

# Disclosures and Deception: Advertisers vs Regulation in Modern America

An STS Research Paper  
presented to the faculty of the  
School of Engineering and Applied Science  
University of Virginia

by

William McCollough

May 8, 2023

On my honor as a University student, I have neither given nor received unauthorized aid on this assignment as defined by the Honor Guidelines for Thesis-Related Assignments.

Signed: William McCollough

Approved: \_\_\_\_\_ Date \_\_\_\_\_  
Peter Norton, Department of Engineering and Society

## **Disclosures and Deception: Advertisers vs Regulation in Modern America**

To live in modern America is to have near constant exposure to advertising. Commuters encounter billboards and radio ads; later, they may find banners on every webpage. American advertising is pervasive and often aggressive. Advertisements that target children, market potentially addictive products such as gambling, and targeted ads using personal information are all prevalent. With ad spending expected to top \$300 Billion in 2023, there are few signs of slowing (Statista 2020). The Federal Trade Commission regulates advertising, but has limited power. Organized groups seek to maximize profit by limiting regulation of manipulative advertising techniques. These groups include ad creators, industry groups that represent larger groups of advertisers, and the companies that manage internet ads (Federal Election Commission, 2023). They helped to shift the perception of advertising regulation to ensure it stays limited, exploiting unregulated areas and helping shape new legislation to ensure it does not interfere with profit (Feathers & Ng, 2022).

### **Review of Research**

Some who look into the current state of advertising focus on the deregulation of the Reagan administration in the 1980s (Logie, 2020). Those who do so fail to take into account the reasons why subsequent administrations have walked back these policies, providing an opportunity for research. Others have investigated the ways that personalized and experience-based advertising, while increasing ad effectiveness, can result in discrimination and compromise privacy (Calder et al., 2009; Speicher et al., 2018). The reasons for persistently lax regulation and the obstacles to more robust standards warrant more research attention. To better understand these potential difficulties, it can be useful to look at other fields.

In a study of the Parents' Music Resource Center's (PMRC) effects on the American music industry, Chastagner (1999) demonstrated the difficulty in pressuring the government into regulation, regardless of the strength of the social group working for it. The PMRC, described by Chastagner as a group of "'Washington Wives,' married to senators, congressmen, and Cabinet officials," (1999, p. 181) held immense sway due to their close relationships with some of the most powerful men in national politics. Concerned with the "pornographic content of rock music" (1999, p. 184) popular with youth of the 1980's, the group was successfully able to lobby the Senate Commerce Technology and Transportation Committee into holding a series of hearings on the content of popular rock albums. As a result of these hearings, the Recording Industry Associate of America instigated a voluntary labelling system that warned of potentially explicit content. This voluntary act of self-regulation was deemed sufficient, and no governmental regulation was implemented, despite continued PMRC pressure in subsequent years. In particular, Chastagner highlights concerns regarding first amendment rights as a reason for the absence of required regulation. The study demonstrates the held position of the US government regarding voluntary regulation. In situations where first amendment rights are involved, governmental regulation is to be avoided if good faith voluntary regulations are able to be implemented. This is highly relevant to the regulation of advertising, which falls under the same first amendment umbrella.

Similar conclusions are drawn by Day and Hall (2010) in their study on childhood access to violent video games and other media. Depicting the conflict as one between "protecting kids or society from certain harm and protecting First Amendment rights" (2010, p. 417) Day and Hall surveyed case law on the issue. Lower court rulings had conflicting opinions on the legality of selling violent games to minors, with some allowing it under first amendment protections, and

others restricting it as obscene speech unprotected by the amendment. Pointing to a lack of research that reveals direct harm to children from violent media, the pair predicted that a then future supreme court case on the subject would side with first amendment proponents. This decision was confirmed after publication with a court case. (*Brown v. Entertainment Merchants Association*, 2011). Applied to advertising regulation, this reveals an obstacle to potential governmental regulation of advertising. Without concrete proof of harm caused, laws regulating advertising practices could be viewed as infringing first amendment rights, and thus struck down in court.

A counterexample of successful legislation is explored by King et al. (1991) in their paper on the history of cigarette advertising. They identified three key “event eras” (1991, p. 64) of cigarette advertising, each having stronger regulations than the former. First barred from advertising on television and making health related claims, cigarette companies pivoted to ads focused on soft factors, selling cigarettes as lifestyle products to a wider variety of target consumers. This pivot kept cigarette ads effective despite regulations, resulted in increased scrutiny, and forced further legislation. Notably, these increases occurred during a time of general deregulation, as the risk to public health was deemed great enough. The analysis demonstrates the necessity of evolving advertising legislation to reflect new methods of marketing. It also demonstrates the ability of the federal government to create legislation that goes counter to free speech rights, should the speech be proven to cause harm. Both conclusions are highly relevant to modern advertising regulation, as it both shows the necessity of evolving legislation and reveals a path that could lead to the passing of more comprehensive advertising law that would stand up to challenges on first amendment grounds.

### **Development of Modern American Advertising Law**

The modern American advertising environment originated with deregulation that began in the 1980's. This deregulation was largely in response to an increase in regulation in the previous decade. A key example was the creation of an FTC substantiation program, wherein advertisers were compelled to provide proof that advertising claims were "substantiated by adequate and well-controlled scientific tests, studies, and other fully-documented proof" (Thain, 1973, p. 389). This program forced companies to disclose when found guilty of false advertising, such as a 1973 decision against Listerine mouthwash regarding the product's ability to "[mitigate] colds and sore throats," a claim found to be "false, deceptive, and misleading" (*Warner-Lambert Company v. FTC*, 1973). Private regulation was also furthered during this decade, with the founding of the National Advertising Review Board (NARB) in 1971, an industry regulatory body. In its first 5 years of operation, NARB "processed over 1000 complaints against national advertisers and hundreds of advertisements judged deceptive were modified or discontinued" (Zanot, 1979, p. 5). This combined federal and private effort resulted in much more strict advertising standards. However, the rapid development of these standards resulted in pushback from those who favored smaller government.

The pushback to this increased rigor occurred quickly, with congressional acts reforming the powers of the FTC. Standards for deceptive advertising were made stricter, attempts to bar the advertising of items such as medicine failed, and child advertising restrictions were reduced. The passing of the Federal Trade Commission Improvements Act of 1980 allowed for more types of advertising to children, only restricting "acts or practices that are 'deceptive' (in contrast to practices that are merely 'unfair')" (Kintner et al., 1980, p. 856). This acted as implicit permission to target children specifically with advertisements, as many legislative clauses were removed. Deceptive advertising standards were similarly reduced with the FTC's 1983 Policy

Statement on Deception, which redefined deception as “a representation, omission or practice that is likely to mislead the consumer,” rather than “[having] a tendency of capacity to mislead consumers,” a much more limited definition (FTC Policy Statement on Deception, 1983, p. 1; *Sears, Roebuck & Co. V. Federal Trade Commission*, 1919). At this time, attempts were made to restrict medicine advertisements, known as Direct-to-consumer Advertising (DCTA), with a moratorium placed in 1983. Despite “the AMA, the American Society of Internal Medicine, the American Academy of Ophthalmology, the American Academy of Family Physicians, the American Society of Internal Medicine, and the American College of Physicians and other groups [taking] positions against the DTCA of prescription drugs,” no laws were passed and the moratorium was removed in 1985 (Donohue, 2006). Following this, Drug companies would lobby to further reduce restrictions on DTCA, having found the “advantage of established brand recognition” useful when seeking increased profit (Ling et al., 2002). These reductions serve as examples of a general trend starting in the 1980s, wherein the powers of the FTC were confined through federal legislation or due to industry pressure. These restrictions would shape the role of the FTC in subsequent decades, and allow for new forms of manipulative advertising to become widespread.

### **Internet Advertising**

The introduction of the internet was a paradigm shift for the advertising industry. Due to the density of content available on a webpage, ads could easily be integrated. These ads could be dynamically updated and link directly to an advertiser’s page, and user engagement could be tracked in real time. Banner ads became common in the mid 1990’s, and allowed advertisers to track the number of times they’d been clicked. A famous early AT&T ad “attracted 42 per cent clickthrough,” according to its creator, G.M. O’Connell (Goddard, 2003). Techniques were

developed to ensure that users received a variety of ads, such as a tool created by ad placement service WebConnect to “maximize their return on investment by creating individualized ad campaigns” (Cox, 1998). Features of Internet browsers were also found useful for advertising. As described by John Schwartz, cookies, small files which stored information about one’s browsing, and which meant that “records of one's transactions, movements and even desires could be stored, sorted, mined and sold” (2001). These techniques, when used in conjunction with each other, became known as targeted advertising, a particularly insidious advertising tactic.

Targeted ads became common with the increased ubiquity of the internet. Utilizing the tracking of user data, they allow for ad makers to tailor marketing to specific groups, ensuring increased effectiveness without increasing cost. Users are served ads based on stored personal information, with Facebook owner Meta’s page on targeted ads encouraging potential advertisers to “consider location, age and gender of the customers you want to see your ads” (Meta, 2022). This information is often gathered through ‘fingerprinting’, the gathering of user info when they visit a webpage, and often can’t be avoided, with “some even [using] the fact you’ve flagged “do not track” in your browser as a way to fingerprint you” according to an expose by The Washington Post (Fowler, 2019). This data is then stored and shared for other advertisers to use, with the Irish Council for Civil Liberty (ICCL) finding “a person in the U.S. has their online activity and location exposed 747 times every day” in a 2022 study (ICCL, 2022). An early adopter of targeted advertising techniques was google, which found that their early forms of targeted banner ads “had click-through rates four times higher than the industry average” (Vogel, 2000). The use of personalized ads allows advertisers to focus on highly specialized groups, greatly increasing influence. Their use also reduces privacy, as personal information is taken without permission and stored for future use.

In addition to making ads more effective through targeted marketing, the ease of creating posts on the internet has led to a rise in advertisements masquerading as unaffiliated articles. Known as “native advertising,” this technique is designed to mislead individuals into believing an ad is actually standard content. Because of this, the FTC has guidelines regarding the creation of native ads, first applying them to fashion company Lord & Taylor in 2015 after they failed to give “any indication to consumers that [influencer posts] were paid advertising” (FTC, 2016). Despite this appearing to be a positive step, it is limited in utility. Even when guidelines are followed, it can still be hard for users to tell when native advertising is occurring. A study from marketing platform Contently found that even after taking FTC guidelines into effect, “no matter what steps publishers have taken, there is still significant confusion on the part of readers as to what constitutes an article and what constitutes an ad” (Lazer, 2015). Many in the industry also express concern over the ability of the FTC to enforce disclosure laws, with advertising software company MarTech arguing that the FTC “is severely understaffed, and you can assume any punishment for native advertising will be a hand-slap at best” (Rodnitzky, 2014). This prediction has largely been correct, as the previously discussed Lord & Taylor lawsuit ended with “a monitoring and review program” being established for the retailer (CDAS, 2016). Lord & Taylor was not fined despite the illegal campaign being highly profitable, and no subsequent major cases have been brought before the FTC. Native advertising is designed to mislead individuals, with current legislation doing little to stop it due to lax enforcement and a lack of adequate penalties.

### **Advertising Harm**

While the FTC restricts advertising methods for a number of product categories deemed hazardous to individuals, such as tobacco products, they fail to do so for other categories of



harmful product. A notable example is gambling, which the FTC does not regulate, despite similar addiction concerns. A 2022 estimate by consultancy group BIA Advisory Services found that “internet casino companies and sportsbooks will drive \$1.8 billion in local advertising this year,” compared to almost no advertising pre 2018 (Shriber, 2022). This explosion came after the legalization of sportsbooks (gambling on the outcome of sporting events) following a 2018 supreme court case. As explained in a 2022 NPR article, “in the absence of more targeted regulation from states and the federal government, sportsbooks face little interference when it comes to how many ads to run and what they say in them” (Hernandez, 2022). The increase in gambling exposure through ads is concerning. A 2022 study from the Journal of Gambling Studies found that those at risk of addiction were more likely to be served gambling advertisements, and that “internet advertising was the strongest predictor of increased gambling involvement due to advertising” (Syvertsen et al., 2022). A similar study in the Journal of Mental Health and Addiction found that “advertising triggered impulses to gamble” in those suffering from addiction (Binde, 2009). This finding is particularly troubling as gambling addicts are more likely to be targeted for advertisements. As more states further legalize this form of gambling, the potential for harm through advertising will only increase, as currently no legislation exists to curb it.

Ads have also been proven harmful in the development of children. Currently, the FTC has higher standards for deception in ads targeting children do to their lack of intelligence and experience. They also protect the privacy of children to a higher degree than adults under guidelines known as the Children’s Online Privacy Protection Act (COPPA), which prevents targeted advertising. Despite these efforts, advertising in the United States can still be deeply harmful to healthy childhood development. A 2004 report by the American Psychological

Association found that children “below the ages of 4-5 years do not consistently distinguish program from commercial content” and that “children younger than 7-8 years of age do not recognize the persuasive intent of commercial appeals” (Wilcox et al., 2004, p. 5). Despite this, advertisements targeting children have largely increased in recent years. Child Psychologist Sandra L. Calvert discusses this, discussing the rise of “so-called stealth marketing techniques, such as embedding products in the program content in films, online, and in video games” (Calvert, 2008, p. 205). This ability of ads to influence children and their increase over time can be linked to the worsening childhood obesity crisis. A 2018 study found that “advertising for unhealthy foods increases immediate dietary intake in children” (Russell et al., 2019, p. 566). Another found that children had their opinions on food brands “significantly influenced” by the presence of food ads in games (Smith et al., 2020, p. 409). Despite these connections between advertisements and childhood harm, the FTC currently has no regulations regarding food marketing, instead prioritizing “effective self-regulatory initiatives to help combat childhood obesity” (FTC, 2008). They similarly lack regulation towards the marketing of other potentially harmful products to children, providing further opportunities for harm.

In response to the potential harm caused by lack of regulation, a number of grassroots campaigns have emerged to push for legislation. Many of these campaigns involve multiple activist groups working in unison to present a united front. A 2022 petition led by The Center for Digital Democracy and backed by more than 20 other activist groups urged the FTC to craft rules that better protected children from online advertising. Reasons for this include “harm to physical health,” “harm to overall mental health,” and a “risk of problematic internet use” (Center for Digital Democracy, 2022). The petition targets the ways that companies attempt to “[maximize] the time users spend online,” with advertising playing a key role in this (Center for Digital

Democracy, 2022, p. 1). Similar pressure is being placed on gambling advertisements, with advocacies such as Stop Predatory Gambling working to promote “restricting gambling advertising, marketing, and sponsorships” (Stop Predatory Gambling, 2022). This pressure has resulted in tangible action in congress, with representative Paul Tonko proposing an act to “prohibit the advertising of sportsbooks on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission” in the ongoing 118<sup>th</sup> congress (Betting on Our Future Act, 2023). Such campaigns provide relevant pushback against industry trends that favor a lack of regulation.

### **Attempts at Regulation and Pushback**

In recent years, select regulators have attempted to push back against modern advertising techniques, in particular targeted advertising. The Banning Surveillance Advertising Act of 2022 aimed to “[restrict] online advertising that targets an individual, internet-connected device, or group of individuals or devices based on personal information” (Banning Surveillance Advertising Act of 2022). Similar acts have already been passed in the European Union and other countries. The bill was supported by privacy focused advocacies, such as the Center for Digital Democracy, and a number of privacy focused companies, such as search engine DuckDuckGo (Eshoo, 2022). In response, a number of corporations and corporate interest groups increased lobbying to prevent the legislation from passing. The Internet Advertising Bureau (IAB), an industry interest group representing Google and Amazon, among other large advertising firms, launched a publicity campaign promoting targeted ads as a tool for small businesses that “[empower] the American Dream” (Interactive Advertising Bureau, 2022). The IAB also increased lobbying in response to the bill, spending 50% more on lobbying in 2022 compared to previous years (*Client Profile: IAB*, 2022). Similar efforts have been made by

companies in response to independent restrictions on targeted ads. In response to Apple providing info regarding personal info usage on iPhones, Meta released a campaign promoting targeted ads in a similar way to the IAB, describing how “personalized ads level the playing field” for small businesses (Meta, 2021). As it currently stands, the Banning Surveillance Advertising Act has not yet been introduced to committee, and is unlikely to proceed due to industry pressure.

Due to the lack of an effective push for legislation on a national level, many have instead focused on state laws. Privacy Legislation that would greatly limit many digital advertising techniques has been considered in 31 states as of 2022. However, almost all statewide legislation has been shaped by the demands of industry groups. In 2019, Tech giant Microsoft pushed a privacy bill in Washington state that would “created loopholes that exempted businesses from complying if they were using the data for certain ‘business purposes.’” (Lapowsky, 2020). Following the bill’s failure to pass through state legislature, the company pushed similar legislation in 4 other states, finding further success due to a lack of grassroots resistance in them. This pattern is not unique to Microsoft. A bill passed in Utah during 2022 provided the right to “[require] a business to delete a consumer’s personal data or stop selling the consumer’s personal data,” but featured the same exceptions as the rejected Washington bill (Utah Consumer Privacy Act, 2022). Before it’s discussion in the Utah legislature, “Amazon, Apple, Facebook, Google, and Microsoft collectively registered 23 active lobbyists in the state. ... when [the bill’s sponsor] introduced substitute language to his bill during a February hearing, he did so with the help of Anton van Seventer, a lobbyist for the State Privacy and Security Coalition, a nonprofit created by a handful of the nation’s biggest tech, retail, and advertising companies(Feathers & Ng, 2022). This same pattern has been followed in other states, with tech

accountability site and advocacy The Markup finding that “445 lobbyists and lobbying firms that actively represented Amazon, Apple, Google, Meta, Microsoft, TechNet” were dispatched to the various states with privacy bills on the docket, many helping to rewrite the bills to prevent lawsuits from consumers (Feathers & Ng, 2022) (Minnesota Consumer Data Privacy Act, 2020). Such pressures are likely to repeat on the national stage should a bill reach critical mass in the US house or Senate, and consumer protection

*William McCollough*

*William McCollough*

focused advocacies

should look to the strategies employed by lobbyists on a state level and prepare for them.

## **Conclusion**

The relative lack of advertising regulation in the United States is not an accident. Instead, it is the result of efforts by groups that benefit from more lenient advertising laws. The FTC has been unable to keep up with new methods of advertising. Precedent shows that advertising legislation can and will be struck down if found to infringe on first amendment rights. However, exceptions are made in cases where harm is caused or privacy violated. Should groups want to restrict the power of advertising through regulation, they should pursue an agenda focused on the

harm and privacy concerns of modern advertisements, considering how potential new technologies will continue to increase ad effectiveness.

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