



UNITED STATES MISSION
TO THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

March 27, 2014

Ms. Farida Shaheed
Special Rapporteur in the Field of Cultural Rights
United Nations Office of High Commissioner for Human Rights
Palais Wilson
Geneva, Switzerland

Dear Ms. Shaheed,

Thank you for your letter dated December 11, 2013 and the accompanying questionnaire. The United States fully supports the mandate of the Special Rapporteur in the Field of Cultural Rights. We appreciate the opportunity to participate in your study, and we look forward to reading your report.

Attached to this letter is our response to your questionnaire. Our response details the laws, regulations, institutions, and practices concerning domestic advertising and the marketing sector in the United States.

Regards,

Peter F. Mulrean
Chargé d'Affaires ad interim

OHCHR REGISTRY

27 MAR 2014

Recipients: S.P.D.
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UNITED STATES RESPONSE TO UN QUESTIONNAIRE ON THE IMPACT OF ADVERTISING AND MARKETING PRACTICES ON THE ENJOYMENT OF CULTURAL RIGHTS

The Government of the United States has enacted a host of laws, rules, and regulations aimed at protecting the rights of its citizens, including relevant human rights, in the areas addressed in this questionnaire. Regulation, enforcement, and policy responsibilities relating to advertising and marketing practices primarily belong to the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC).

The Federal Trade Commission (FTC) is an independent federal agency with a unique dual mission to protect consumers and promote competition. Through its primary statute, the FTC Act, 15 U.S.C. §§ 41, et seq., the FTC has broad jurisdiction over most products and services in the United States. It protects consumers from unfair or deceptive advertising and marketing practices, including those that raise health and safety concerns, as well as those that cause economic injury. It brings law enforcement actions in United States federal district courts to stop fraudulent advertising practices, coordinates FTC actions with federal and international law enforcement agencies, and monitors advertising and marketing of alcohol, tobacco, violent entertainment media, and food to children. The FTC also brings administrative lawsuits to stop unfair and deceptive advertising.

In addition to the FTC, the Federal Communications Commission (FCC) receives complaints from consumers about broadcast advertising. These complaints concern a wide variety of issues, including: the nature of the products being advertised; the timing of certain advertisements (for example, during mealtime); commercials that consumers believe are indecent or in poor taste; advertisements they feel are poorly produced or grammatically incorrect; and false and misleading advertisements.

Freedom of Speech, Commercial Speech and Advertising Laws

The FTC's authority over unfair or deceptive advertising and marketing practices comports with constitutional guarantees of freedom of speech enshrined in the First Amendment to the U.S. Constitution. The First Amendment provides protections for political, ideological, artistic, or scientific expression as well as "commercial speech," such as product advertising. Commercial speech that is false or misleading, however, is not protected speech under the First Amendment.

Unlike political or creative speech, which receives the highest level of protection under the First Amendment from government interference, the government may restrict commercial speech provided the governmental interest in such regulation is substantial, the regulation directly advances the interest, and the regulation is no more extensive than is necessary to serve that interest. One example is information disclosure requirements, which the Supreme Court has ruled are different from outright bans on speech, particularly with respect to commercial speech. Provided that the required disclosures are reasonably related to the government's interest in preventing deception to consumers, and are not "unjustified or unduly burdensome," they do not chill commercial speech. In general, however, the U.S. approach, as underpinned by the First Amendment, is to promote freedom of speech without government censorship or many legal constraints.

Enforcement Standards

Using its enforcement mandate, the FTC vigorously enforces laws against misleading commercial speech by investigating and bringing actions against advertisers who make express or implied claims in advertisements that are generally disseminated to the American public. The FTC has primary responsibility for determining whether specific advertising is false or misleading, and for taking action against the sponsors of such material.

When reviewing advertising claims for truthfulness and fairness, the FTC views the advertisement from the viewpoint of a "reasonable consumer." The FTC's inquiry considers the entire advertisement – or its net impression – to determine what it conveys to consumers. Under FTC law, an advertisement can be deceptive or unfair, and thus unlawful, for express claims and implied claims. The FTC's legal tests focus on whether the advertising claims are false or deceptive, or do not have adequate substantiation, and not on whether the advertising is in good taste or offends any particular group's social or cultural values.

In addition, as noted above, in some circumstances, the U.S. Constitution permits Congress to pass laws that restrict certain types of speech. Accordingly, Congress has passed laws that restrict television stations from broadcasting material that promotes certain lotteries, advertises cigarettes or smokeless tobacco products, or perpetuates a fraud. Broadcasters are responsible for selecting the broadcast material that airs on their stations, including advertisements. In addition to the FTC standards, the FCC expects broadcasters to be responsible to the community they serve and act with reasonable care to ensure that advertisements aired on their stations are not false or misleading. Consumers who consider an advertisement offensive because it is obscene, indecent, or profane can file a complaint with the FCC.

Obscene, Indecent, and Profane Broadcasts

It is a violation of federal law to air obscene programming at any time. It is also a violation of federal law to air indecent programming or profane language during certain hours. Congress has given the FCC the responsibility for administratively enforcing these laws. The FCC may revoke a station license, impose a monetary forfeiture, or issue a warning if a station airs obscene, indecent or profane material.

Obscene broadcasts are prohibited at all times. Obscene material is not protected by the First Amendment to the Constitution and cannot be broadcast at any time. The Supreme Court has established that, to be obscene, material must meet a three-pronged test. First, an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest. Second, the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law. Third, the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

Indecent Broadcast Restrictions

The FCC has defined broadcast indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.

The courts have held that indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted in order to avoid its broadcast during times of the day when there is a reasonable risk that children may be in the audience.

Consistent with a federal indecency statute and federal court decisions interpreting the statute, the Commission adopted a rule that broadcasts – both on television and radio – that fit within the indecency definition and that are aired between 6:00 a.m. and 10:00 p.m. are prohibited and subject to indecency enforcement action.

Profane Broadcast Restrictions

The FCC has defined profanity as “including language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” Like indecency, profane speech is prohibited on broadcast radio and television between the hours of 6:00 a.m. and 10:00 p.m.

Enforcement actions in this area are based on documented complaints received from the public about obscene, indecent or profane material. FCC staff will review each complaint to determine whether it contains sufficient information to suggest that there has been a violation of the obscenity, indecency or profanity laws. If it appears that a violation may have occurred, the staff will start an investigation, which may include a letter of inquiry to the broadcast station.

If the FCC determines that the material about which a complaint was received was obscene, indecent and/or profane, it may issue a Notice of Apparent Liability (NAL), which is a preliminary finding that the law or the FCC’s rules have been violated. Subsequently, this preliminary finding may be confirmed, reduced or rescinded when the FCC issues a Forfeiture Order.

Protection for Vulnerable Populations

Complementing the FCC's protection measures, the FTC also utilizes its policy and enforcement tools to encourage increased protection for members of vulnerable groups that may face unique or heightened risks from unfair and deceptive advertising and marketing practices. One example is FTC efforts to encourage increased protection for children with respect to the advertising and marketing of food and beverages, alcohol, and violent entertainment. In the food and beverage area, the FTC has taken numerous steps to encourage the development of industry self-regulation standards and programs focused on marketing to children.

The FTC also issues reports on industry self-regulatory efforts to reduce advertisements and marketing for alcohol to underage audiences, and engages in consumer and business educational campaigns to combat the sale of alcohol to minors. Using its information-gathering authority, the FTC has required alcohol advertisers to produce information about their efforts to reduce alcohol marketing to underage consumers. The information provided, which the FTC has synthesized into public reports, has resulted in agreements with industry participants to adopt voluntary advertising placement standards, buying guidelines for placing advertisements on radio, in print, on television, and on the internet; requirements for alcohol suppliers to conduct periodic internal audits of past placement of advertisements; and systems for external reviews of complaints and compliance. The FTC also publishes consumer and business education materials designed to prevent minors from buying and/or consuming alcohol. Recently, the FTC led a national education campaign designed to reduce underage drinking by reminding parents and other adults that alcohol consumption by minors creates negative health, social, and economic consequences for adolescents, their families, and communities.

Similarly, the FTC has issued reports and studies on violent entertainment marketed to children, and called on industry to adopt effective self-regulatory standards to restrict the promotion of such products to children. The FTC issued its first report in 2000, calling on the entertainment industry to restrict the marketing to children of products intended for an adult market, clearly and prominently disclose rating information, and restrict children's access to mature-rated products at retail. Since then, the FTC has issued six reports. Most recently, in 2009, the FTC issued another report that analyzed marketing documents submitted by industry members, an undercover or "mystery" shopper survey, consumer surveys conducted in shopping malls and by telephone, "surfs" of industry websites, and data from advertisement-monitoring services. The report found that the entertainment industry needs improvement with respect to the marketing of music, movies, and video games to children, and made additional self-regulatory recommendations for these industries. In 2013, the FTC announced an undercover shopper survey on entertainment ratings enforcement, which showed marked improvement in enforcement among the music, movie, and gaming industries.

The FTC has also brought targeted enforcement actions to protect Spanish-speaking consumers from deceptive marketing practices that are tailored to specifically exploit this group. For example, using Section 5 of the FTC Act, the FTC commenced enforcement actions alleging that it is a deceptive marketing practice to offer verbal terms in Spanish and then provide different written terms in English, and obtained final orders and implemented trade regulation rules requiring sellers and advertisers to make disclosures in the same language as the sales presentation. The FTC also hosts a Spanish-language consumer education website.

In addition, the FTC brought target enforcement actions to protect financially vulnerable consumers. After the 2008 financial crisis, the FTC took concerted enforcement measures to protect financially vulnerable Americans from scams that preyed on their financial and unemployment status.

Notable Recent FTC Actions Against Deceptive Advertising

Pom Wonderful LLC and Roll International Corp., Doc. No. 9344 (Dec. 12, 2009): Administrative action commenced by the FTC alleging that the makers of POM Wonderful 100% Pomegranate Juice and POMx supplements made false and unsubstantiated claims that their products would prevent or treat heart disease, prostate cancer, and erectile dysfunction.

FTC v. Skechers U.S.A., Inc., d/b/a Skechers, Civ. No. 1:12-cv-01214 (N.D. OH. May 16, 2012): Federal district court action commenced by the FTC, alleging that Skechers made false and unsubstantiated weight loss and other

health claims in its advertisements for “Shape-ups,” “Resistance Runner,” “Toners,” and “Tone-ups” shoes. Skechers settled the FTC’s charges by agreeing to a permanent injunction and paying \$40 million, which was used for consumer redress.

The Dannon Company, Inc., Doc. No. C-4313 (Dec. 15, 2010): Administrative action alleging that Dannon made unlawful advertising claims by exaggerating the health benefits of Activia yogurt and DanActive dairy drink. Final order prohibits Dannon from making future claims about the health benefits, performance, or efficacy of yogurt, dairy drinks, or any probiotic food or drink unless it has two well-designed human clinical studies supporting the claims.

Consumer Options for Blocking Television Channels

Consumers themselves also have the ability to block television channels on which objectionable programming may appear through technologies such as the V-chip and cable “lockboxes.”

The V-chip is a technology that lets parents block television programming they do not want their children to watch. The V-chip electronically reads television-programming ratings and allows parents to block programs they believe are unsuitable for their children. (The television industry has voluntary ratings for TV programs that appear in the corner of the television screen during the first 15 seconds of each television program and in TV programming guides.) This rating is encoded into the program, and the V-chip technology reads the encoded information and blocks shows accordingly. Using their remote control, parents can program the V-chip to block certain shows based on their ratings.

Cable television subscribers may request a “lockbox” from cable operators to prevent viewing any channel on which objectionable programming may appear. Cable operators are required to make lockboxes available for sale or lease to customers who request them. Lockboxes can also be purchased from other commercial distributors.

The Communications Act includes a provision that is designed to increase control over the programming coming into a subscriber’s home. Section 640 requires a cable operator to scramble or block fully the audio and video portions of programming services not specifically subscribed to by a household. The cable operator must fully scramble or block the programming in question upon the request of the subscriber and at no charge to the subscriber.

Advertising Self-Regulatory Organizations

The FTC’s advertising enforcement program is complemented by a wide range of advertising self-regulatory organizations, including industry oversight bodies such as the National Advertising Division and the Children’s Advertising Review Unit of the Council of Better Business Bureaus. These oversight bodies implement processes for resolving consumer or competitor complaints about deceptive or unfair advertising practices. If businesses are reluctant to comply with these resolution processes, the oversight bodies may refer the matters to the FTC, which can initiate a law enforcement proceeding as a backstop to the self-regulation system. Consumers may also complain directly to the FTC about false and deceptive advertising.

It is the government’s view that industry self-regulation in the advertising area can promote prompt, flexible, and effective oversight of industry participants. Typically, self-regulatory organizations benefit from the collective knowledge and expertise of various stakeholders, and permit industry to respond more quickly and effectively to market changes and consumer needs than government can implement or amend regulations.

Consumer Privacy/Behavioral Marketing

As part of its consumer protection mission, the FTC serves as the nation’s chief privacy policy and enforcement agency in the commercial privacy sphere. The agency initiates actions enforcing legal standards that require companies to collect and use consumers’ information in accordance with promises made in companies’ advertisements and privacy policies. As one example, in 2011, the FTC settled charges with Facebook, Inc., that it violated federal law by misrepresenting to consumers that the consumers’ information would be kept private and

then repeatedly allowing the information to be shared and made public. The settlement requires Facebook to take steps to ensure it lives up to its data privacy promises, such as mandating that Facebook give clear and prominent notice to consumers and obtaining the consumer's express consent before sharing consumer information beyond Facebook's privacy settings.

On a policy level, the FTC has issued reports that intersect advertising and behavioral marketing concerns. In 2009, the FTC issued a report that included four self-regulatory principles to guide and encourage industry selfregulation with respect to online behavioral advertising. The report, while recognizing the potential benefits of behavioral advertising, addressed the privacy concerns posed by the practice, including the invisibility of the data collection practices and the risks associated with safeguarding consumers' personal information. And in 2012, the FTC issued a privacy report that called for comprehensive federal data privacy legislation and set forth a framework of best practices for businesses to protect consumer privacy and give consumers greater control over the collection and use of their personal information.

The FTC's privacy initiatives also have sought to protect certain vulnerable populations, such as children. The agency enforces the Children's Online Privacy Protection Act ("COPPA") through an implementing rule, which requires website operators and online services that are either directed to children under 13 or that have actual knowledge that they are collecting personal information from children under 13 to give parents notice and obtain parents' verifiable consent before collecting, using, or disclosing children's personal information, and to safeguard the information that is collected. The FTC recently amended the COPPA rule to account for new developments – such as social networking, smartphone Internet access, and the ability to use geolocation information – that affect children's privacy. (The new rule went into effect July 1, 2013.) The FTC has also issued reports concerning children and mobile applications ("apps"), which examined the privacy disclosures and practices of mobile apps offered for children in popular app stores. Most recently, in January 2014, the FTC announced a settlement in a law enforcement action against Apple Inc. for its marketing practices. The FTC alleged that Apple failed to inform parents that by entering a password on their mobile device they were approving not only a single in-application purchase but also 15 minutes of additional unlimited purchases their children could make without further action by the parent. Apple Inc. settled the charges, agreeing to pay at least \$32.5 million in consumer redress, as well as agreeing to an injunction that requires it to change its billing practices to ensure it has obtained express informed consent from consumers before charging them for in-application purchases.

Advertising Regulations Regarding Schools

The majority of the legislative and regulatory authority governing advertising, sponsorship, and commercial practices on school property is vested with state and local governments. Therefore, regulations differ among jurisdictions. For example, a number of states regulate commercial advertising on school buses. While states, like Washington, have banned certain types of advertising such as liquor advertisements throughout the entire state, other states, like Tennessee, Utah, and New Mexico, have authorized local school boards to establish the guidelines and regulations under which commercial advertisements are permitted on school buses.

Similarly, regulations differ concerning the types of advertising permitted on school premises. For example, the Los Angeles Unified School District has prohibited on District premises "the advertising, or sale to students or employees of any article whatsoever." However, with the written permission of the Superintendent of Schools, or his/her designee, limited exceptions can be made, such as with advertisements that are educational in nature.

Conversely, the School Board of Hillsborough County, Florida allows a more robust list of factors to be considered in permitting commercial advertising. Regulations allow the School Board to permit advertising in District facilities or on District property in accordance with the following guidelines:

Product Sales

- Product sales benefiting a district, school or student activity (e.g., the sale of beverages or food within schools)
- Exclusive agreements between the District and businesses that provide the businesses with the exclusive right to sell or promote their products or services in the schools (e.g. pouring rights contracts with soda companies)

- Fundraising activities (e.g. short term sales of gift wrap, cookies, candy, etc.) to benefit a specific student population, club, or activity where the school receives a share of the profits

Direct Advertising/Appropriation of Space

- Corporate logos or brand names on school equipment (e.g. marquees, message boards, or score boards)
- Advertisements, corporate logos, or brand names on book covers, student assignment books, or posters
- Advertisements in school publications (newspapers and yearbooks and event programs)
- Free samples (e.g. of food or personal hygiene products)

Indirect Advertising

- Corporate-sponsored instructional or educational materials, teacher training, contests, incentives, grants, or gifts
- Instructional materials developed by commercial organizations such as films and videos only if the educational value of the materials outweighs their commercial nature
- The films or material shall be carefully evaluated by the school principal for classroom use to determine whether the films or materials contain undesirable propaganda and are in compliance with the guidelines as set forth above.

In addition, all advertisements must conform to the following 15 requirements in Hillsborough County:

- All commercial or corporate involvement should be consistent with the District's educational standards and goals.
- The Board reserves the right to consider requests for advertising in the schools on a case-by-case basis.
- No advertisement shall promote or contain references to alcohol, tobacco, drugs, drug paraphernalia, weapons, or lewd, vulgar, obscene, pornographic, illegal, or otherwise inappropriate materials.
- No advertisement shall promote any political candidate or ballot issue.
- No advertisement may contain libelous material.
- No advertisement may be approved which would tend to create a substantial disruption in the school environment or inhibit the functioning of any school.
- No advertisement shall be false, misleading, or deceptive.
- Each advertisement must be reviewed in advance for age appropriateness.
- Advertisements may be rejected by the District if determined to be inappropriate or to be inconsistent with the educational objectives of the District or with the guidelines set forth in this policy.
- All corporate support or activity must be consistent with the Board's policies prohibiting discrimination and must be age-appropriate.
- Students shall not be required to advertise a product, service, company, or industry.
- The Superintendent is responsible for screening all advertising.
- The Superintendent may require that samples of advertising be made available for inspection.
- The inclusion of advertisements in District publications, in facilities, or on its property does not constitute or imply approval and/or endorsement of any product, service, organization, or activity.
- Final discretion regarding whether to advertise and the content and value of the materials to be advertised will be with the Board.

Support for the Arts

Support for the arts is provided in numerous ways in the United States. The Federal government operates public institutions and provides grants to private arts institutions. For example, the Smithsonian Institution is a Federal complex of museums and research facilities. Its revenue sources include Federal appropriations (58 percent), private contributions and grants (19 percent), government grants and contracts (11 percent), revenues from operations (3 percent), as well as investment income from its endowment (6 percent). National monuments and heritage buildings can be owned and operated by the Federal government, primarily by the National Parks Service, and can include cultural assets, such as Abraham Lincoln's home. State and local governments also may operate similar public institutions and offer grants to encourage the arts.

In addition to public institutions, there are many private arts institutions. These are often organized as non-profit

organizations that may qualify for exemption from Federal income taxes under Section 501(c)(3) of the tax law. This section provides tax exemption for "charitable organizations," which must have one of the following purposes: charitable, religious, educational, scientific, literary, testing for public safety, fostering amateur sports competition, or preventing cruelty to children or animals. Many of these organizations file Form 990 information returns with the Internal Revenue Services (IRS). The IRS uses these returns to monitor for organizations' compliance with their tax-exempt status. These forms are made available to the public. In 2007, 31,800 arts, cultural, and humanities organizations with more than \$100,000 in income and more than \$250,000 in assets filed this form. Their total revenues were \$34.0 billion, with contributions, gifts, and grants – from private citizens, corporations, foundations, and governments – accounting for \$18.5 billion. States generally also provide income tax exemption to Federally designed 501(c)(3) organizations. In addition, these organizations may also receive exemption from other state taxes, such as state sales taxes and local property taxes, if state requirements for exemption are met.

In addition to being exempt from income tax, certain donations to charitable organizations are deductible from taxable income of the donor. This provides a subsidy for private giving to these organizations. Individuals and corporations giving money or in-kind donations often can deduct the value of the donation from their taxable income, subject to certain limits and conditions. Private giving was estimated to be \$303.8 billion in 2009, with individuals accounting for \$227.4 billion, corporations for \$14.1 billion, foundations for \$38.4 billion, and charitable bequests for \$23.8 billion. Estate and gift taxes, both Federal and state, can be also reduced by charitable bequests and gifts.

Private foundations are another type of 501(c)(3) organization that receives most of their income from investments and endowments by an individual, family, or corporation and usually either donate funds or support other organizations. The top U.S. foundations supporting arts, culture, and the performing arts are the Annenberg Foundation, the Ford Foundation, the Andrew W. Mellon Foundation, the John S. and James L. Knight Foundation, the Shubert Foundation, the William and Flora Hewlett Foundation, and the Brown Foundation. Another example is the United States Artists (USA) Fellows Program that offers unrestricted grants of \$50,000 to 50 artists each year. The foundations annually file a Form 990-PF with the IRS and may be subject to excise taxes on net investment income if they do not distribute enough of their annual earnings. The charitable deduction supports donations to private foundations that make grants to the arts, including direct support to artists for their work.

In addition, there are targeted tax incentives, such as the rehabilitation investment credit for certain historic structures. Similarly, low income performing artists can deduct certain expenses from their gross income while writers, photographers, and artists do not have to capitalize some expenses. Although creative works are generally not capital assets in the hands of their creators, a special rule allows taxpayers to elect to treat them as such.