



Regulation of Commercial Speech and Advertising

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Advertising Regulation

First Amendment limitations on regulations of commercial speech

Commercial speech is protected by the First Amendment, albeit in a somewhat limited way - sometimes called "intermediate scrutiny."

In practice, SCOTUS has often required something closer to strict scrutiny when dealing with content regulation of commercial speech ...

... but sometimes, as applied, it seems like something closer to rational-basis scrutiny.

Some (including Justice Thomas, e.g.) would erase the commercial/noncommercial speech distinction.

Advertising Regulation

First Amendment limitations on regulations of commercial speech

Two questions for analysis:

1. Are we dealing with “commercial speech”?
2. If so, does the regulation survive scrutiny (i.e., is it “constitutional”)?

Advertising Regulation

What is “commercial speech”?

Commercial speech is “expression related solely to the economic interests of the speaker and its audience.”

Central Hudson Gas & Electric. v. Public Service Commission of New York, 447 U.S. 557 (1980)

What is “commercial speech”?

In *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), SCOUTS looked at three factors:

1. Is the speech conceded to be an advertisement?
2. Is there reference to a specific product?
3. Was there an economic motivation for distribution?

In *Bolger*, the answer was “yes” to all three and the speech was judged to be commercial.

What is “commercial speech”?

No single formulaic test can be applied to the question of whether certain speech falls within the rubric of commercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983).

“Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.” *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 796 (1988).

In cases where commercial speech is “inextricably intertwined with otherwise fully protected speech,” more substantial constitutional scrutiny will apply. *Id.*

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Is a regulation of commercial speech constitutional?

Apply the test derived from *Central Hudson*:

Threshold inquiry:

1. To receive First Amendment protection commercial speech “at least must concern lawful activity and not be misleading.”

If so, the government must show:

2. There is a substantial government interest
3. The regulation must directly advances the interest
4. The regulation must not be more extensive than is necessary to serve the interest

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EASIER THAN IT LOOKS

Regulations

States and the federal government have myriad regulations on commercial speech, which can be highly specific.

Example: Mandated information disclosures in advertising, including regulations prescribing certain text formats (bold, font size, prominence, etc.).

FTC Act §5 is a general regulation of constitutionally unprotected commercial speech.

FTC Act §5 15 U.S.C. §45

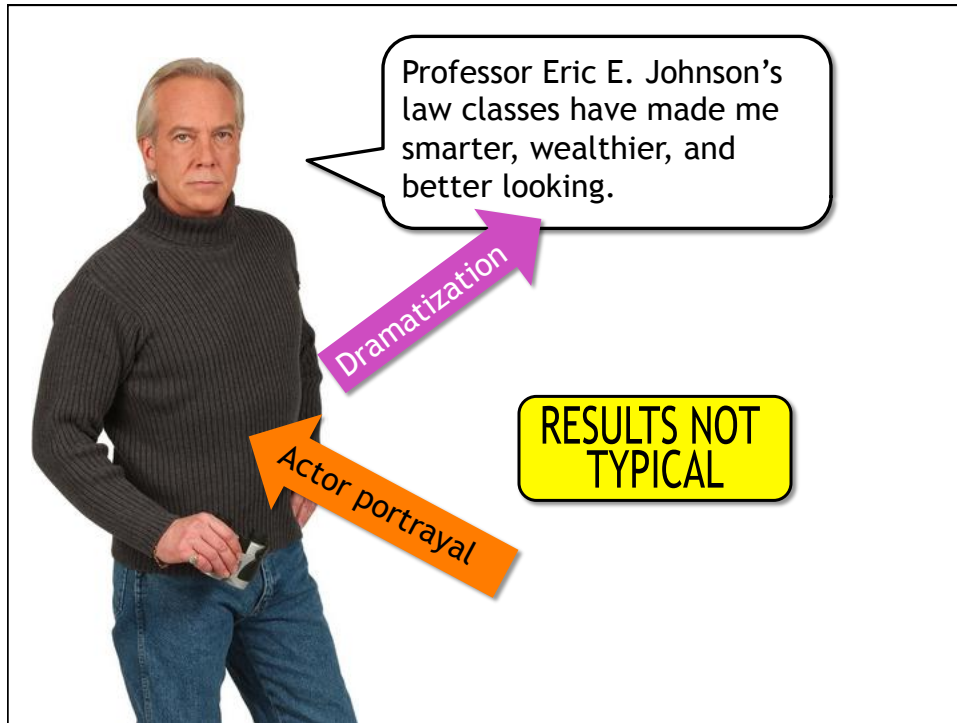
(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered [to enforce this.]

Fine Print

Specific language in advertisements, such as “fine print,” disclaimers, or the like, may be included either because of specific provisions of regulations, or because of a need to avoid liability under general proscriptions of misleading advertisements (e.g., FTC Act §5).





FTC Endorsement Guides

- Endorsements must be truthful and not misleading;
- If the advertiser doesn't have proof that the endorser's experience represents what consumers will achieve by using the product, the ad must clearly and conspicuously disclose the generally expected results in the depicted circumstances; and
- If there's a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, it should be disclosed.

FTC Q&A

I've heard that every time I mention a product on my blog, I have to say whether I got it for free or paid for it myself. Is that true?

- No. If you mention a product you paid for yourself, the Guides aren't an issue. Nor is it an issue if you get the product for free because a store is giving out free samples to all its customers.

FTC Q&A

What if all I get from the company is a \$1-off coupon, or if the product is only worth a few dollars? Do I still have to disclose?

- Here's another way to think of it: While getting one item that's not very valuable for free may not affect the credibility of what you say, sometimes continually getting free stuff from an advertiser or multiple advertisers is enough to suggest an expectation of future benefits from positive reviews. If you have a relationship with a marketer who's sending you freebies in the hope you'll write a positive review, it's best if your readers know you got the product for free.

FTC Gets Real:

“It’s all pretty common sense:
Don’t mislead readers into
thinking that you are giving an
unbiased testimonial if you’re
on the take.”