

¿ What me worry?

Legal Issues & Best Practices for the Small Publisher

An Update

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Interactive Advertising Bureau
Long Tail Alliance Series
Webinar from New York
October 23, 2009



Advertising Compliance

Privacy

Social Media

Convergence

Distinctions between information, marketing, advertising, entertainment, promotion and, in some cases, networks, ISPs and distribution platforms are blurring.

Advertisers are becoming content creators, media and entertainment companies are becoming ad supported revenue engines, media buying is being performed by advertisers and agents, telecom companies - wired and wireless - are becoming content creators and gaming companies are becoming distribution platforms.

Publishing - A New World

The logo for the Interactive Advertising Bureau (iab.), consisting of the lowercase letters 'iab.' in a bold, black, sans-serif font.

The Machine is . . .

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The Legal Landscape

Rise of Consumer

- Integration
- Engagement
- Power

Digital Distribution Platform

- Unique Privacy Regulations

Threat of Regulation & Legislation

- Anecdotal Evidence
- Overlapping Jurisdiction
- Dynamically Evolving Technology

Changing Perceptions of Privacy

- National
- Social
- Cultural
- Age Demographics
- Workplace

Intellectual Property

- Protection
- Enforcement
- Confusion
- Dilution

Threats to Privacy

- Who You Are
- Where You Are
- What You Are Doing
- When You Are Doing It
- And With Whom?

What is Private?

- My 'Space'?
- Information About Me?
- Sharing Information About Me?
- Use of Information About Me?

Marketing to Children and ...

**BLURRING THE DISTINCTIONS BETWEEN
INFORMATION, ENTERTAINMENT and ADVERTISING**

In Theory

Enforcement is a government & industry partnership . . .

- Federal




- State



- Self Regulation





FTC

- Heightened Consumerism - Activist Philosophy
- New Endorsement Guidelines
- No More Astroturfing
- Regulate Behavioral Advertising
- Take a PROMINENT seat at many different tables, including FINANCIAL SERVICES, HEALTH CARE, PHARMA, SECURITIES, and more . . .

MAYBE [Consumer Financial Protection Agency?]

FTC - Astroturfing

An incisivemedia website

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LAW.COM **LEGALTECHNOLOGY** | Featuring Law Technology News

Law.com > Legal Technology

FTC Ready to Cut 'Astroturfing'

By Tresa Baldas
[The National Law Journal](#)
September 21, 2009

Post a Comment

The controversial promotional practice of "astroturfing" -- flooding the Internet with bogus product reviews -- is about to hit the dirt.

The Federal Trade Commission is apparently on the brink of updating its 29-year-old guidelines on product endorsements. While that threat has been looming for more than a year now, advertising lawyers say final rules are expected to be announced before the year is up.

And the FTC, lawyers warn, will be making one thing clear: Phony online reviews will not be tolerated.

The revised guidelines, who go beyond astroturfing to address other product endorsement issues, have everyone from mommy bloggers to health care product promoters in a tizzy, all fearing that what they say about an item online could run afoul of the new guidelines.

"I think everyone should be concerned," said Barry Reingold, a Washington partner at Seattle-based Perkins Coie who counsels advertisers. He said the FTC's plans have caused "an uproar" in the advertising industry.

Why? Because the FTC, he said, may be poised to require companies to provide proof to back up any claims about a product or a service. The mandate will be, "If you don't have the scientific proof to back it up, don't say it."

Reingold suggests the FTC may be taking things too far: "In the old days, you could say, 'I lost 50 pounds,' but there had to be a disclosure saying, 'Results vary.' Now, you have to affirmatively say, 'The average consumer will lose two pounds in a week,' and you have to provide statistics."

"I understand [the FTC's] concern, but I think they're imposing a potentially enormous cost on the industry," Reingold said.

Bloggers also will not be spared, attorneys noted. Under the FTC's proposed guidelines, bloggers who write about products will have to disclose when they



ULTRA.F, Getty Images

Related Items

[Web Ad Blockers Have Broad Shield From Suits](#)

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An endorsement means any verbal or visual communication that consumers, acting reasonably, would be likely to understand to be expressing the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser.

Note: The FTC uses endorsement and testimonial, interchangeably

A Typical Professional Athlete Endorsement



funny
OR DIE.COM

Starter – Tony Romo (Mock) Ad

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Guides Concerning the Use of Endorsements and Testimonials in Advertising

[16 C.F.R. Part 255; First promulgated in 1975, last revised in 1980 and **NOW** in 2009:

- Advertisers subject to Guides when “sponsoring” advertising.
- Advertisers liable for “sponsored” endorsers.
- Celebrity endorsers should ensure adequate basis for claims.
- “Results Not Typical” no longer a safe harbor.
- Disclose “material connections”.
- Disclose sponsored clinical trials.

Endorsements - Why Change?



The FTC recognized the Guides were designed for a different world and there is a “new paradigm” of marketing practices, most notably in social media where marketing practices have shifted from “advertising” to the consumer to “engaging” with the consumer.

FTC Testimony in the U.S. Senate, Washington, DC, July 22, 2009*

“In 1980, the advertiser always disseminated the advertisement. With the advent of advertiser-promoted consumer blogging, the advertiser is not always disseminating the endorsement, although it certainly expects to profit from the message.

Moreover, the Commission's enforcement history with false or deceptive advertising using consumer endorsements, as well as its own research, have made it increasingly clear that in one key aspect - disclaimers of typicality - the Guides are not working as intended to prevent consumer deception.”

*Prepared Statement of the Federal Trade Commission on Advertising Trends and Consumer Protection before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science and Transportation.

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Liability

Advertisers will be liable for making false or unsubstantiated statements made through endorsements; and

Advertisers will be liable for failing to reveal material connections to endorsers; and

Endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser who will be liable for false or unsubstantiated statements.

The only relevant criterion in determining whether a statement is an 'endorsement' is whether consumers believe the statement reflects the endorser's views.

Substantiation

Advertisers using consumer endorsements must possess sufficient substantiation to support claims as if the advertiser had made the representation without any endorsements.

In other words, consumer endorsements alone are not equated with scientific evidence and do not serve as reliable or competent scientific evidence. Individual consumer experiences in the form of anecdotal evidence do not provide a sufficient basis to substantiate claims.

Typicality

If an advertiser cannot substantiate an endorser's experience as depicting what consumers will generally achieve, then:

the advertisement must disclose, clearly and conspicuously, the generally expected performance of the product or service

and

the advertiser must use adequate substantiation in making that representation.

Safe Harbor Disappeared

"Results may vary" or "results not typical" will no longer be considered effective in disclaiming actual or implied representation of typicality.

The FTC staff determined these types of disclaimers alone are unlikely to be effective in communicating to consumers the limited applicability of the endorser's experience.

Experts and Celebrities

Previously, experts and celebrities treated the same way. Payments did not generally trigger disclosure requirements.

Now:

An expert can be paid for an endorsement, but if it's not a flat fee or if the fee is related to success, disclosure of the compensation relationship is required; BUT

If consumers would normally expect a celebrity endorser to be paid, no disclosure is required.

Future Expert Endorsement



Nike – Woman's Foot Testimonial Ad

Future Celebrity Endorsement



Stroh's Light – Fidel Castro Ad

Social Media Formally Subject to Regulation

Commercial blogs are subject to the FTC Act (*FTC v. Enternet Media, Inc., et al.*)

Endorsements in social media (e.g., blogs, buzz, viral, word of mouth) covered by FTC regulation.

Relationships between advertiser and promoter that would affect the consumer's perception of the promoter's credibility, must be disclosed.

Example: Bloggers and advertisers held accountable for contents of blog posts and product reviews:

- Obligation to guide and correct errors;
- Disclose payments (consideration);
- Disclose connections (material); and
- Blogger's opinion must be honest, free of unsubstantiated or false claims. "Expert" bloggers may have independent obligations.

Future Virtual Endorsements

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FCC



Who Cares?

The phone adds the combined utility of the fixed telephone, Internet, computer, credit card, game console, library, radio and TV, to name only a few.

Because of its multi-functional characteristics and its reach and because the mobile phone will continue to cannibalize some or all of the features and functions of an unparalleled number of other applications and inventions, the mobile phone will impact your life in more ways than we can imagine. . . .

Why We Should Care . . .

As of January 2007:

800 million cars; 850 million personal computers; 1.3 billion fixed landline phones; 1.4 billion credit cards and 1.5 billion TV sets.

Mobile phones in use? 2.7 billion

About 800 million email users

1.8 billion SMS text messaging users

Even taking 10% as multiple subscriptions, in January 2007 about 36% of the planet's population carried a mobile phone.

In 2006 about 950 million mobile phones were sold worldwide:

About 66% had built-in cameras; 30% had MP3 players and 80% had color screens. All could access the Web (at least via WAP) and exchange SMS text messages; Over 66% were high speed (at least GPRS/ EDGE/CDMA2000 1xRTT); and 20% of were 3G phones.

- Participating in Online Behavioral Targeting Discussion
- "Consumers should stay alert, recognize the potential risks associated with cyber crimes and take some simple precautions to help reduce their chances of falling victim to scams." FCC Chairman Genachowski, 10.09.09
- Implement the Child Safe Viewing Act of 2007
- Net Neutrality
- Use Based Pricing

OMG! Ads Trgt TiVo Usrs +



Unilever

Marketers Try to Be 'Kewl'
With Text-Message Lingo

Unilever's OMG Moment

Marketers are getting hip to text-message lingo. In ads for a new line of Degree deodorant for teen girls, Unilever is highlighting "OMG! Moments."

Roadside toilets now accessible by SMS

Posted Feb 5th 2008 1:05PM by [Darren Murph](#)


... People traveling through Western Finland will need to take out their handsets to relieve themselves in select public restrooms.



They will require restroom visitors to text "OPEN" (in Finnish, of course) in order to let them in.

Coming Soon to a Mobile Device Near You Targeted Advertising & Marketing

- User Search & Input
- Geo Targeting - Location, Location, Location
- Coupling Location with Context
- Coupling Location with Behavior
- Location Sharing Capabilities
 - Among Users
 - Among Devices
- Social Networking Coupled with Location Sharing
- Surveillance Capabilities



FDA

FDA - What's New?

- Scheduling public hearings on the use of the Internet and social media tools (such as blogs, wikis, and social networking sites) by the manufacturers of prescription drugs, medical devices, and prescription animal drugs in the promotion of regulated products and in the reporting of adverse event information.
- New guidelines for drug makers and medical device manufacturers on how to present risk information to both health care professionals and consumers alike - the requirements for a "balanced presentation".
- More transparency, integrity and disclosures mandated in the areas of paid endorsements of drugs and medical devices, paid ghost writing and other direct-to-consumer (DTC) advertising developments.
- Important developments in the area of off-labeling advertising, marketing and information disclosures (Alergan v. FDA)

FDA - What's REALLY New?



Cracking down on misleading and inaccurate food labeling, especially nutritional logos like the green-check mark associated with “*Smart Choices*” on cereals, crackers and other processed food. The FDA is developing proposed nutritional standards that would have to be met before claims can appear on product packaging.

The Washington Post

Wednesday, October 21, 2009

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FDA seeks better nutrition labeling

Pursuit of standards comes as foodmakers set up own systems

By Lyndsey Layton

Washington Post Staff Writer

Wednesday, October 21, 2009

The federal government is wading into the supermarket aisle, making its first effort to provide better nutritional information on food products since it developed the black-and-white Nutrition Facts label 15 years ago.

Margaret A. Hamburg, the commissioner of the Food and Drug Administration, said Tuesday that shoppers are bombarded by slogans ("Heart Healthy," "Good for You," "A Better Choice") on products and that the government needs to set standards and knock down spurious claims.

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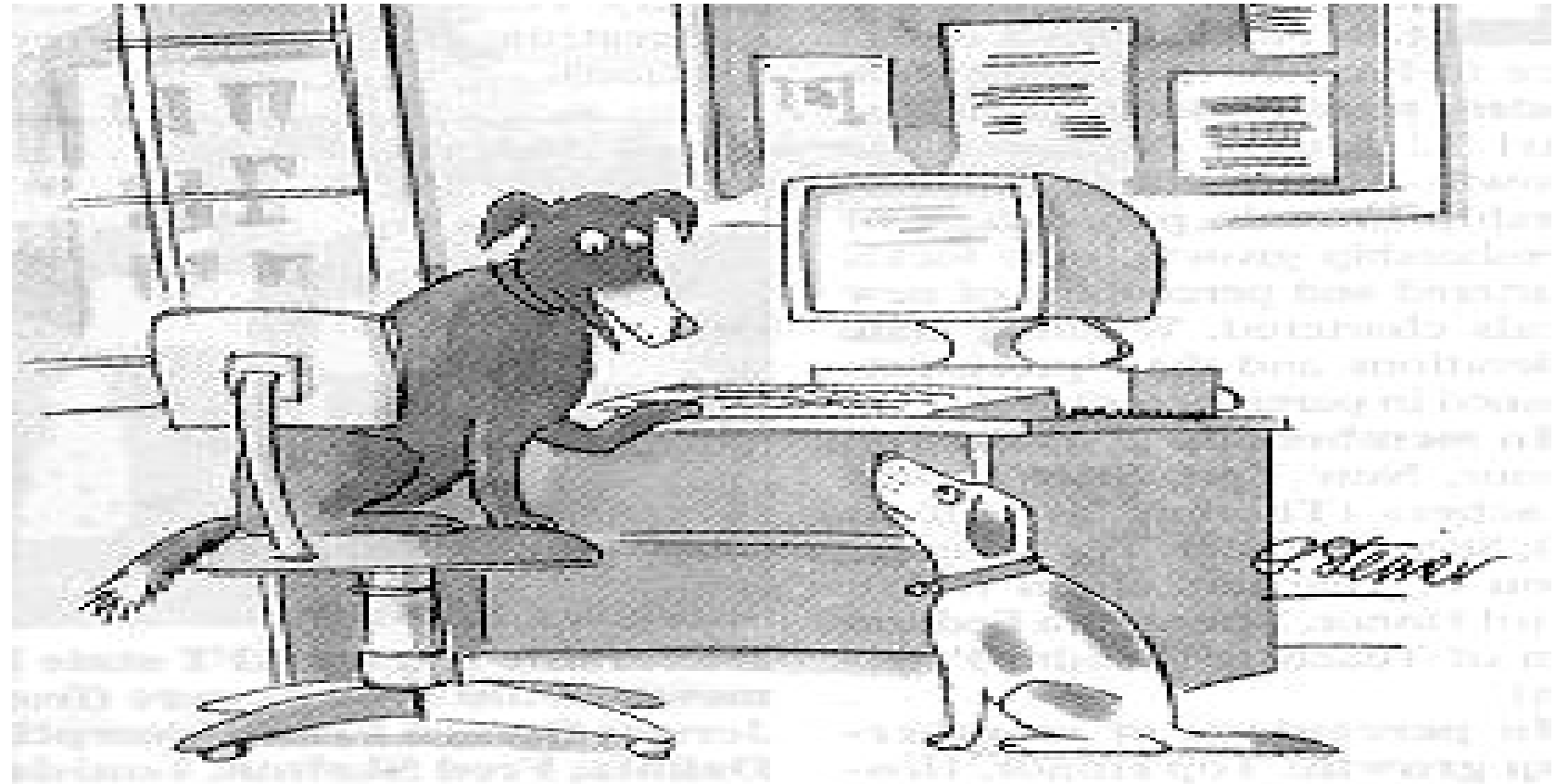


Privacy

1993 New Yorker Cartoon



On the Internet, nobody knows you're a dog.



On the Internet, everybody knows you're a male beagle who prefers dry dog food, sneaks into the master's bedroom to lie on the bed watching cable all day and who wears a specially designed, blue flea collar.

- FTC: Children's Online Privacy Protection Act ("COPPA")
- Council of Better Business Bureau: Children's Advertising Review Unit ("CARU")
- State Law (e.g., Maine's "Act To Prevent Predatory Marketing Practices against Minors" ... BUT ...)

"Online behavioral advertising means the collection of data from a particular computer or device regarding Web viewing behaviors over time and across non-affiliate web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors."

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Want to stop this
from happening?

Take Action!

Replay the movie?



Privacy - Self-Regulation?

- February 2009: FTC supplements its "Self-Regulatory Principles for Online Behavioral Advertising" report, highlighting the FTC's voluntary best practices for the behavioral advertising industry.
- July 2009: Group of the nation's largest media and marketing trade associations release self-regulatory principles.
- September 2009: Coalition of 10 privacy and consumer advocacy groups release a legislative primer calling for more regulation and calling current regulation insufficient and self-regulation inadequate.
- September 2009: Administration and Congress propose Consumer Financial Protection Agency, contemplating transfer of regulation of financial advertising to consumers to a new agency.
- October 2009: Congress announces it is poised to enact new privacy legislation targeted at behavioral advertising, with the FTC as its agent.

Self-Regulatory Online Behavioral Advertising Principles

- *Education*
- *Transparency*
- *Consumer Control*
- *Data Security*
- *Material Changes*
- *Sensitive Data*
- *Accountability*





Social Media

Social Media refers to the activities, practices, communication and behavior of and among communities of individuals who gather online to share information, experience, knowledge and opinions, using conversational and interactive media.

User Generated Content



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The Power of Negative Social Media



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twitter

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What's a Publisher to Do?

Consumer influence

Can you control it?

Enable conversations

Influence conversations

Monitor conversations

React to conversations

Monetize Conversations

PARANOIA HAS A PURPOSE!

True or False?

- Linking is not copyright infringement.
- A tweet is not protected by copyright law.
- I am not liable for copyright infringement committed by others on my site.
- As the publisher I am free to grant permission to use any and all materials posted on my site.
- If I paid for content to be created, I own the copyright.
- The copyright owner retains control of material posted to a blog or social network.

Search: "Starbucks"



facebook Home Profile Friends Inbox Douglas J. Wood

Starbucks Coffee Company [Become a Fan](#)

Wall Info Video Events Discussions Boxes >>

Starbucks Coffee Company Just Fans

The Official Starbucks Page

3,016,115+ Fans

Starbucks Coffee Company About to pass 3 million fans here on World We are honored and humbled by this question for you all: what else would you like to see us do on this site? By that I mean content, discussion or offers regarding Starbucks would you like to see? Yesterday at 2:19pm

11,480 people like this.

View 5,254 comments

Starbucks Coffee Company Here is Cara's morning ritual...wha









Cara | Italian Roast and passion
Source: www.youtube.com

This is a series of lifestyle vignettes, each brought different Starbucks coffee. Each story will document creative process be they a singer or a seamstress

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Search: "Starbucks"

		
	Application: Developer: Description: Users: Matches:	Starbucks drinks Ben Yoder Send drinks and pumps of syrups to your friends 170,766 monthly active users Application Name
	Application: Developer: Description: Users: Matches:	Starbucks Drinks Craig Tietzoni send friends mouthwatering Starbucks drinks 121,354 monthly active users Application Name
	Group: Size: Type: News:	Addicted to Starbucks 141,602 members Common Interest - Food & Drink 333 More Members, 6 Board Topics, 21 Wall Posts, 7 Photos
	Page: Type: Size:	starbucks***** Other Business 47,978 fans
	Application: Developer: Description: Users: Matches:	Starbucks Lorraine Short Send your friend a coffee and brighten up their day 38,911 monthly active users Application Name
	Application: Developer: Description: Users: Matches:	Starbucks N/A is h Send star buck coffes to your friends!!! Don't drink too much :) 9,844 monthly active users Application Name
	Page: Type: Size:	*Starbucks Coffee* Other Business 43,507 fans

But who are these people ? ?

(500+ sites)

Search: "Starbucks Sucks"

The screenshot shows the Facebook search interface. At the top, the search bar contains 'starbucks sucks' and a search button. Below the search bar, a suggestion reads 'Did you mean: starbuck suzuki'. The results are categorized by 'All Results', 'People', 'Groups', 'Events', and 'Web'. The 'Groups' tab is selected, showing a list of search results. The first result is a group named 'STARBUCKS SUCKS' with 1,044 members, categorized as 'Common Interest - Food & Drink'. The second result is 'Starbucks Sucks' with 180 members, categorized as 'Common Interest - Beliefs & Causes'. The third result is another 'Starbucks Sucks' group with 55 members, categorized as 'Common Interest - Food & Drink'. The fourth result is 'starbucks sucks' with 47 members, categorized as 'Common Interest - Food & Drink'. The fifth result is 'STARBUCKS SUCKS' with 33 members, categorized as 'Common Interest - Food & Drink'. Each result includes a profile picture and a brief description of the group's size and type.

Or these people ??

(88+ sites)

- Do you have a social media presence? Do you know?
- Familiarize yourself with the primary social media platforms.
- Review T&C's
- Audit social media programs and initiatives.
- Do you have a Facebook page? Fans? A personalized URL? Blogs? Virtual worlds? Who's tweeting? Where are your customers; your competitors?

- Consider adopting a social media policy for internal and external communications.
- Be careful to keep on strategy
- Don't ban what you can't stop
- Engage, participate, influence
- Monitor legal developments

Social media does not create new rights. But things move faster. There are things you can do to protect your IP rights, brand and image:

- Do regular sweeps; monitor how people are using your IP and what they say about you.
- Consider enforcing your IP and other rights (defamation, libel, etc.) against third parties.
- Report problems. Facebook, Twitter and YouTube have procedures for dealing with these issues.
- Don't overlook traditional enforcement mechanisms.
- Have a public relations, communications, marketing and legal strategy - and a crisis team and plan (just in case).

IAB + Additional Resources



<http://www.LegalBytes.com>

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Serving Clients in a Digital World

January 2007
Volume VI, Number 1

Legal Bytes

Advertisers Online and on the Frontline

New York's Attorney General has just settled actions against Priceline, Travelocity and Cingular Wireless for promoting products and services using "adware"—the first time a law enforcement agency has held an advertiser responsible for ads displayed through adware.

These settlements require the advertisers (and affiliates—presumably sales agents and promotional partners) to give consumers full disclosure of any adware (including adware bundled in other software); ensure advertising has a conspicuous, identifiable brand; obtain consent from the consumer to download and allow the adware to operate on the computer; and make it reasonably simple for a consumer

Light Bytes

"To laugh often and much, to win the respect of intelligent people

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Adlaw News

[Group Releases Report on TV Violence: Urges Advertisers To Weigh In](#)

January 29, 2007 - The advertising industry—which regularly takes a beating from consumer groups for a whole host of reasons—is now being prodded to go beyond focusing on the content of commercials to take the lead in curbing violent television programming.

Adlaw Features

[Douglas Wood, Lead Negotiator for the Joint Policy Committee on Broadcast Union Talent Relations chairs panel on the 2006 SAG/AFTRA/JPC Extension Agreement](#)

January 30, 2007 - At the 3rd annual ANA Advertising Law & Business Affairs Conference in New York City on January 18, Douglas Wood, General Counsel to the ANA and the advertising industry's Lead Negotiator opposite the unions representing actors, outlined the provisions of the

Adlaw Forum

[The Prozac Case](#)
by Gerhard W. Volz

[Read more](#)



Ratiopharm España, a Spanish manufacturer of generic pharmaceuticals, challenged

<http://www.AdLawByRequest.com>

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Thank You

Got Questions ??



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