectation is perfectly wrong, however. When advertisers began switching from verbal to pictorial persuasion on a large scale, FTC staff suspected that a communication revolution was taking place.¹¹¹ They struggled, though, to

(2008); Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493 (1995).

109. See, e.g., Wendy Bryce & Thomas J. Olney, *Modality Effects in Television Advertising: A Methodology for Isolating Message Structure from Message Content Effects*, 15 ADVANCES CONSUMER RES. 174 (1988); Terry L. Childers & Michael J. Houston, *Conditions for a Picture-Superiority Effect on Consumer Memory*, 11 J. CONSUMER RES. 643 (1984); Terry L. Childers et al., *Memory for the Visual and Verbal Components of Print Advertisements*, 3 PSYCHOL. & MARKETING 137 (1986); Edward F. McQuarrie & David Glen Mick, *Visual and Verbal Rhetorical Figures Under Directed Processing Versus Incidental Exposure to Advertising*, 29 J. CONSUMER RES. 579 (2003).

110. For example, visual imagery enhances memory by providing a holistic view that unifies individual elements, a fluency issue. Deborah J. MacInnis & Linda L. Price, *The Role of Imagery in Information Processing: Review and Extensions*, 13 J. CONSUMER RES. 473, 475-76 (1987).

111. See *supra* note 25-26 and accompanying text.

comprehend its consequences for consumers and to develop a coherent response.¹¹² Presently, the situation remains strikingly consistent.

The FTC continues to regulate advertising as if it were still primarily a verbal profession, ignoring the visual imagery revolution that turned advertising from a mere business technique into a metamorphic social force. Private remedies for false advertising under the Lanham Act have failed to take up the slack or suggest new avenues to effective regulation. The FTC and courts have tried to cope with the few types of visual advertising claims involving clear and flagrant deception. Regulation of even this subset of deceptive imagery is sparse, however, and has actually decreased while visual imagery has proliferated. Also substantially unregulated is the universe of less obvious, yet often very effective, deceptive advertising claims made through visual imagery.

To reveal the disjunction between deceptive advertising practices and regulation, this Part first describes the general framework that the FTC and courts apply in deceptive advertising cases. It then shows how these policymakers have faltered in employing the framework to decide allegations of deceptive visual imagery. After presenting the formal legal mechanisms designed to inhibit deceptive visual imagery in advertising, the Part explains how a self-regulatory body, the Advertising Self-Regulatory Council (“ASRC”) (previously the National Advertising Review Council (“NARC”)), has attempted to monitor this realm. While ASRC lacks the legal authority necessary to deter deceptive claims, its cases suggest that deceptive visual imagery is prevalent in modern advertising, that business firms are concerned with deceptive visual imagery employed by their competitors, and that increased formal regulation of advertising is feasible, though challenging.

A. Principles of Deceptive Advertising Law

The modern FTCA prohibits “unfair or deceptive acts or practices in or affecting commerce.”¹¹³ The Act does not define deceptive advertising, except to

112. See, e.g., *Westen Raps Lack of “Hard” Data in National Ads*, *supra* note 13, at 70 (reporting the Deputy Director of the FTC’s Consumer Protection Bureau’s call for development of a method to measure nonverbal deception).

113. 15 U.S.C. § 45(a)(1) (2012). Originally, the FTCA granted the FTC the authority to prohibit “unfair methods of competition in commerce.” Federal Trade Commission Act, Ch. 311, § 5, 38 Stat. 717, 719 (1914). The Supreme Court interpreted this language narrowly to require that the FTC demonstrate injury to a business before it could take action. S. REP. NO. 75-211, at 2, 5 (1937); H.R. REP. NO. 75-1613, at 3 (1937). Congress subsequently confirmed the FTCA’s application to consumer injuries in the Wheeler-Lea Act of 1938, by additionally prohibiting “unfair or deceptive acts or practices in commerce.” Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2012)). Since then, the FTC has possessed the authority to regulate advertising that deceives consumers regardless of its effects on business firms. S. REP. NO. 75-221, at 2; H.R. REP. NO. 75-1613, at 3. See also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239, 244 (1972). Through the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Congress changed “in commerce” to “in or affecting commerce” in order to grant the FTC authority to regulate not merely acts and practices in

state that “false advertisements” are “misleading in a material respect.”¹¹⁴ Congress refrained from legislating a more precise definition of deception on several grounds. It lacked the expertise to identify all of the unfair practices then in use, it lacked the foresight to anticipate unfair practices that advertisers might adopt in the future, and determinations of deception are necessarily fact-specific making an abstract rule too blunt an instrument for protecting consumers and business firms in the commercial speech context.¹¹⁵ Rather, Congress created the FTC and tasked it with adopting and implementing specific and nuanced deceptive advertising regulations.¹¹⁶

The Lanham Act similarly prohibits “false or misleading representation of fact” in advertising.¹¹⁷ The federal courts hearing Lanham Act cases naturally adopted the FTC principles they endorsed when deciding appeals of FTC cases, rather than develop an entirely new lens through which to view these private claims of deception.¹¹⁸

The test developed by the FTC declares advertising claims deceptive if they are “likely to mislead consumers acting reasonably under the circumstances” and are “material.”¹¹⁹ The Commission applies this test to evaluate deceptive advertising of all kinds; it has not adopted a separate and distinct test for visual imagery. Any informed assessment of the FTC’s performance in regulating deceptive imagery and the complementary role of the Lanham Act in this context thus rests on these core concepts, which FTC enforcement precedents and policy guidance have fleshed out significantly.

interstate commerce, but local acts and practices that affect interstate commerce. Pub. L. No. 93-637, § 201, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 45 (2012)).

114. 15 U.S.C. § 55(a)(1) (2012). The FTC and courts have subsequently deemed deceptive advertising to include false claims that consumers cannot be expected to realize are false and literally true claims that are presented in a misleading manner. FTC, FTC POLICY STATEMENT ON DECEPTION (1983) [hereinafter FTC POLICY STATEMENT ON DECEPTION], reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 174, 192, 195 (1984); see also *infra* Part II.A.1–4.

115. S. REP. NO. 63-597, at 13 (1914); H.R. REP. NO. 63-1142, at 19 (1914). The legislators often spoke in terms of unfairness rather than deception, but the FTC and courts consider deception to be a subcategory of unfairness. *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1060 (1984) (“[U]nfairness is the set of general principles of which deception is a particularly well-established and streamlined subset.”).

116. 15 U.S.C. §§ 41, 45 (2012).

117. 15 U.S.C. § 1125(a) (2012).

118. See, e.g., *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310–11 (1st Cir. 2002); *Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297–98 (2d Cir. 1992); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971–72 (7th Cir. 1999). As this Part will discuss, the courts have modified the FTC principles to better suit them to private actions, but these changes are relatively minor.

119. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 192, 195.

1. *The Reasonable Consumer*

The FTC and courts sometimes conceive of the “reasonable consumer” as a fictitious construct—like the hypothetical “reasonable person” of tort law—who responds to the claims made in advertisements more or less rationally under the circumstances.¹²⁰ At other times, they use the “typical” or “average” consumer as a proxy for the reasonable consumer.¹²¹ Under this approach, policymakers generally must conclude that an ad is likely to mislead a significant minority of consumers in order for it to be deemed deceptive.¹²² In Lanham Act cases, the courts also incorporate a reasonableness requirement into their decision-making. Similar to FTC cases, this requirement sometimes manifests in judicial references to reasonable consumers, whereas at other times the courts require that the ad deceive a “substantial segment” of the intended audience.¹²³

These different interpretations of the reasonable consumer standard introduce a degree of uncertainty regarding what advertising claims the FTC and courts will consider deceptive, but the standard nonetheless serves an important function. It aids in distinguishing between advertising claims that deceive the public generally and those that deceive merely a small percentage of people for idiosyncratic reasons.¹²⁴ Pursuing only those claims that would deceive reasonable persons enables the FTC and courts to protect the public and industry from

120. *Id.* at 178 n.26; *see also* FTC v. Stefanchik, 559 F.3d 924, 929 (9th Cir. 2009); FTC v. Bay Area Bus. Council, Inc., 423 F.3d 627, 634–35 (7th Cir. 2005).

121. *E.g.*, Standard Oil Co. v. FTC, 577 F.2d 653, 659 (9th Cir. 1978) (referring to the meaning the ad would have for the “average viewer”); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (“Unlike that abiding faith which the law has in the ‘reasonable man,’ it has very little faith indeed in the intellectual acuity of the ‘ordinary purchaser’ who is the object of the advertising campaign.”); FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 179 (stating that the FTC evaluates advertising claims “in light of expectations and understandings of the typical buyer”); FTC, ADVERTISING PRACTICES: FREQUENTLY ASKED QUESTIONS & ANSWERS FOR SMALL BUSINESS 4 (2001) [hereinafter FTC ADVERTISING PRACTICES], *available at* <http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business/> (“The FTC looks at the ad from the point of view of the ‘reasonable consumer’—the typical person looking at the ad.”).

122. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 177 n.20.

123. *See, e.g.*, Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 248 (3d Cir. 2011) (referring to a “substantial portion”); Buetow v. A.L.S. Enters., 650 F.3d 1178, 1182 (8th Cir. 2011) (referring to a “substantial segment”); JTH Tax, Inc. v. H&R Block E. Tax Servs. Inc., 359 F.3d 699, 704 (4th Cir. 2004) (referring to “reasonable consumers”).

124. A classic pair of (rather unflattering) statements illustrates the policy concerns underlying the reasonable person standard in FTC and Lanham Act cases. The prohibition on deceptive advertising is intended to protect “that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.” Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). Yet “[a]n advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feebleminded.” *In re Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff’d*, 337 F.2d 751 (9th Cir. 1964).

misinformation while avoiding excessive censorship of commercial communications.

An exception to the general reasonable consumer standard applies in FTC cases when an advertising claim targets a specific group of consumers, as opposed to the general populace. In this situation, the FTC and courts make the determination from the perspective of a reasonable member of the targeted group.¹²⁵ Certain groups are considered atypically vulnerable to deception and require a lower standard of reasonableness. Clearly recognized vulnerable groups include children, who have not yet developed their full cognitive capacity to discern deception, and the elderly and terminally ill, who are presumed to possess diminished objectivity.¹²⁶ The FTC and courts have also applied a lower standard to other populations. Socioeconomically disadvantaged groups, for example, have been considered at greater risk for accepting deceptive advertising claims because they may lack information and resources necessary to discern the deception,¹²⁷ and overweight persons have been found susceptible to unrealistic claims regarding the efficacy of weight-loss products due to diminished objectivity.¹²⁸

At the other end of the vulnerability continuum, a higher standard of reasonableness applies when ads are directed at members of highly educated or experienced groups.¹²⁹ The FTC presumes that such persons possess a greater degree of sophistication, and corresponding objectivity, which should cause them to reject claims that would deceive others.¹³⁰

In determining whether a reasonable consumer—either in the general population or in a more or less vulnerable group—would be deceived by an

125. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 179.

126. *Id.*

127. S.S.S. Co. v. FTC, 416 F.2d 226, 231 (6th Cir. 1969) (upholding the FTC's finding that disclosure of the limited efficacy of the advertised tonic was necessary when "among the principal groups to whom their advertising is directed are the urban and rural poor—who are less likely to get the medical attention they need, who are more likely to be uneducated and uninformed, and who are thus most likely to be victimized by improper self-medication resulting from false and misleading advertising").

128. *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 864–65 (1977), *aff'd*, 605 F.2d 294 (7th Cir. 1979) ("[M]any people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance if not abstinence simply does not pass muster.")

129. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 179.

130. *Id.* An example is advertisements for prescription drugs directed at physicians. *Id.* Although the regulation of prescription drug promotion falls primarily within the jurisdiction of the Food and Drug Administration ("FDA"), not the FTC, the example illuminates the type of consumer that the FTC would consider to be less vulnerable to deception. See *Truthful Prescription Drug Advertising and Promotion (Bad Ad Program)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/DrugMarketingAdvertisingandCommunications/ucm209384.htm#DDMACsMission> (last modified July 18, 2012) ("[The] FDA's Office of Prescription Drug Promotion['s] mission is to . . . [p]rotect the public health by assuring prescription drug information is truthful, balanced, and accurately communicated.")

advertisement, the FTC and courts consider the net impression conveyed by the ad.¹³¹ That is, advertising claims are viewed holistically and in context rather than on an element-by-element basis. Therefore, claims that might be deceptive if considered in isolation can be cured by other content in an advertisement. The corrective information, generally referred to as “disclaimers” or “disclosures,” must be noticeable and understandable to the reasonable consumer.¹³² The FTC recognizes that the reasonable consumer does not always view advertisements in their entirety; indeed, sometimes he is diverted by the ads from reading the qualifying language carefully.¹³³

Courts take a similar approach in Lanham Act cases. Whether an ad is deceptive under the Lanham Act rests on the “overall impression created by the advertisement,”¹³⁴ such that disclaimers, disclosures, and other parts of ads that convey accurate information may correct claims that would be deceptive if viewed in isolation.¹³⁵

2. Types of Deceptive Claims

The FTC and courts (in FTC and Lanham Act cases) recognize two general types of deception in advertising: claims that are literally false (“express claims”) and claims that are literally true but mislead consumers nonetheless (“implied claims”).¹³⁶ An advertiser makes an expressly false claim, for instance, by representing a mineral specimen as natural when it has been artificially enhanced or furniture as antique when it is insufficiently old to warrant the designation. Expressly false claims tend to be relatively straightforward and are the more easily discernible type of deception. Implied claims, in contrast, invoke more subtle psychological processes to convey misleading messages. An advertiser might play the U.S. national anthem in the background during his radio advertisement for clothing actually made in a foreign country. If consumers are likely to infer erroneously that the clothing is made in the United States, the use of

131. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 179 (“[I]n advertising, the Commission will examine the entire mosaic, rather than each tile separately.” (internal quotation marks omitted)).

132. *See, e.g.,* Removatron Int’l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989) (“Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.”); FTC ADVERTISING PRACTICES, *supra* note 121, at 17 (“When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, the information should be presented clearly and conspicuously so that consumers can actually notice and understand it.”).

133. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 180–81; FTC, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING 13 (2000), *available at* <http://www.ftc.gov/opa/2000/05/dotcom.shtm>.

134. *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 590 (S.D.N.Y. 1987).

135. *Id.*; *see also* *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 828–31 (9th Cir. 2011).

136. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007); *In re Thompson Med. Co.*, 104 F.T.C. 648, 788 (1984).

the song may constitute an implied claim about its country of origin.¹³⁷ Impliedly false claims thus encourage consumers to draw inaccurate inferences from ads as opposed to directly presenting false information within the ads. By their nature, implied claims tend to be susceptible to multiple interpretations. In the radio ad above, the use of the national anthem could merely convey the advertiser's patriotism or the seller's nationality, rather than suggesting the origin of the clothing. Consequently, although the FTC and courts prohibit both express and implied deception, detecting and proving implied deception poses greater regulatory challenges.

3. *Likely to Mislead*

In deciding which ads are likely to mislead consumers, the FTC pays close attention to claims that consumers are ill-equipped to evaluate,¹³⁸ presumably from a lack of requisite knowledge or objectivity. The FTC generally does not regulate advertisers' subjective claims, including opinions regarding the taste, feel, or appearance of a product, so long as they are sincerely held and the reasonable consumer is unlikely to interpret them as statements of fact.¹³⁹ The more extravagant the subjective claims, the less likely they are to provoke an FTC investigation or an adverse Lanham Act ruling. Claims that a product is the "world's best" or "amazing," for example, are generally excused as mere puffery.¹⁴⁰ The FTC and courts presume that the reasonable consumer understands the biased source of these statements, realizes that the claims are not factual, and discounts them accordingly.

As the "likely to mislead" label suggests, the FTC generally does not require extrinsic evidence that ads actually deceive consumers; rather, it interprets most advertisements according to its intuitions.¹⁴¹ The Supreme Court endorses this practice, largely due to the difficulty and expense of obtaining extrinsic evidence.¹⁴² If the FTC is unable to decide with confidence whether a claim is likely to deceive, however, it draws upon consumer surveys, expert testimony, and other sources to make its determinations.¹⁴³

137. For a detailed discussion of implied claims, see IVAN L. PRESTON, *THE TANGLED WEB THEY WEAVE: TRUTH, FALSITY, AND ADVERTISERS* 42–47 (1994).

138. See FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 181.

139. *Id.*

140. *Id.*; see also *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 496–98 (5th Cir. 2000).

141. *E.g.*, *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (“[T]he Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.”).

142. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965) (noting that the FTC is not required to conduct consumer surveys when determining whether an ad is misleading); *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1055 (1984) (“[A]s one instance of streamlining, we do not go beyond likelihood to require evidence on the incidence of actual false belief.”).

143. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 176.

The courts also generally assess Lanham Act claims using a “likely to mislead” standard.¹⁴⁴ Unlike FTC cases, though, Lanham Act plaintiffs who allege that the defendant deceived consumers through implied claims must provide extrinsic evidence to support the allegation.¹⁴⁵ This evidentiary requirement apparently aids the federal courts, which are less experienced in identifying deceptive practices, in making their determinations. The courts may blur the demarcation between express and implied claims in Lanham actions, however, by finding express claims to have been made by “necessary implication.” More specifically, when consumers would recognize an implied claim “as readily as if it had been explicitly stated,”¹⁴⁶ the courts may consider the implied claim to be express and decide its deceptiveness without extrinsic evidence. This interpretative tool permits the courts to use their own intuitions to identify implied deception, as the FTC generally does.

4. Materiality

The FTC and courts recognize that not all deceptions are of equal magnitude. They consider deceptions “material,” and therefore actionable as injurious to the public, if they are likely to affect the reasonable consumer’s decision to purchase a product or service.¹⁴⁷ The FTC presumes that certain categories of claims are material. These include claims expressly made in the advertisement; implied claims that the business intended to make; claims that involve health, safety, or other issues that would be important to the reasonable consumer; and claims regarding the central characteristics of the product, such as its purpose, efficacy, or cost.¹⁴⁸ If a claim falls outside of these presumptive categories, the FTC may nonetheless find it material if the reasonable consumer

144. See, e.g., *Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 907 (7th Cir. 2007); *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310–11 (1st Cir. 2002).

145. E.g., *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 33 (1st Cir. 2000) (“If the advertisement is literally false, the court may grant relief without considering evidence of consumer reaction. In the absence of such literal falsity, an additional burden is placed upon plaintiff to show that the advertisement, though explicitly true, nonetheless conveys a misleading message to the viewing public.” (citation omitted)); *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 229 (2d Cir. 1999) (“[P]laintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe. By contrast, plaintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the [consumer] that conflicts with reality. This latter claim invites a comparison of the impression, rather than the statement, with the truth.”).

146. See e.g., *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007); *Clorox Co. P.R.*, 228 F.3d at 35; *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

147. See, e.g., *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984).

148. FTC POLICY STATEMENT ON DECEPTION, *supra* note 114, at 182–83.

would consider it so.¹⁴⁹ The courts invoke a similarly conceived, if less detailed, materiality requirement in Lanham Act actions as well.¹⁵⁰

5. Summary

Developed and refined for over a century by the national experts on consumer protection and the federal courts, these principles of deceptive advertising law are the foundation for FTC and Lanham Act determinations. While it is possible to take issue with various facets of the principles, they nonetheless serve a potentially valuable role in protecting consumers and business firms from unfair business practices. Collectively, they provide a structured yet flexible framework for assessing the manifold forms that deception may take in the advertising context. A critical question remains, however: Are the principles actually fulfilling their policy goals, or have they lost relevance as applied to sophisticated modern advertising techniques?

B. Selective Blindness to Visual Imagery

In theory, the principles of advertising law govern all types of deception regulated by the FTC and challenged by business firms under the Lanham Act. The commercial “speech” doctrine captures verbal and visual advertising messages alike. Were the law otherwise, one appellate court observed, society “would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.”¹⁵¹

In practice, however, the FTC and courts implement the principles differently when dealing with visual imagery as opposed to language. Since 1970, the FTC has brought some 110 actions alleging that a deceptive component of an advertising campaign was communicated primarily through visual imagery.¹⁵² To put this number in perspective, consider that the typical American is exposed to hundreds of ads each day,¹⁵³ the vast majority of which make claims through visual imagery.¹⁵⁴ Estimating conservatively, she views more than 50,000 ads

149. *Id.* at 183.

150. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001) (“[T]he plaintiff must also show that the defendants misrepresented an ‘inherent quality or characteristic’ of the product.”); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999) (stating that the deception must be “on a subject material to the decision to purchase the goods”).

151. *See, e.g., Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982).

152. These results derive from the Author’s searches of Westlaw’s Federal Antitrust & Trade Regulation-Federal Trade Commission Decisions database (FATR-FTC) for deceptive advertising cases including terms such as “visual,” “image,” “picture,” “photograph,” “depiction,” or “scene,” and a general review of FATR-FTC deceptive advertising cases for visual imagery claims.

153. MAX SUTHERLAND, *ADVERTISING AND THE MIND OF THE CONSUMER: WHAT WORKS, WHAT DOESN’T, AND WHY* 3 (3d ed. 2008); *see also* Caitlin A. Johnson, *Cutting Through Advertising Clutter*, CBS NEWS (Feb. 11, 2009, 5:59 PM) (citing an advertising executive who suggests that the number may actually be several thousand).

154. *See supra* notes 18–19 and accompanying text.

annually containing visual imagery, whereas the FTC has brought about two deceptive visual imagery advertising actions on average each year. In contrast, the FTC has pursued several hundred cases involving either primarily verbal deception or a visual component that becomes deceptive primarily in the context of the linguistic parts of the ad.¹⁵⁵

Even more striking than the paucity of FTC actions involving deceptive imagery is the direct inverse correlation between the prevalence of visual imagery in advertising and FTC actions involving a claim of deception communicated primarily through visual imagery. Dividing the 1970–2011 timeframe into three eras of equal length reveals that 39% of the FTC actions occurred between 1970 and 1983, 38% occurred between 1984 and 1999, and merely 23% have occurred since 1998.¹⁵⁶ As business firms and advertisers enthusiastically embraced visual imagery as the chosen means by which to make claims regarding products and services, and as visual imagery became more sophisticated, FTC regulation faded markedly. It is difficult to state with certainty what percentage of visual imagery is deceptive. Advertisers appear to have switched from language to visual imagery in part, however, because the FTC more actively regulates questionable linguistic claims.¹⁵⁷ Visual imagery affords advertisers the means to communicate in a more subtle, less direct manner ideas that the FTC would consider deceptive if put into words. Consequently, the decrease in FTC cases involving visual imagery is not traceable to a reduced prevalence of deception.

The limited number of FTC enforcement actions involving visual deception covers a narrow range of impugned practices. They may be classified into two broad categories. The first category encompasses ads in which advertisers depict their products or services as having characteristics or capabilities that they do not actually possess. In the second category are advertisements that portray products or services performing under highly unusual conditions or in a manner not intended by the manufacturer. These ads are considered deceptive because they suggest to consumers that how the products and services perform in the artificial circumstances accurately reflects how they would perform for consumers. By conceptualizing the cases this way, the gaps in FTC enforcement become more evident.

Most FTC cases involving visual imagery fall within the “false characteristics or capabilities” category of deception. The dispute tends to revolve around technical questions of evidence without the need for nuanced exegesis. Does the product actually have the characteristics depicted? Can it perform in reality as advertised? Often, these questions can be answered by resorting to scientific study. Ads for weight-loss and other products claiming improved physical appearance through deceptive before-and-after pictures account for nearly 20% of the 110 cases that the FTC has brought since 1970. Aside from this most readily identified form of deceptive visual imagery, the cases address a variety of

155. This estimate results from the Author’s review of Westlaw’s FATR-FTC deceptive advertising cases.

156. See *supra* note 152.

157. See *supra* note 13 and accompanying text.

only slightly less obvious deceptive practices. For example, the Swedish car manufacturer Volvo aired television commercials in which a monster truck drove over a row of cars, flattening all except the Volvo, which emerged unscathed.¹⁵⁸ Not communicated to the viewing public were the facts that the Volvo had been structurally reinforced, structural supports in the competing cars had been severed, and the Volvo was subjected to less force by the monster truck than were the competing cars.¹⁵⁹ The FTC concluded that the ad deceptively represented the cars as unaltered and subjected to equal peril.¹⁶⁰ No reasonable observer could doubt that the advertisements depicted a falsehood fundamental to the purpose of portraying Volvos as safer than other cars on the road.

Other FTC cases in this category similarly rely on a blatant misrepresentation easily refuted by mostly elementary tests.¹⁶¹ They include a company's placement of clear glass marbles at the bottom of a bowl of soup so that the solid ingredients sat higher, thereby creating the illusion that its cans of soup contained more solid ingredients than was actually the case;¹⁶² an advertiser's use of human models with washboard abs to tout the benefits of its electronic stimulation belt when the models had in fact not achieved their physiques through use of the product (indeed, the belt was entirely incapable of producing these benefits);¹⁶³ and margarine ads depicting nonexistent sparkling "Flavor Gems" that purportedly caused the product to taste more like butter than other margarines.¹⁶⁴

The second category of FTC actions addresses visual depictions designed to distract consumers from the product's meaningful performance characteristics toward irrelevant or illusionary characteristics, often to permit the product to compare favorably with a competing product. If the products were used in their natural and intended manner, the advertised product would be equivalent or inferior to the competitor's product. For example, the makers of Baggies-brand sandwich bags employed this tactic in a television ad showing an interaction between two friends—a Baggies user and an "other brand" user.¹⁶⁵ To prove the superiority of Baggies, one friend fully submerged in water a sandwich in a Baggies bag and another sandwich in the competitor's bag. The Baggies sandwich stayed dry, whereas the other sandwich did not.¹⁶⁶ The FTC found the ad deceptive in that the test failed to demonstrate, as implied, that Baggies were superior at retaining food freshness under normal, dry conditions.¹⁶⁷ In this case, the FTC

158. *In re Volvo N. Am. Corp.*, 115 F.T.C. 87, 88 (1992).

159. *Id.* at 88.

160. *Id.*

161. Richards & Zakia applied the term "blatant misrepresentation" to only the first category of deception, perhaps because they did not discuss the second category. Richards & Zakia, *supra* note 12. The term aptly covers the more obvious, clear-cut deceptions within both categories, however, and is used in this more expansive sense here.

162. *In re Campbell Soup Co.*, 77 F.T.C. 664, 665 (1970).

163. *Telebrands Corp. v. FTC*, 457 F.3d 354, 355–57 (4th Cir. 2006).

164. *In re Standard Brands, Inc.*, 56 F.T.C. 1491, 1493 (1960).

165. *In re Colgate-Palmolive Co.*, 77 F.T.C. 150, 151 (1970).

166. *Id.*

167. *Id.* at 151–52.

inferred that the demonstration had no relevance to normal sandwich bag use. That inference required no great insight; presumably, the typical sandwich bag user does not scuba dive with her lunch.

As in the Baggies case, other FTC actions in the second category tend to rely on obvious, first-order inferences about how the depicted use of the product differs from its intended use. In one, a company purported to show the superiority of its antifreeze over a competing product by dipping metal strips covered in the respective antifreezes into vats of acid.¹⁶⁸ The FTC found the demonstration deceptive because the acid used in the commercial was dissimilar to that found in cars, the strips were of a different metal than that used in cars, and the concentration of the company's product used in the ad was enhanced.¹⁶⁹ In another case, a television ad showed a competitor's floor wax drying cloudy and yellowish in a crystal bowl while the advertising company's wax dried clear in an identical bowl.¹⁷⁰ The purpose of the wax was not to sit in a bowl, however, but to protect and beautify floors, and the product did not outperform its competitors on these scores. The demonstration was therefore deceptive.¹⁷¹ In both cases, there was no room for arguing that the advertised conditions accurately predicted the product's performance in normal conditions. Even the most attentive, thoughtful, rational, and informed consumer could not know about the chemical manipulations in the antifreeze ad. Very few could be expected to know that the performance of a sandwich bag underwater does not predict its performance in reducing air exposure, or that the color of dried floor wax in a bowl is unrelated to its appearance when applied to the floor.

In closer cases in both categories, the FTC has consistently and increasingly assumed that the reasonable consumer can adequately understand and resist the influence of the deception. The FTC's presumption of consumer resistance to visual deception is particularly evident in its cases involving a "vulnerable group." Most of these actions condemn ads depicting children's toys performing in ways unlikely or impossible in real life. In one instance, a company showed toy battle helicopters flying and hovering autonomously.¹⁷² The ads were ruled deceptive because the helicopters were actually suspended from monofilament wires attached to poles manipulated by persons off-camera, and battery-operated motors (absent in the toys) had been installed to spin the rotors during the sequences.¹⁷³ The FTC has objected to these and similar ads on the ground that children do not possess the knowledge or reasoning skills necessary to comprehend the fantastical nature of the depictions.¹⁷⁴ The "vulnerable group" factor turns out to be a red herring in practice, however. The deceptive toy advertisement cases are few and far between, and the FTC has not extended the

168. *In re* Union Carbide Corp., 79 F.T.C. 124, 125 (1971).

169. *Id.*

170. *In re* Am. Home Prods. Corp., 81 F.T.C. 579, 581 (1972).

171. *Id.* at 581-82.

172. *In re* Hasbro, Inc., 116 F.T.C. 657, 658 (1993).

173. *Id.* at 659.

174. *See, e.g., In re* Lucky Prods., Inc., 63 F.T.C. 1039, 1043 (1963).

logic of vulnerability beyond the toy context to food, clothing, or other children's products.

Further, very few enforcement actions treat adults as vulnerable groups when assessing deception in visual imagery.¹⁷⁵ A rare case involved ads promising cures to critically ill persons for whom western medicine had little to offer.¹⁷⁶ Travel agencies offered tours to the Philippines for "psychic surgery."¹⁷⁷ A core part of the promotional materials consisted of films depicting the operations, during which a healer opened the body with his bare hands, removed diseased tissue, and then closed the incision. Afterward, the patient showed no signs of having undergone surgery and walked away from the operating table healthy.¹⁷⁸ The FTC found the travel agencies' representations problematic because they "prey upon and exploit the frustrations and hopes of people who are seriously ill, and their families."¹⁷⁹ Outside of this extreme life-or-death situation, the FTC has not applied the vulnerable group principle to deceptive visual imagery claims in advertising directed at adults.

In both reasonable person and vulnerable group cases, the FTC and courts consider whether any linguistic disclaimers or disclosures within the ad rectify the otherwise deceptive visual imagery. In the vast majority of the cases finding deception, the ad contained no disclaimer or disclosure to offset the imagery. When an ad discloses countervailing information about the unrealistic aspects of the imagery and does so in a manner that the reasonable consumer can understand, the courts are likely to find the ad nondeceptive. For example, if Volvo had disclosed that it manipulated the monster truck demonstration, then the ad likely would no longer be considered deceptive because the reasonable consumer would be informed that the imagery did not represent how the vehicle could be expected to perform for the consumer. Only with advertising directed at a particularly vulnerable group has the FTC found a visible and comprehensible disclaimer or disclosure ineffective to negate the visual deception. In the psychic surgery case, the court ruled that the few disclaimers the agencies made—suggesting that psychic surgery may be impossible—were insufficient to counter "the profound emotional message of the films."¹⁸⁰ But this case is exceptional. Even in children's toy cases, the FTC has indicated that a verbal disclaimer may be sufficient to overcome visual deception.¹⁸¹ Given the superior persuasive power of visual

175. In a few cases, the FTC has considered adults vulnerable to toy ads directed at their children because the ads "unfairly play upon the affection of adults, especially parents and other close relatives, for children." *Id.* at 1043. The ads appeal to adults who want to offer their children the best toys and they appeal to children who then plead with adults to purchase the toys for them. In effect, the agency deems adults to be directly and vicariously vulnerable to this type of deceptive imagery in advertising. Were they not, children's vulnerability would be remedied by their parents' sound decision-making.

176. *In re* Travel King, Inc., 86 F.T.C. 715, 717–18 (1975).

177. *Id.* at 717.

178. *Id.* at 722–24.

179. *Id.* at 718.

180. *Id.* at 773.

181. *In re* Gen. Mills Fun Grp., 93 F.T.C. 749, 753 (1979) ("The effectiveness of

imagery over verbal assertions discussed previously,¹⁸² and the fact that advertisers convey deceptive messages in visual imagery while relegating the offsetting disclosures to verbiage, the FTC and courts here, too, generally treat the reasonable consumer as having the remarkable ability to resist believing or being influenced by what his or her eyes plainly see.

In summary, the FTC has exercised its enforcement authority over deception through visual imagery with marked restraint. While advertisers have bombarded consumers with advertisements that make claims primarily through pictorial means, the agency has steadily disengaged from the regulatory process to become, at present, little more than a passive bystander. In contrast to the wide range of verbal deceptions that have prompted FTC condemnation, only the most brazen and easily refuted visual deceptions have stirred the agency into action. The agency's focus on the linguistic parts of ads is also evident in its policy statements, rules, guides, and reports. None set forth a coherent method for identifying deceptive visual imagery or even articulate the complexities of visual imagery and the challenges it poses for consumers and policy makers.¹⁸³ The FTC apparently considers persons easily swayed by verbal misrepresentations to staunchly resist pictorial misrepresentations when, in fact, the opposite is true.

The Lanham Act has likewise proven an ineffectual vehicle for curtailing visual deception. Whether due to judicial reluctance to find deception or other disincentives to litigation, business firms have rarely employed this private regulatory mechanism. Since 1970, they have brought fewer than 30 Lanham Act deceptive advertising cases alleging that a competitor's ad deceived primarily through visual imagery.¹⁸⁴

Like the FTC cases, most of the Lanham Act disputes also fall within the "false characteristics or capabilities" category of deception and involve blatant misrepresentations.¹⁸⁵ Here, though, the courts have mainly found in favor of defendants; plaintiffs have prevailed in only about one-third of the cases in which

any oral or written disclosure, disclaimer or qualification of any visual portrayal . . . shall be considered in determining whether the advertisement, as a whole, misrepresents to children the toy's performance, operation, size or appearance.").

182. See *supra* Part I.

183. See *Guidance Documents: Advertising*, FTC BUREAU OF CONSUMER PROTECTION, <http://www.ftc.gov/bcp/menus/resources/guidance/adv.shtm> (last visited July 24, 2012).

184. This figure results from the Author's search conducted in Westlaw's All Federal Cases database (ALL-FEDS) for opinions that mention in the synopsis or digest one of the visual imagery terms listed in *supra* note 152, the Lanham Act, and deceptive advertising, as well as a general search of ALL-FEDS Lanham Act deceptive advertising cases for terms related to visual imagery.

185. See, e.g., *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 314 (2d Cir. 1982) (finding an ad in which Olympic gold medalist Bruce Jenner squeezed an orange and poured the juice into a carton to be literally false because the juice undergoes pasteurization and sometimes freezing); *Schick Mfg., Inc., v. Gillette Co.*, 372 F. Supp. 2d 273, 285 (D. Conn. 2005) (finding an animated dramatization of facial hairs extending in length as a result of the razor's "micropulses" to be literally false).

the courts decided the deceptive visual imagery claim. Aside from the Lanham Act's requirement that plaintiffs prove implied deception, plaintiffs were disadvantaged by courts' periodic invocation of the puffery doctrine. An illustrative case involved a battle between manufacturers of wet-shaving and dry-shaving razors.¹⁸⁶ Norelco represented in a series of ads that its dry-shaving razor was less irritating to skin than its competitors' wet-shaving razors. In one ad, the wet shaver spit out flames. In another, the handle of the wet shaver morphed into a coiled snake, with a forked tongue flicking outward from between the blades. In yet another, the wet shaver transformed into a creature with sharp teeth and snapped at viewers.¹⁸⁷ The court found the ads not literally false, because "stroking one's face with the blade of a razor is to some degree, however small, a dangerous activity . . . that can be painful."¹⁸⁸ It found the ads not misleading, because "consumers are not likely to believe that their wet shavers will turn into a flamethrower or that a snake's tongue will slither from the razor's cartridge. The . . . visual images . . . are exaggerations. What they exaggerate are realities not uncommon to wet-shaving."¹⁸⁹

The difficulty in proving implied deception under the Lanham Act, and courts' invocation of the puffery doctrine to excuse visual exaggerations designed to provoke an irrational response in consumers, may explain in part business firms' general reluctance to bring these actions. It also illustrates the narrow view of deception that the courts have adopted with regard to visual imagery.¹⁹⁰ Lanham Act cases nonetheless exhibit the opposite trend of FTC cases, becoming more prevalent over time.¹⁹¹ This increase suggests that market actors have perceived greater deception in visual imagery in recent years or at least are more inclined to shoulder attempts to eradicate this form of deception as the FTC has become less active.

186. *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 118 (D. Mass. 1996).

187. *Id.* at 119.

188. *Id.* at 129.

189. *Id.* at 130. For additional Lanham Act cases involving visual imagery claims decided on puffery grounds, see *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007) (finding that video service provider's ads portraying the screen image of its competitors as very highly pixelated constituted non-actionable puffery on the ground that the visual representation was "so grossly exaggerated that no reasonable buyer would take it at face value"); and *American Express Travel Related Services Co. v. MasterCard International Inc.*, 776 F. Supp. 787, 790 (S.D.N.Y. 1991) (finding MasterCard's visual depiction of American Express cardholders' difficulty in finding places to get cash as sufficiently exaggerated to be puffery).

190. The FTC visual imagery cases generally do not address puffery, presumably because the Commission does not pursue advertising claims that it believes fall within this realm.

191. The Author's search revealed the following increase in Lanham Act cases over time: 1970–1983=11%; 1984–1997=35%; and 1998–2011=54%. See *supra* note 184.

C. Analytical Evaluation

It is ironic that the FTC and courts treat consumers as less vulnerable to deceptions communicated through a more powerful tool of persuasion. This disjunction between advertising practice and regulatory policy undoubtedly results in part from visual imagery's capacity for sustained ambiguity and its variable effects on consumers. A lawyer's arsenal is largely linguistic rather than visual. When advertising was predominantly textual, it conformed to the familiar language of legal discourse. It has been difficult for attorneys at the FTC and judges to adapt to a mode of communication foreign to their training and professional experience. The tools of linguistic interpretation—dictionaries and canons of construction—do not exist for photographs, animations, motion pictures, and other information-rich visual content. While these features of visual imagery are appealing to advertisers seeking greater subtlety in, and influence through, the form and content of their messages, they pose obstacles to reasoned regulation based on objective interpretations of the messages conveyed by ads. The FTC's machinery of deceptive advertising regulation with respect to visual imagery has effectively stalled in all but the most provocative and evident cases. While visual imagery has proliferated in recent decades, FTC enforcement has dwindled to a small number of ineffectual and desultory cases.

Congress recognized the nearly boundless world of applied deception and refrained from drawing a bright statutory line between deceptive and permissible advertising that ingenious advertisers could circumnavigate. Instead, it delegated to the FTC responsibility for developing a viable and appropriately nuanced approach to deception. But the agency has faltered, and FTCA provisions governing deceptive advertising are essentially unenforced in the realm most in need of regulation. The Commission continues to focus on the antiquated and comparatively weak linguistic elements of advertisements despite the fact that modern advertising consists mainly of visual images. Pictures and video, given their sophisticated and ambiguous nature, have simultaneously bestowed on advertisers unprecedented abilities to persuade consumers of the validity of their claims and enfeebled regulatory efforts to monitor the truthfulness of the claims. Without a clear policy for identifying deceptive imagery, the FTC has effectively succumbed to the marketplace.

In the enforcement actions that the FTC has brought against visual imagery in advertisements, the reasonable consumer is generally treated as a model of rationality and insight. In consequence, visual claims are considered less likely than verbal claims to materially mislead. The FTC has never said as much—indeed, the agency has made no meaningful statement about deceptive visual imagery since raising concerns with it in the 1970s. However, the relatively few enforcement actions based on visual deception reveal the FTC's extreme reluctance to challenge any but the most blatantly and fundamentally deceptive visual depictions. The agency turns a blind eye to the more nuanced and influential nature of pictures, apparently unable to tackle the subtleties of implied claims that

pictures make. The Samsung commercial,¹⁹² for example, does not explicitly misrepresent that the phone causes an immediate and intense explosion of festivities and elated users, but the ad obviously implies it and provides almost no other information.¹⁹³ When Nissan depicted its Frontier truck averting a commercial airline disaster by catching the failed front landing gear of a passenger jet in its bed,¹⁹⁴ the FTC took no notice. Perhaps it was satisfied with the minuscule disclaimer—"Fictionalization. Do not attempt"—momentarily displayed on the bottom of the screen.¹⁹⁵ The candy bar and deodorant ads mentioned earlier¹⁹⁶ likewise make implied claims that surpass the products' capabilities; a candy bar cannot cause a metamorphosis of age and gender, and a person's brand of deodorant is irrelevant to his coolness or athletic prowess. These and similar ads use the visual component to imply what the advertiser dare not assert verbally, yet the FTC has neither investigated the visual component nor issued guidance to govern its interpretation.

More troubling still, the FTC has rarely challenged advertisements that are blatantly visually deceptive, and is challenging fewer and fewer. Magazines, the Internet, and television are replete with depictions of fast food with no correspondence to reality.¹⁹⁷ Car manufacturers overstate in photographs and video what consumers can expect from their products. One ad, for example, showed Daimler AG's smart car with a photoshopped elephant standing on top, obviously attempting to allay consumers' concerns about the safety of the car by implying that it could withstand extreme external force in a collision.¹⁹⁸ The FTC punished Volvo for its monster truck ad in 1992;¹⁹⁹ less than 20 years later, an almost identical ad apparently raises no eyebrows at the Commission. Perhaps the blatant deception most in vogue (and in *Vogue*) is airbrushed and computer-enhanced images advertising cosmetics. It is abundantly clear that the product is not

192. See *supra* notes 93–94 and accompanying text.

193. One may argue that the ad is merely meant to create a sense of excitement about the product and that no real information is conveyed to consumers in its vivid imagery. This view is inconsistent, however, with the Supreme Court's information-focused justification for providing constitutional protection to commercial speech. It is also factually misguided. Business firms do not pay advertisers substantial fees merely to entertain the public. They have a clear goal—to increase demand for their products and services—and they hire advertisers to create messages that further this goal by altering consumers' views of the products and services. Visual imagery-laden ads speak to consumers more indirectly than words, but their messages nonetheless (mis)inform consumers.

194. Science2Student, *Believe It or Not: Airplane Is Being Stopped by a Nissan Frontier*, YOUTUBE (Oct. 18, 2011), https://www.youtube.com/watch?v=u7cGzYc3_2E.

195. *Id.*

196. See *supra* notes 9–10 and accompanying text.

197. See, e.g., Kim Bhasin, *Look at the Shocking Difference Between Fast Food Ads and Real Menu Items*, BUS. INSIDER (Jan. 10, 2012, 3:45 PM), <http://www.businessinsider.com/fast-food-ads-vs-the-real-thing-2012-1?op=1>.

198. William Jeanes, *Tusk, Tusk: Car Ad Sparks Discussion*, AOL AUTOS (Sept. 24, 2009), <http://autos.aol.com/article/smart-ad-elephant/?icid=main>.

199. See *supra* notes 158–60 and accompanying text.

responsible for the models' personal beauty,²⁰⁰ just as the electronic stimulation belt did not cause six-pack abs in the 2005 FTC enforcement action,²⁰¹ but here too no action is taken. In fact, no one looks in real life like the models, including the models themselves. Yet these claims that the advertised product can work beauty and anti-aging miracles on consumers' appearances go unchallenged. Not only do these inconsistencies suggest that the FTC has disengaged in recent years from regulating visually deceptive advertising, but they demonstrate that its previous enforcement actions have had a limited meaningful deterrent effect.

In this growing regulatory vacuum, victims of visual deception can seek recourse from the federal judiciary under the Lanham Act. But generalist courts are ill-equipped to develop a coherent deceptive advertising doctrine. Moreover, private litigation is expensive and time-consuming, entails a high standard for proving implied claims, and, perhaps most importantly, invites government regulation that few potential plaintiffs would welcome. Business firms and advertisers have taken two different routes instead. Many revel in advertising anarchy, using visual imagery to make claims that their competitors would challenge in court as deceptive if made verbally. As a result, these tactics have come to define, rather than represent anomalies of, the marketplace for many industries. The other route, with numerous advertisers stretching the bounds of honesty in visual imagery, is to challenge the acts through a private, voluntary self-regulatory mechanism.

The review process, overseen by the ASRC and administered by the Better Business Bureau ("BBB"), allows business firms or consumers to challenge the accuracy of advertisements.²⁰² The cases are initially heard by one of two ASRC bodies—the National Advertising Division ("NAD") if the ad is directed at adults and the Children's Advertising Review Unit ("CARU") if the ad targets children.²⁰³ A party may appeal a decision from either body to the National

200. Andrea Kiliany Thatcher, *Five Lies Airbrushing Sells*, FASHION SPOT (Aug. 10, 2012), <http://www.thefashionspot.com/beauty/news/175351-five-lies-airbrushing-sells>.

201. *In re Telebrands Corp.*, 140 F.T.C. 278 (2005).

202. ASRC, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION (2011) [hereinafter ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION], available at http://www.asrcreviews.org/wp-content/uploads/2012/05/NAD-CARU-NARB-2011-Procedures-REVISED-MAY2012_4-3-12.pdf. The National Advertising Review Council ("NARC") recently became the Advertising Self-Regulatory Council ("ASRC"). Maureen Morrison, *NARC Nixed: Name Changed to Advertising Self-Regulatory Council*, ADVERTISING AGE (Apr. 23, 2012), <http://adage.com/article/news/narc-regulatory-council/234288/>. ASRC is an alliance between the BBB and several advertising associations, including the American Association of Advertising Agencies ("AAAA"), the American Advertising Federation ("AAF"), and the Direct Marketing Association ("DMA"), whose mission is to foster honesty in advertising through self-regulation. *Supporting Advertising Industry Self-Regulation*, ASRC, <http://www.asrcreviews.org/supporting-advertising-industry-self-regulation/> (last visited Aug. 25, 2012).

203. NAD and CARU are composed of attorneys and ad review specialists who draw upon marketing executives, research and development departments, and other resources to determine whether a challenged ad is deceptive or otherwise objectionable. *About NAD*, ASRC, <http://www.nadreview.org/AboutNAD.aspx> (last visited Aug. 25,

Advertising Review Board (“NARB”).²⁰⁴ At both levels, the decision-makers assess challenged advertisements using principles of deception approximating those formulated by the FTC. Compared to legal action, the ASRC process is inexpensive and brief. If these rulings were accompanied with fines or some other remedy to encourage compliance, they might more effectively deter deception in advertising. As things stand, however, the self-regulatory program’s primary enforcement tool is, ironically enough, to refer the case to the FTC if the advertiser does not voluntarily comply.²⁰⁵ As a result of the largely hypothetical sanctions, the disincentive to advertise deceptively using visual imagery is weak.

Nonetheless, the ASRC cases usefully showcase the types of visual deception that business firms and advertising industry organizations perceive as misleading and recognize a few modes of deception that the FTC has overlooked. Many of the ASRC cases involve blatant misrepresentations of a product’s characteristics or capabilities; they thus overlap with the clear, but rarely enforced, FTC prohibition on this type of claim. Other ASRC cases, though, examine more subtle deceptions implied by visual imagery and evidence a more nuanced and exacting view of visual deception than the FTC and courts have adopted.

Two analytical factors illustrate how the ASRC system frequently sets a stricter standard of truthfulness in visual advertising. First, the Council is less forgiving of exaggerations than the FTC is. In an ad for a paint and varnish remover, for example, the company showed a person, purportedly using a competitor’s product, armored in heavy rubber gloves and a respirator.²⁰⁶ The respondent argued that consumers would understand the outfit as “obvious hyperbole” and that the ad accurately asserted that the advertised product was safer than conventional furniture strippers.²⁰⁷ NAD declined to assume that the hyperbolic nature of the depiction would be obvious to the reasonable consumer, who might well take it literally.²⁰⁸ Similarly, the manufacturer of a turkey snack aired an ad with a young boy bouncing erratically around a room like a human pinball because he had consumed sugar.²⁰⁹ When challenged before NAD, the advertiser characterized the depiction as mere “hyperbolic exaggeration” that the reasonable consumer would not interpret to imply a causal relationship between sugar and hyperactivity in children.²¹⁰ NAD thought otherwise, however; it viewed

2012); *About Us—CARU*, ASRC, http://www.ascreviews.org/category/caru/about_caru/ (last visited Aug. 25, 2012).

204. *About the National Advertising Review Board*, ASRC, <http://www.ascreviews.org/2011/08/about-the-national-advertising-review-board/> (last visited July 24, 2012). The NARB consists of national advertisers, advertising agencies, and public members. *Id.*

205. See ADVERTISING INDUSTRY’S PROCESS OF VOLUNTARY SELF-REGULATION, *supra* note 202, at 12.

206. 3M Corp., NAD Case No. 2774, at 1 (Feb. 1, 1990).

207. *Id.*

208. *Id.*

209. Jerome Foods, Inc., NAD Case No. 3078a, at 1 (Apr. 1, 1994).

210. *Id.*

the ad as plainly suggesting a fictitious link between sugar consumption and hyperactivity.²¹¹

From these cases, it appears that the line between regulated and unregulated visual deception need not be drawn at explicit and patently obvious claims by advertisers, as the FTC and courts have done. As the ASRC cases demonstrate, the fact that a visual depiction employs exaggeration or "puffery" does not mean that it is devoid of substantive claims about the advertised product or the products of competitors. It may be possible to translate the claims and consider how the reasonable consumer would likely interpret them using the implicit intentions of the advertiser (inferable from its self-interest) as a guide. A stricter approach to hyperbole acknowledges the persuasive ability of picture-based claims even when they slide into the fantasy world. From a psychological perspective, there is no reason to believe that exaggerated depictions are inherently less persuasive than realistic depictions, and some reason to believe the opposite.²¹²

The NAD cases also demonstrate that non-puffery claims in visual imagery could be subject to a more analytically rigorous interpretation than the FTC has adopted. The FTC's focus on blatant misrepresentations in visual imagery, and its reluctance to actively pursue even this type of deception in recent years, leaves many potentially deceptive implied claims unregulated. NAD, in contrast, has been more inclined to delve into the intricacies of implied claims and decipher their messages as the reasonable consumer is likely to do. Subaru, for example, pictured its four-wheel-drive wagon following a mountain goat on a trek over various terrains and delivering the U.S. Ski Team up a steep, snow-covered hill.²¹³ NAD found the ads misleading in that they represented the wagon as an off-road vehicle when in reality it was poorly suited for this use.²¹⁴ As car manufacturers' frequent employment of variants on this ad demonstrates, the FTC does not regulate in this area.

In a more interpretatively demanding case, SmithKline Beecham compared its Nicoderm CQ, a six-week, three-nicotine strengths smoking-cessation aid to a competitor's six-week, one-nicotine strength aid by depicting two models: one stood atop a large step, pondering how she would reach the ground; the other easily descended three smaller steps and was elated at having accomplished her goal.²¹⁵ The steps thus represented the process of quitting smoking and the ground represented success.²¹⁶ NARB concluded that the ad inaccurately portrayed the relative qualities of the products and the smoking cessation process because the competitor's product provided a more gradual

211. *Id.*

212. *See, e.g.*, IVAN L. PRESTON, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING* 26-29 (1975).

213. Subaru of Am., Inc., NAD Case No. 1239, at 1 (Feb. 15, 1978).

214. *Id.*

215. SmithKline Beecham Corp., NARB Panel No. 95, at 1-2 (Sept. 11, 1997).

216. *Id.* at 2.

withdrawal from cigarettes than the one step implied.²¹⁷ ASRC also has not shied away from applying its stricter interpretation of deceptive imagery to ads directed at groups that the FTC considers theoretically less vulnerable to deception. National Car Rental aired an ad for its Emerald Club service depicting a car approaching an unmanned, gated exit booth; the gate rose and the car left the lot without slowing or stopping.²¹⁸ NARB found that the reasonable consumer would likely conclude that the visual sequence dramatized the actual car rental process; the ad therefore falsely implied that Emerald Club members did not have to stop to transact business before exiting the rental lot.²¹⁹ Even though Emerald Club members were sophisticated car renters, NARB found that the ad was likely to mislead.²²⁰

As these cases illustrate, the ASRC self-regulatory program has more realistically and insightfully interpreted visual imagery in advertising than have the FTC and courts. The ASRC decisions show that visual imagery can be regulated. Although the program has not developed a consistent and articulated theory of visual deception, its rulings and their reasoning could assist policymakers in developing an effective methodology for identifying pictorial deception. While the ASRC is more active than the FTC and courts, business firms' participation in the ASRC process is voluntary, as is their compliance with ASRC rulings. It is thus incumbent on the FTC and courts to fulfill the tasks delegated to them by Congress by acquiring the expertise needed to regulate visual advertising effectively.

CONCLUSION

The modern advertising industry relies heavily on visual imagery to convey its claims and messages. Through imagery, an advertisement can seize and hold consumer attention and alter consumer perceptions of reality in ways that even the most vivid prose cannot hope to replicate. These qualities, which have made visual imagery indispensable to advertisers, allow advertisers not just to entertain and inform, but at times to deceive with seductive depictions of artificial realities in which their products and services perform feats beyond the laws of physics and possibilities of social intercourse. A particular brand of truck survives the apocalypse; a bottle of beer makes a man the cynosure of the party; a perfume renders a woman irresistible to men; the gift of a diamond ring *ipso facto* cements a meaningful relationship. Such visually conveyed claims are intended on some level to deceive;²²¹ whether they succeed is the question that Congress relies on the FTC and courts to pose and answer.

217. *Id.* at 3.

218. Nat'l Car Rental, NARB Panel No. 136, at 2 (Nov. 16, 2006).

219. *Id.*

220. *Id.*

221. One might assert that advertisers strive merely to increase consumers' positive affect toward products with these claims, not to influence consumers' beliefs toward the products (akin to the idea that advertisers may try to generate excitement about a product without conveying information about the product). *See supra* note 193. The ads, however, clearly convey information to consumers that may influence their product-related beliefs. Moreover, emotions and cognitions are reciprocally related, such that influencing

Congress and the Supreme Court have articulated a clear policy against deceptive advertising. The FTC supports this policy on the grounds that such deception "is harmful to consumers, undermines the rational functioning of the marketplace, and . . . never offers increased efficiency or other countervailing benefits."²²² Forty years ago, however, the FTC publicly acknowledged that it would need to evolve its regulatory regime to encompass visual imagery if it were to fulfill its mandate.²²³

In theory, as the ASRC dispute resolution system suggests, the FTC could have adapted its classic framework for regulating verbal deception to visual media. The general principles of deception law that the FTC developed and the courts have endorsed are adequate for the regulation of visual imagery if applied and interpreted intelligently. Visual advertising claims, like verbal ones, could be treated as deceptive if they are "likely to mislead consumers acting reasonably under the circumstances" and are "material." That has never happened, however. Rather, the agency has mainly avoided regulating pictorial deception. The subversive paradox of advertising law is that federal regulators have abandoned any serious attempt to protect the public from deception in the more ubiquitous and influential visual form of communication and have instead confined their efforts primarily to policing the eclipsed and far less persuasive verbal elements of advertising.

This regulatory approach furthers neither the Supreme Court's policy of withholding constitutional protection from deceptive commercial speech nor congressional mandates shielding consumers and business firms from deception in advertising. It may be analogized to the Environmental Protection Agency overlooking pervasive environmental pollution while rigorously enforcing anti-littering laws. Government regulation of the linguistic forms of deception in advertising certainly provides a valuable public service, but the more pressing policy concerns raised by deceptive visual imagery should take priority.

When deception unhindered by regulation influences consumers *en masse*, its negative effects on markets and society alike can cumulate and create a vicious cycle of destructive forces. Deception hinders the ability of consumers to judge the relationship between the advertised product or service and their personal needs and desires. On a microcosmic level, it harms consumers by transferring some of their wealth from uses that would satisfy their wants to the very agents who deprive them of that satisfaction. It could be argued that, by changing consumer preferences, deceptive advertisers actually do fulfill consumer needs and desires, albeit ones that the advertisers themselves have created or diverted from other, equally arbitrary needs and desires. But this argument assumes that consumer wants are inherently arbitrary and not based on sound factors. Consumer wants may not, in fact, always be based on sound factors. However, accurate information is a necessary (if not a sufficient) condition to making minimally

consumer emotions necessarily affects consumer beliefs. See *supra* note 100 and accompanying text.

222. *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1056 (1984).

223. See *supra* notes 24-26, 113 and accompanying text.

rational decisions about self-interest. Compounding the harm, consumers may be persuaded to pay more for deceptively advertised products or services than their actual qualities justify. Deceptive advertising thereby skews consumption away from the most productive and psychologically fulfilling uses of wealth into less efficient and satisfying avenues.

A regulatory void leaves business firms that exaggerate the characteristics and benefits of their products and services with a distinct advantage over competitors that describe their offerings more accurately but less enticingly. In disadvantaging truthful business firms, a deception-based advertising system creates additional market pathologies by encouraging firms to invest resources in the most persuasive and attention-grabbing deceptive ads to attract consumer spending. Money that could be invested in collecting and providing useful information to consumers, improving products and services, reducing their costs, and rewarding investors and employees is instead diverted into unproductive deception. In the absence of effective regulation or market self-correction, nothing deters advertisers from racing to the bottom, using tricks and lies to hawk what cannot be sold as readily through accurate information.

The FTC itself may exacerbate the effects of market-based deception by misleading consumers to assume that the Commission fulfills its protective mandate. The FTC represents itself to the public as the agency that “[e]nhances consumer confidence by enforcing federal laws that protect consumers.”²²⁴ To the extent that consumers believe the FTC’s self-description or more generally rely on government protection to deter and punish deceptive advertising, they may lower their guards against the exaggerated claims of dishonest business firms.

On the other hand, when consumers perceive that false advertising is common and legally unfettered, they may be expected to become distrustful of all advertising and disbelieve representations that are in fact truthful but cannot be easily and quickly verified. The honest business firm thereby suffers from undeserved cynicism resulting from the overreaching claims of less punctilious firms. The main legitimate function of advertising that justifies the constitutional protection of commercial speech in the Supreme Court’s jurisprudence—the dissemination of information to consumers—is thereby undermined. Each of these outcomes and their resulting inefficiencies derives from consumer decisions driven by a proliferation of questionable, yet unquestioned, representations in advertising.

Unfortunately, the effects of sanctioned, pervasive deception in commercial communications are unlikely to end in the marketplace. Unregulated deceptive advertising may impose additional costs—economic, political, and interpersonal—on individuals and society through a multifaceted degradation of social relationships. Advertising is sufficiently ubiquitous in the United States that, when exaggerations and lies suffuse its content, deception transforms from an antisocial aberration to an accepted, or at least expected, social norm. The government’s failure to monitor the accuracy of the very commercial messages it

224. *Welcome to the Bureau of Consumer Protection: Who We Are*, FTC BUREAU OF CONSUMER PROTECTION, <http://www.ftc.gov/bcp/> (last visited July 24, 2012).

permits to appear at every turn further entrenches that norm by communicating the value it places on honesty and an informed citizenry.

A culture of deception erodes social cohesion by undermining trust in others. Trust is a valuable form of social capital that lubricates economic and personal relations alike, reducing transaction costs and the psychological pressures inherent in interpersonal dependency.²²⁵ The consequences of accepting dishonesty in the advertising context are not easily isolated, but may translate to expectations of dishonesty in other settings. A veil of distrust alters our views of significant others in our social networks, as well as our interpretations of, and reactions to, their behaviors. Patients who lack trust in physicians are less inclined to adhere to diagnostic recommendations and treatment regimens,²²⁶ employees who distrust their employers and co-workers perform more poorly and experience greater job dissatisfaction,²²⁷ and neighbors who harbor suspicions about one another more often experience conflict.²²⁸ Less trusting citizens frequently eschew participation in social activities and community organizations. Society fails to capitalize not only on specific benefits the participation could have produced, but also the social cohesion strengthened by these relations.²²⁹ More disturbingly, the distrust may be justified. When we learn through deceptive advertising that lying is normal and acceptable, we may act consistently, consciously or unconsciously. Deceptive advertising obviously is not the sole cause of deceit and distrust in social dynamics, but its contribution in a decidedly capitalistic culture should not be underestimated.

Supreme Court Justice Cardozo cautioned that: “[t]he law . . . must be ready for the morrow. It must have a principle of growth.”²³⁰ Among the prerequisites for adequate growth is keeping pace with advances in technology and new social practices. A look beneath the façade of deceptive advertising regulation reveals that the law has lost much of its relevancy in this policy domain. If advertising regulation is to regain its vitality, the FTC will need to develop a method for identifying deceptive visual imagery that acknowledges and addresses the tool’s nuanced communicative qualities. The least acceptable approach to visual deception in advertising is the current “turn a blind eye” policy, which

225. For classic discussions of the integral role of trust in society, see, for example, FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1995); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

226. See Tara Parker-Pope, *Doctor and Patient, Now at Odds*, N.Y. TIMES, July 29, 2008, at F6.

227. See, e.g., Roy J. Lewicki & Barbara Benedict Bunker, *Developing and Maintaining Trust in Work Relationships*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 114 (Roderick M. Kramer & Tom R. Tyler, eds., 1996).

228. See, e.g., Linda R. Tropp, *The Role of Trust in Intergroup Contact: Its Significance and Implications for Improving Relations Between Groups*, in *IMPROVING INTERGROUP RELATIONS: BUILDING ON THE LEGACY OF THOMAS F. PETTIGREW* 91 (Ulrich Wagner et al. eds., 2008).

229. See, e.g., PUTNAM, *supra* note 225, at 48–64, 116–33.

230. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 20 (1924).

equally undermines the Federal Trade Commission Act, the Supreme Court's commercial speech jurisprudence, and the logic of information markets that sustains both commerce and social relations.
