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"Actual Results May Vary": Toward Fiercer National Regulation of Digitally Manipulated Cosmetics Advertisements

Jason Rea

"ACTUAL RESULTS MAY VARY": TOWARD FIERCER NATIONAL REGULATION OF DIGITALLY MANIPULATED COSMETICS ADVERTISEMENTS

> *Good advertising does not just circulate information. It penetrates the public mind with desires and belief.*
>
> —Leo Burnett[1]

INTRODUCTION

In July 2011, the Advertising Standards Authority (ASA) in the United Kingdom banned two cosmetics advertisements.[2] One was for a makeup foundation called "Teint Miracle" by Lancome, and the other was for a foundation called "The Eraser" by Maybelline.[3] According to Lancome, the Teint Miracle foundation could "illuminate skin and make it appear glowing . . . . [by] reinforc[ing] the skin's radiance and improv[ing] its ability to reflect light."[4] As for The Eraser foundation, Maybelline stated that it "would reduce the appearance of lines and blemishes," including crow's feet.[5] After viewing the advertisements, Member of Parliament Jo Swinson

1. *Leo Burnett Said, "Good Advertising Does Not Just Circulate Information. It Penetrates the Public Mind with Desires and Beliefs,"* MARKETING PASSION http://marketingpassionmarketing.blogspot.com/2009/03/leo-burnett-said-good-advertising-does.html (last visited Nov. 6, 2012).

2. *See* Cassandra A. Soltis, *Cosmetic Advertisement + Photoshop = Deceptive Advertising?*, FDA LAW BLOG (Aug. 4, 2011, 7:48 PM), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2011/08/cosmetic-advertisement-photoshop-deceptive-advertising-.html.

3. *Id.*

4. *ASA Adjudication on L'Oreal (UK) Ltd*, ADVER. STANDARDS AUTH. (July 27, 2011), http://www.asa.org.uk/Rulings/Adjudications/2011/7/LOreal-(UK)-Ltd/SHP_ADJ_149640.aspx [hereinafter *ASA Adjudication on Teint Miracle Foundation*].

5. *ASA Adjudication on L'Oreal (UK) Ltd*, ADVER. STANDARDS AUTH. (July 27, 2011), http://www.asa.org.uk/Rulings/Adjudications/2011/7/LOreal-(UK)-Ltd/SHP_ADJ_149632.aspx [hereinafter *ASA Adjudication on The Eraser Foundation*].

complained to the ASA that the advertisements were misleading because digital retouching techniques exaggerated the effect that both products had on the skin of the celebrities depicted.[6] In response, Lancôme and Maybelline detailed what post-production techniques had been applied to both ads and supplied photographs of both celebrities taken at public events.[7] The fact that Lancôme and Maybelline offered photographs taken at public events to show the celebrities in a more natural state is laughable in itself. Curiously, however, as noted by the ASA, the companies refused to provide digitally unedited versions of the ads for comparison.[8] The companies also emphasized that they used photography techniques such as soft focus and lighting and professional makeup artists to create the ads.[9] Moreover, Maybelline maintained that the text featured on its Eraser ad "stated that the image was an '[i]llustrated effect,'" and this was a sufficient indication that the foundations would not achieve results as dramatic as those depicted.[10] Of course, the text was not the focus of the ads. Furthermore, Maybelline and Lancôme claimed that the images were "illustrative"[11] and "aspirational,"[12] rather than literal depictions of the results a consumer could achieve.[13] Because the ASA could not, based on the information they had received, conclude that the digital alterations to the ads had not exaggerated the effect the products could achieve, they banned the ads in their current form.[14]

It is obvious that advertisements of all kinds exaggerate their products' effectiveness.[15] However, in the case of cosmetics advertisements such as these, the exaggerations (i.e., digital retouching) blur the line between the actual, attainable effects of the product, and

6. *See ASA Adjudication on The Eraser Foundation*, *supra* note 5; *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4; Hélène Mulholland, *Lib Dems Call for Ban on Airbrushed Photos*, GUARDIAN (London), Sept. 19, 2009, http://www.guardian.co.uk/politics/2009/sep/19/liberal-democrats-airbrush-ban.

7. *ASA Adjudication on The Eraser Foundation*, *supra* note 5; *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

8. *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4; Adam Sherwin, *L'Oréal Ads Banned Over 'Airbrushing,'* INDEPENDENT (London), July 27, 2011, http://www.independent.co.uk/news/media/advertising/lor233al-ads-banned-over-airbrushing-2326477.html.

9. *ASA Adjudication on The Eraser Foundation*, *supra* note 5; *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

10. *ASA Adjudication on The Eraser Foundation*, *supra* note 5.

11. *Id.*

12. *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

13. *See id.*

14. *ASA Adjudication on The Eraser Foundation*, *supra* note 5; *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

15. *See* Ivan L. Preston, *Puffery and Other "Loophole" Claims: How the Law's "Don't Ask, Don't Tell" Policy Condones Fraudulent Falsity in Advertising*, 18 J.L. & COM. 49, 54 (1998).

"aspirational"[16] results that no consumer could possibly achieve in a much narrower context. There is no way to tell whether a model in an anti-aging product advertisement achieved her youthful appearance by using the actual product, purely by digital airbrushing, or by some combination of the two. At the very least, advertising regulations should demand that the product being advertised, and not digital manipulation, is the primary cause of the result depicted. In this Note, I will argue that United States regulatory agencies should follow the lead of the United Kingdom's ASA in requiring more stringent standards of honesty in cosmetics advertisements.

I. THE CURRENT NATIONAL REGULATORY SCHEME

In the United States, advertising is regulated on a national level by two authorities: the government and the advertisers themselves.[17] Specifically, the Federal Trade Commission (FTC) investigates and enforces federal advertising laws and regulations, and the Advertising Self-Regulatory Council (ASRC), formerly the National Advertising Review Council (NARC), is a self-regulating body of advertisers that attempts to maintain truthfulness in advertising.[18]

A. Federal Advertising Regulation Through the FTC

The FTC is a governmental agency that regulates unfair business competition, including false and misleading advertising claims.[19] The FTC derives its authority from the Federal Trade Commission Act (FTCA):[20] "Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices, or cosmetics.

16. *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

17. *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC (July 2008), http://www.ftc.gov/ogc/brfovrvw.shtm; *ASRC Snapshot*, ASRC, http://www.asrcreviews.org/about-us/ (last visited Nov. 6, 2012).

18. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 17; *ASRC Snapshot*, supra note 17; *The National Advertising Review Council Is Now the Advertising Self-Regulatory Council*, ASRC (Apr. 23, 2012), http://www.asrcreviews.org/the-national-advertising-review-council-is-now-the-advertising-self-regulatory-council. For a brief outline of national advertising law, see *Advertising Law*, PERS. CARE PRODS. COUNCIL, http://www.ctfa.org/advertising-law (last visited Nov. 6, 2012).

19. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 17. It is important to emphasize that the FTC regulates only the *advertising* of cosmetics. The FDA regulates the labeling, packaging, and potential health consequences of the products. *See FDA Authority Over Cosmetics*, FDA (Mar. 3, 2005), http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ucm074162.htm.

20. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006).

Section 15 defines a false ad . . . as one which is 'misleading in a material respect.'"[21] The FTC has interpreted the FTCA as requiring three elements to prove a false, misleading, or deceptive advertising claim: (1) "there must be a representation, omission or practice that is likely to mislead the consumer," (2) the consumer's interpretation of the advertisement must be reasonable, and (3) the representation, omission, or practice must be material.[22] More recently, deceptive advertising claims have come under the purview of the Lanham Act when brought by one commercial competitor against another.[23] However, the FTCA remains the primary vehicle through which ordinary consumers are protected from deceptive advertising.[24]

The FTC has many components, including the Bureau of Consumer Protection's Division of Advertising Practices is the, which handles false advertising claims.[25] The FTC receives consumer complaints and files complaints on its own authority.[26] However, it is important to note that "[t]he FTC does not resolve individual consumer complaints," but instead enters complaints into an online database where other administrative and law enforcement agencies may access them to build a case against an advertiser.[27] Like other government agencies, the FTC has the authority to bring administrative proceedings, federal court actions, engage in rule-making, and issue advisory opinions when warranted.[28] In adjudications, an administrative law

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21. JAMES C. MILLER, FTC, FTC POLICY STATEMENT ON DECEPTION (1983), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm (responding to the Committee on Energy and Commerce's inquiry on the FTC's enforcement policies).

22. *Id.* For a more nuanced discussion of the different types of false advertising claims, see *infra* Part IV.

23. The Lanham Act primarily governs trademark infringement between commercial competitors. Lanham Act, 15 U.S.C. § 1051 (2006). However, Section 43 provides that if an advertiser "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, [he] shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." *Id.* § 1125(a)(1)(B). For a comprehensive discussion of consumers' standing to bring false advertising claims under the Lanham Act, see James S. Wrona, *False Advertising and Consumer Standing Under Section 43(A) of the Lanham Act*, 47 RUTGERS L. REV. 1085 (1995).

24. *See* HENRY COHEN, CONG. RESEARCH SERV., 96-920 A, FEDERAL ADVERTISING LAW: AN OVERVIEW 3 (1998), *available at* http://www.policyarchive.org/handle/10207/bitstreams/326.pdf.

25. David Vladeck, *About the Bureau of Consumer Protection*, FTC (Mar. 5, 2012), http://www.ftc.gov/bcp/about.shtm.

26. *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 17.

27. *Before You Submit a Complaint*, FTC, https://www.ftccomplaintassistant.gov/ (last modified Aug. 1, 2012). In this way, the FTC's role is in sharp contrast with the ASRC's, discussed below in Part B. Of course, consumers may also sue advertisers under state advertising and consumer protection laws. My focus, however, is on national regulation.

28. *FTC Actions*, FTC, http://www.ftc.gov/os/index.shtml (last modified June 14, 2012).

judge may issue an order while lawsuits in federal court may result in injunctions.[29]

Despite having the governmental authority to regulate deceptive advertising practices across all industries, the FTC relies heavily on self-regulating agencies, such as the ASRC, to augment its enforcement actions.[30] To date, the FTC has never brought an enforcement action against a cosmetics company for enhancing the results of its product through digital manipulation.[31]

B. Self-Regulation Through the ASRC

The ASRC is essentially the American counterpart to the United Kingom's ASA. Its board members are executives of corporations and advertising agencies,[32] and its nearly two dozen staff members are a combination of attorneys and directors.[33] The self-described goals of the ASRC are to establish "policies and procedures for advertising industry self-regulation," to monitor the marketplace, and to hold "advertisers responsible for their claims and practices and track emerging issues and trends."[34] Despite its self-regulating function, however, the ASRC has close ties to the FTC.[35] As one commentator explained, the ASRC's "rulings are respected and followed by most advertisers because it enjoys a close relationship with the FTC, from which it has historically drawn some of its senior staff."[36]

The ASRC is a division of the Council of Better Business Bureaus (CBBB),[37] and it has four divisions of its own: the National Advertising

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29. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, *supra* note 17.

30. *See Advertising Trends and Consumer Protection: Hearing Before the S. Comm. on Commerce, Science and Transp.*, 111th Cong. (July 22, 2009) (statement of David Vladeck, Professor, Georgetown University Law Center & Director of the Bureau of Consumer Protection at the Federal Trade Commission), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1091&context=cong.

31. *See also* Jessica Seigel, *The Lash Stand: Will New Attitudes and Regulatory Oversight Hit Delete on Some Photo Retouching in Print Ads?*, ADWEEK (May 29, 2012), http://www.adweek.com/news/press/lash-stand-140785 (detailing the opening of a new age of regulation for digital manipulation).

32. *Supporting Advertising Industry Self-Regulation*, ASRC, http://www.asrcreviews.org/supporting-advertising-industry-self-regulation/ (last visited Nov. 6, 2012).

33. *ASRC Contact Us*, ASRC, http://www.asrcreviews.org/asrc-contact-us/ (last visited Nov. 6, 2012).

34. *ASRC Snapshot*, *supra* note 17.

35. C. Lee Peeler, the President and CEO of the ASRC, previously worked at the FTC for 33 years. *ASRC Contact Us*, *supra* note 33; *C. Lee Peeler, CBBB EVP and President, National Advertising Review Council (NARC)*, BBB, http://www.bbb.org/us/cbbb-staff/c-lee-peeler/ (last visited Nov. 6, 2012).

36. Jim Edwards, *US Moves Toward Banning Photoshop in Cosmetics Ads*, BUS. INSIDER (Dec. 16, 2011), http://www.businessinsider.com/us-moves-toward-banning-use-of-photoshop-in-cosmetics-ads-2011-12.

37. *ASRC Snapshot*, *supra* note 17.

Division (NAD), the Children's Advertising Review Unit (CARU), the Electronic Retailing Self-Regulation Program (ERSP), and the National Advertising Review Board (NARB).[38] The titles of these divisions are somewhat self-explanatory: the NAD handles claims against advertisements in general, the CARU deals with claims against advertisements directed at children,[39] the ERSP regulates electronic retailers,[40] and the NARB provides independent appellate review of the other three divisions' rulings.[41] Cosmetics products' advertisements typically fall under the purview of the NAD since they are neither directed at children nor based primarily on electronic communications.[42] Therefore, we will focus on the path that a complaint typically takes through the NAD, though the procedures are similar for both divisions.[43]

Anyone may file a complaint with the NAD, including consumers, commercial competitors, and even the NAD itself.[44] Then, the NAD determines whether to open a case.[45] This determination is based on several criteria, such as whether the advertisement is disseminated nationally, currently in circulation or discontinued, already the subject of pending litigation, and whether the complaint has "sufficient merit to warrant the expenditure of NAD/CARU's resources."[46] The complaint must concern the truth of an advertisement rather than matters of taste or labeling.[47] If the complaint does not pass these hurdles, the NAD informs the complainant that a case will not be opened and may refer her to the appropriate government body.[48] If, on the other hand, the complaint comports with these requirements, the NAD promptly forwards the complaint to the advertiser for a response.[49] In turn, the advertiser submits its response to the NAD,

38. *Id.*

39. *About the Children's Advertising Review Unit (CARU)*, CHILDREN'S ADVER. REVIEW UNIT, http://www.caru.org/about/index.aspx (last visited Nov. 6, 2012).

40. *About the Electronic Retailing Self-Regulation Program (ERSP)*, NAT'L ADVER. REVIEW COUNCIL, http://www.narcpartners.org/ersp/index.aspx (last visited Nov. 6, 2012).

41. *About Us—NARB*, NAT'L ADVER. REVIEW BD., http://www.asrcreviews.org/category/narb/about_narb/ (last visited Nov. 6, 2012).

42. *See Case Report Search*, NAT'L ADVER. REVIEW COUNCIL, http://www.narcpartners.org/search/searchcombo.aspx?doctype=1&casetype=1 (last visited Nov. 6, 2012).

43. NAT'L ADVER. REVIEW COUNCIL, THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION (2011), *available at* http://www.asrcreviews.org/wp-content/uploads/2012/05/NAD-CARU-NARB-2011-Procedures-REVISED-MAY2012_4-3-12.pdf [hereinafter THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION]

44. *Id.* at 2.

45. *Id.* at 3–4.

46. *Id.* at 3.

47. *Id.* (stating that such matters are not within NAD's mandate).

48. *Id.*

49. THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION, *supra* note 43, at 4.

which forwards it on to the complainant.[50] Next, the complainant may issue his response to the NAD, which again forwards it to the advertiser.[51] Once again, the advertiser responds and the NAD forwards its response to the complainant.[52] This represents the final exchange of responses unless the NAD requests more information from the parties.[53] After this final exchange of responses, the NAD reviews the evidence, makes a determination, and prepares a final case report for the parties.[54] Finally, the advertiser drafts a statement informing the NAD what action it intends to take with respect to the NAD's decision.[55] If the NAD finds that the advertisement should be modified or discontinued, and the advertiser does not comply with the decision, the NAD will forward the case to the appropriate government agency, such as the FTC.[56] After the advertiser issues its statement, the NAD publishes the final case decision, which either party may appeal to the NARB.[57]

This entire process usually takes place within sixty days due to the strict time limits that the ASRC imposes on the parties each step of the way.[58] Parties to this process must maintain the confidentiality of the investigation until its final resolution.[59] All materials and data, excluding trade secrets, are submitted to the NAD and must be made available to the other party; otherwise they will not be considered.[60] Such materials must not be shared with any nonparties, and copies must be returned after the matter is closed.[61]

The NAD review process clearly strives to maintain integrity by affording ordinary consumers an opportunity to bring false advertising claims against large corporations with the help of an intermediary.[62] Consumers avoid the extreme costs, delay, and inconvenience of a lawsuit, instead engaging in an accelerated arbitration of sorts.[63] Although the ASRC is a self-regulating agency, its decisions have

50. *Id.* at 5, 6.

51. *Id.* at 6. If the complainant fails to issue a response, NAD will decide the case based on the record as it stands. *Id.*

52. *Id.* at 6.

53. *Id.* (stating that the NAD may or may not call a meeting between the parties).

54. *Id.* at 7.

55. THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION, *supra* note 43, at 7.

56. *Id.*

57. *Id.*

58. *See id.* at 3–12.

59. *Id.* at 2.

60. *Id.* at 4–6.

61. THE ADVERTISING INDUSTRY'S PROCESS OF VOLUNTARY SELF-REGULATION, *supra* note 43, at 5.

62. *See id.* at 3.

63. *Id.* at 1.

teeth because of its relationship to the FTC,[64] and it encourages a more voluntary atmosphere in which advertisers can act to appease consumers.[65]

However, we know from the advertisements we see around us, and from the fact that so few ads are banned due to the use of digital manipulation, that neither the FTC nor the ASRC are holding advertisers to high enough standards. The combination of the government's and industry's lack of regulation on digital manipulation in cosmetics advertisements has harmful effects on women in our society. This combination also allows advertisers to propagate false advertisements contrary to accepted common law doctrines and the stated missions of agencies like the FTC and the ASRC.[66]

II. THE IMPACT OF MEDIA ON GENDER EQUALITY

In order to establish the harm that women suffer as a result of the digital manipulation of ads in particular, we must first recognize the harm women suffer from their portrayal in the media generally. We must also recognize the effect that women's portrayal in the media has on the treatment of women in the real world must also be recognized, for this treatment is also propagated by the digital manipulation of ads.

The first of these connections is uncovered by Cheryl B. Preston in her article *Significant Bits and Pieces: Learning from Fashion Magazines About Violence Against Women*.[67] In this article, Preston discusses how women are objectified in fashion magazine advertisements.[68] She lists several ways in which this objectification is accomplished: fragmentation (the visual dismemberment of women);[69] fungibility (women are interchangeable, particularly because of the covering of their eyes);[70] artificial perfection (depicting women as impossibly flawless, their skin free from all imperfections);[71] depicting women as dolls, masks, and mannequins (literally making them inanimate objects rather than living, breathing individuals);[72] disguise

64. *See supra* notes 32–33 and accompanying text.
65. *ASRC Snapshot*, *supra* note 17.
66. *See infra* Parts III and IV for a discussion of the common law doctrines governing commercial speech.
67. Cheryl B. Preston, *Significant Bits and Pieces: Learning from Fashion Magazines About Violence Against Women*, 9 UCLA WOMEN'S L.J. 1 (1998).
68. *Id.* at 14–15.
69. *Id.* at 15–16.
70. *Id.* at 17.
71. *Id.* at 20.
72. *Id.* at 23.

(portraying women through styling or costumes as animals);[73] and contortion (depicting women in either vulnerable, rather than aggressive, poses, or in unnatural positions designed to cover up certain body parts of a naked woman).[74]

The method of objectification most relevant to our inquiry here is "artificial perfection."[75] Preston notes that some advertisements go so far as to depict women "without blemishes and, in fact, usually without pores. Their flawlessness makes them less like the viewer. Consequently, it is easier to perceive them as commodities rather than as people."[76] In this way, Preston notes that even when women are portrayed in natural poses with their faces shown, they still look equally "inhuman":[77]

> The flawlessness of [advertising's woman] is, in fact, an illusion created by makeup artists, photographers, and photo retouchers. Each image is painstakingly worked over: teeth and eyeballs are bleached white; blemishes, wrinkles, and stray hairs are airbrushed away. According to Louis Grubb, a leading New York retoucher, "Almost every photograph you see for a national advertiser these days has been worked on by a retoucher to some degree . . . . [F]undamentally, our job is to correct the basic deficiencies in the original photograph or, in effect, to improve upon the appearance of reality." In some cases, a picture is actually an amalgam of body parts of several different models—a mouth from this one, arms from that one, and legs from a third. By inviting women to compare their *unimproved* reality with . . . airbrushed perfection, advertising erodes self-esteem . . . .[78]

Cosmetics companies attempt to achieve this same "artificial perfection" when advertising, for example, anti-aging products or foundations such as Maybelline's "The Eraser" and Lancome's "Teint Miracle." Digital retouching in advertisements for products like these gives women, not only an image to aspire to,[79] as does every image

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73. Preston, *supra* note 67, at 25.
74. *Id.* at 26–27.
75. *Id.* at 20.
76. *Id.* at 21.
77. *Id.* at 20.
78. *Id.* at 21 (quoting MICHAEL F. JACOBSON & LAURIE ANN MAZUR, *Sexism and Sexuality in Advertising*, *in* MARKETING MADNESS: A SURVIVAL GUIDE FOR A CONSUMER SOCIETY 74, 75 (1995)).
79. Preston, *supra* note 67, at 23 ("The advertising industry . . . redefines attractiveness to an unattainable standard. Attractiveness is fairly unusual in nature, but advertisements make attractiveness seem more beautiful, perfect, and commonplace than it is in life. These unrealistic standards lead women to believe they should also have faces without blemishes or pores . . . .").

of a model regardless of the product being advertised,[80] but also offers them a fantasy that the advertised cosmetic product can help them achieve the perfect skin that the object of the advertisement "has" (but in reality, only *appears* to have). Advertisers should not be permitted to substitute or augment the effects of the advertised product with digital retouching to propagate such a harmful ideal and blatantly lie about the product's effectiveness. The detrimental effect on women's self-esteem caused by artificial perfection in advertisements was one of the main reasons Member of Parliament Jo Swinson argued for the ban of the Teint Miracle and The Eraser foundation ads.[81] Swinson and her colleagues were concerned about the continuing effect that such advertising would have on children and teenagers.[82] In particular, Swinson singled out cosmetic surgery and eating disorders as two societal issues that she believed stemmed from unrealistic media portrayals of women.[83] Advertisers' consistent portrayal of artificially perfected women may lead to a disconnect and a feeling of futility for young women in their struggle to attain the same results as the model in an ad.[84] As a result, women may develop low self-esteem, which contributes to conditions such as eating disorders.[85] Preston notes that there was a direct correlation between the increase in reported cases of anorexia and bulimia and an increase in diet-related essays and advertising in women's magazines.[86] Stacey S. Baron similarly notes that media teaches women at an early age "that a woman's role in life is to be beautiful, and that women should become beautiful at any painstaking cost. Despite the liberating efforts of the modern women's movement,

80. *See* Cassandra A. Soltis, *Dying to Be a Supermodel: Can Requiring a Healthy BMI Be Fashionable?*, 26 J. CONTEMP. HEALTH L. & POL'Y 49, 70 (2009) (arguing that the FTC should require a healthy BMI for models in advertising, or at the least public service announcements, in order to assuage the self-esteem issues and eating disorders that women may have due to bombardment by impossibly skinny, airbrushed models.). Although Soltis is primarily concerned with the body image issues caused by models with unhealthy weights, she also argues that the FTC should require disclaimers on advertisements where airbrushing has been performed, because the ads are misleading absent such disclaimers. *Id.*

81. Mulholland, *supra* note 6.

82. *Id.*

83. *Id.*

84. *Id.*

85. In fact, studies show a link between portrayals of women in the media and low self-esteem and eating disorders. *See* Soltis, *supra* note 80, at 51; *Eating Disorders: Body Image and Advertising*, HEALTHYPLACE, http://www.healthyplace.com/eating-disorders/articles/eating-disorders-body-image-and-advertising/ (last updated July 11, 2012); *Women 'Suffer Poor Self-Esteem Due to Airbrushing in Advertising,'* TELEGRAPH (London), Nov. 27, 2009, http://www.telegraph.co.uk/news/uknews/6662958/Women-suffer-poor-self-esteem-due-to-airbrushing-in-advertising.html.

86. Preston, *supra* note 67, at 67.

society at large still determines a woman's self worth by her ability to attract a man."[87]

The harm is not only psychological, and it does not only affect women's treatment of themselves. Studies show that the cultural objectification of women may contribute to the violent crimes committed against them,[88] as well as to other issues they may face, such as workplace discrimination and harassment.[89] These studies suggest that repeatedly viewing women in their media portrayal as hypersexualized objects to be dominated may foster an environment where violence and discrimination against women is tolerated at the least, and encouraged at the worst.[90]

The "artificial perfection" of women in advertisements, although more subtle than posing women in unnatural or submissive positions, is merely another means of objectifying women by suggesting that they are less than human.[91] Preston notes that:

> A culminating motif in advertising is . . . that . . . [women] can be physically overcome . . . . This invitation to be victimized and abused is intimated in each of the [objectification] motifs discussed above. The perception of a passivity that allows violence is, of course, a natural by-product of both objectification and artificial beauty.[92]

She also suggests that objectification is coincidental to dehumanization, which leads to violence against the perceived object in war, prison settings, and in the minds of rapists.[93]

Indeed, for the digital retoucher himself the model is an object on a computer screen to be stripped of its imperfections, and therefore its individuality.[94] He may believe that he is distilling pure beauty from the image, but he is instead sapping the model of her humanity.[95] As noted above, pores, the most readily identifiable trait of authentic human skin, become undesirable.[96] The skin should

87. Stacey S. Baron, Note, *(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty*, 46 B.C. L. REV. 359, 380–81 (2005).

88. *See* Tamara R. Piety, *Onslaught: Commercial Speech and Gender Inequality*, 60 CASE W. RES. L. REV. 47, 77 (2009).

89. *See* Britain A. Scott & Sidney W. Scott, *Dirty Business: Women Managing Sexual Objectification in the Workplace*, *in* 3 GENDER, RACE, AND ETHNICITY IN THE WORKPLACE 43, 49–51 (Margaret Foegen Karsten ed., 2006).

90. Piety, *supra* note 88, at 77; *see* Scott & Scott, *supra* note 89, at 49–51.

91. Preston, *supra* note 67, at 29.

92. *Id.*

93. *Id.*

94. *Id.* at 21.

95. *See id.*

96. *Id.*

instead appear as smooth and blemish-free as plastic.[97] The desirability of a youthful appearance is one thing, but a longing for the impossibly perfect, unnatural skin depicted in an advertisement is another matter entirely.[98] It is particularly disturbing that advertisers create these harmful "aspirational" images in order to sell a product.[99]

Moreover, recent research suggests that the objectification of women in advertising contributes to sexism.[100] Tamara R. Piety notes that:

> Women continue to make less money than men do in the same jobs. They continue to experience disparate burdens with respect to housework and childrearing. Women are *over*represented in lower status jobs within the same professions and job categories with men and are *under*represented in politics and in the upper echelons of management.[101]

Objectification leads to commodification, and "[c]ommodification reinforces women's status as subordinate."[102] Men adopt these viewpoints, whether consciously or subconsciously, through the constant bombardment of hypersexualized, fragmented, and submissive models in advertisements.[103] Piety describes a study in which men who were "primed with images from advertising depicting women as sexual objects . . . . engaged in more sexist behavior with female test interview subjects, and reflected lower evaluations of women's competency than did a control group of men who . . . had not been 'primed' by the advertising materials."[104] Another study "found that the males who had viewed the ads portraying women as sex objects" demonstrated "acceptance of what the researchers called 'rape acceptance myths' . . . [suggesting] that exposure to ads that portray women as sex objects increases some men's willingness to commit or tolerate violence against women."[105]

Studies such as these bring the issue of advertising's effect on women's self-esteem to a much more external and dangerous effect;

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97. For more discussion of the portrayal of women as plastic, *see* Preston, *supra* note 67, at 25.

98. *See id.* at 23.

99. *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

100. *See* Piety, *supra* note 88, at 54–55.

101. *Id.* at 50–51 (citations omitted).

102. *Id.* at 55.

103. *See id.* at 75.

104. *Id.* at 75–76.

105. *Id.* at 77 (citations omitted) (quoting Kyra Lanis & Katherine Covell, *Images of Women in Advertisements: Effects on Attitudes Related to Sexual Aggression*, 32 SEX ROLES 639, 646 (1995)); *see also* Scott & Scott, *supra* note 89, at 48–54 (discussing a study in which male subjects became less concerned with violence against women after viewing pornography repeatedly).

men who consume these advertising images are more likely to adopt the derogatory viewpoints expressed by those images. The images promote the importance of beauty, submissiveness, and sexualization of women, while at the same time downplaying any other traits that a woman might have, such as intelligence, managerial competence, assertiveness, et cetera.[106] Moreover, the ads suggest that the essence of a woman is only that which is portrayed, and, by implication, that anything else a woman might be is unwomanly or unusual.[107] We see what happens when men in positions of power adopt such a philosophy: discrimination in salary, in promotions, and sexual harassment.[108]

The effect that advertising has on women's views of themselves and men's views of women is only half of the cycle. The other half is adroitly demonstrated by Preston's point that advertisers do not spend billions of dollars to present a new and potentially objectionable ideology—they present the ideology that their research shows consumers respond to and identify with.[109] In this way, advertising and societal views of gender roles reinforce each other.

The way to break this cycle is to show advertisers that consumers are fed up with the ideology of women portrayed in advertisements.[110] The way to express this disapproval to advertisers, however, is twofold. Preston suggests a basic market-controlled approach. Women, as the majority of consumers, should simply refuse to purchase goods sold by companies who propagate negative portrayals of women in their advertisements.[111] Although theory such an approach would work, so many companies sell so many products by objectifying women that women cannot realistically turn elsewhere for the products they need or want.[112] In fact, studies suggesting how advertising reinforces gender roles and negative portrayals of women—and alongside them, calls to boycott advertisers—have been around for over two decades.[113] Nevertheless, the objectification of women in advertisements has actually increased.[114] This is precisely the reason that I propose starting

106. *See* Scott & Scott, *supra* note 89, at 50.
107. *See* Preston, *supra* note 67, at 22.
108. Scott & Scott, *supra* note 89, at 54.
109. Preston, *supra* note 67, at 75–76.
110. *Id.*
111. *Id.*
112. Whether women *should* want or need these products (i.e., makeup) is another element of the cycle entirely. The difficulty is that a boycott of such products cannot succeed because women's desire for those products cannot disappear overnight.
113. *See, e.g.*, Lanis & Covell, *supra* note 105, at 646–48.
114. *See, e.g.*, Preston, *supra* note 67, at 48 ("In a study published in 1995, researchers concluded that, although women are now depicted in a 'wider range of social and occupational roles, . . . there has been a parallel *increase* in the sexually exploitive use of women in advertisements.'"(quoting Lanis & Covell, *supra* note 105, at 640)).

with a small, but effective, step in the right direction and to accomplish this step through legal reform, rather than reform based purely on moral principles. Prohibiting artificial perfection in advertisements, while far from eradicating objectification of women, would, at least on a micro level, begin to bring advertisements' depiction of women more in line with the way women look in real life. Though such a measure would not immediately affect the objectification of women through posing, nudity, fragmentation, etcetera, it would begin to counteract the literal objectification of women by making them look more realistic, more human, and less like plastic dolls to be dominated. Rehumanizing women in this way—from the ground up, from the pores—is the first step toward changing the way women are viewed.

Piety also suggests that granting brands the right to constitutionally protected free speech for their advertisements propagates gender inequality by removing restrictions on advertisements.[115] Thus, corporations and their brands are given more leeway to depict women in their advertisements without fear of governmental intrusion.[116] Because women are traditionally objectified and regulation of these depictions is limited, one way we can attack traditional depictions of women in the media is to combat them through the common-law doctrines of fraud, as well as through the FTC and NAD under misleading advertising claims.

Although we can never outlaw the portrayal of women as objects in the media is impossible without violating the constitutional right to free speech, we can use the more limited application of deceptive advertising claims to diminish advertisers' ability to propagate these harmful portrayals of women. At the very least, we can prohibit cosmetics companies from depicting "artificial perfection," which is the result of digital retouching, rather than the actual results of their products. In this way, we can foster more literal truth in advertising while, at the same time, taking a sound step toward reversing the harmful societal trend of objectifying women. Over time, this will reduce the violence and discrimination against women and assuage the psychological harm done to them by providing women with more realistic images to which they can aspire.[117]

In fact, recent trends in legal decisions suggest that a measure prohibiting artificial perfection of models in advertisements, at least

115. Piety, *supra* note 88, at 90–91.

116. *See id.*

117. Again, this is only a small step in the right direction. Much harm is still done by forcing women to aspire to the image of a made-up woman at all. Ultimately, cosmetics companies have the right to advertise their products, but at least we can improve the way in which they do so.

where digital retouching provides the results that the advertiser purports the product to deliver, is likely to be well received in the near future.[118] In her Note *(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty*,[119] Stacey S. Baron discusses a progressive trend in court decisions on appearance-based discrimination claims.[120] Baron cites a 2003 California Court of Appeal case *Yanowitz v. L'Oreal USA, Inc.*,[121] to demonstrate this emerging trend.[122] The *Yanowitz* case stemmed from the manager of a L'Oreal makeup counter ordering one of his female employees to fire another female employee for not being attractive enough, according to the manager's own standards, to work the counter.[123] The manager had expressed his preference for thinner, lighter-skinned, and "hotter" blonde women.[124] The manager then fired the female employee for failing to fire the allegedly unattractive employee.[125] The court held that it was sex discrimination for the manager to fire an employee for not being physically attractive enough according to his personal standards.[126] The court noted that the manager presumably would not have held a male employee to the same standards.[127]

Baron notes that this case decision is in line with the decision in *Wilson v. Southwest Airlines Co.*,[128] but it contrasts sharply with that in *Craft v. Metromedia, Inc.*[129] In *Wilson*, the court rejected an airline's claim that flight attendants had to be attractive.[130] Instead, the court found that attractiveness was merely a "business convenience," not a "business necessity."[131] By contrast, in *Craft* a female news anchor sued the news station over her firing, claiming that the station's "appearance standards were based on stereotypical characterizations of the sexes and were applied to women more constantly and vigorously than they were applied to men."[132] The court rejected the anchor's claim, finding that the news station's "standards were the product of professional and technical considerations, making

118. *See also, e.g.*, Baron, *supra* note 87, at 374–75 (discussing a successful recent California decision on an appearance-based discrimination claim).
119. *Id.*
120. *See, e.g.*, *id.* at 374–75.
121. Yanowitz v. L'Oreal USA, Inc., 131 Cal. Rptr. 2d 575 (Cal. Ct. App. 2003).
122. Baron, *supra* note 87, at 374–75.
123. *Yanowitz*, 131 Cal. Rptr. 2d at 582; Baron, *supra* note 87, at 374–75.
124. *Yanowitz*, 131 Cal. Rptr. 2d at 582; Baron, *supra* note 87, at 374–75.
125. *Yanowitz*, 131 Cal. Rptr. 2d at 582; Baron, *supra* note 87, at 374–75.
126. *Yanowitz*, 131 Cal. Rptr. 2d at 587; Baron, *supra* note 87, at 375.
127. *Yanowitz*, 131 Cal. Rptr. 2d at 587; Baron, *supra* note 87 at 375.
128. 517 F. Supp. 292, 303 (N.D. Tex. 1981); Baron, *supra* note 87, at 372–75.
129. 766 F.2d 1205, 1215–16 (8th Cir. 1985); Baron, *supra* note 87, at 372–75.
130. *Wilson*, 517 F. Supp. at 303.
131. *Id.*
132. *Craft*, 766 F.2d at 1210.

them reasonable business qualifications."[133] Baron, however, notes that the trend is in favor of decisions like that in *Yanowitz*, which signals courts' increasing cognizance of discrimination based on women's appearance.[134]

III. THE COMMON LAW DOCTRINES OF COMMERCIAL SPEECH

Generally, advertising is commercial speech.[135] The seminal case in commercial speech doctrine is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[136] In this case, plaintiff-consumers brought suit against the Virginia State Board of Pharmacy alleging that a Virginia statute which declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs was unconstitutional on free speech grounds.[137] The district court had declared the statute void.[138]

According to the Court, if a licensed pharmacist was found to have violated the statute, he would be "subject to a civil monetary penalty, or to revocation or suspension of his license."[139] The Court noted that, at the time of this case, because only licensed pharmacists could dispense prescription drugs in the state, "advertising or other affirmative dissemination of prescription drug price information is effectively forbidden."[140] Plaintiff-consumers argued that they would benefit from the free advertising of prescription drug prices because the prices for the same drugs varied greatly from pharmacy to pharmacy even within the same locality.[141] The Court also noted that this case was distinguishable from previous cases about the advertising of prescription drug prices because earlier cases were brought by pharmacists and this case was brought by consumers.[142] The Court found that plaintiffs' cause was legitimate because freedom of speech applies equally to the speaker and to the recipients.[143]

Acknowledging, however, that its previous rulings had left many with the impression that commercial speech (i.e., advertising) was

133. Baron, *supra* note 87, at 374.
134. *See id.* at 372.
135. I discuss the definition of "commercial speech" in much greater detail in this section.
136. 425 U.S. 748 (1976).
137. *Id.* at 749–50.
138. Va. Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 687 (E.D. Va. 1974).
139. *Va. State Bd. of Pharmacy*, 425 U.S. at 752.
140. *Id.*
141. *Id.* at 753–54.
142. *Id.* at 755.
143. *Id.* at 756–57.

not protected by the First Amendment, the Court stated that it needed to clarify its position on the matter.[144] Quoting its opinion in *Bigelow v. Virginia*,[145] the Court emphasized that its earlier decisions "merely upheld 'a reasonable regulation of the *manner* in which commercial advertising could be distributed.'"[146] The Court also noted that "'the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection.'"[147] According to the Court in *Bigelow*, simply because speech is commercial does not mean that it is "valueless in the marketplace of ideas,"[148] and therefore not deserving of First Amendment protection.[149]

Yet, the Court also acknowledged that in *Bigelow* it did not need to determine "the precise extent to which the First Amendment permits regulation of advertising."[150] *Va. State Bd. of Pharmacy*, on the other hand, required the Court to determine that extent. The Court stated:

> It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another . . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money.
>
> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its *content*. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject . . . . Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection.
>
> Our question is whether speech which does "no more than *propose a commercial transaction*," is so removed from any "exposition of ideas," and from "'truth, science, morality, and arts in general . . .'" that it lacks all protection. Our answer is that it is not.[151]

The Court proceeded to break down the dynamics of a transaction involving commercial speech.[152] First, there is the advertiser, whose

144. *Id.* at 758–59.
145. 421 U.S. 809, 819 (1975); *Va. State Bd. of Pharmacy*, 425 U.S. at 759–60.
146. *Va. State Bd. of Pharmacy*, 425 U.S. at 760 (emphasis added).
147. *Id.* at 760 (quoting *Bigelow*, 421 U.S. at 826).
148. *Bigelow*, 421 U.S. at 826.
149. *Id.*
150. *Va. State Bd. of Pharmacy*, 425 U.S. at 760 (quoting *Bigelow*, 421 U.S. at 825).
151. *Id.* at 761–62 (emphasis added) (citations omitted).
152. *Id.* at 762.

interest is purely economic.[153] This interest does not disqualify the advertiser from First Amendment protection.[154] On the other hand, there is the consumer, who has an interest in the free flow of commercial information.[155] The Court noted that withholding prescription drug information harms the poor, the sick, and the elderly in particular because these groups spend a large amount of money on prescription drugs, yet the prohibition on advertising the prices of those drugs prevents these consumers from making informed purchasing decisions.[156]

The Court then extended the scope of its inquiry, finding that even in less dire cases society in general "may have a strong interest in the free flow of commercial information."[157] Then, even more boldly, the Court declared that perhaps "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn"[158] because:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. 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. To this end, the free flow of commercial information is indispensable . . . . Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[159]

Thus, the Court took the opportunity afforded to it by consumers' alleged interest in prescription drug price information to declare that all advertising serves a legitimate public purpose and is therefore protected by the First Amendment. With regard to the case at hand, the Court held that the consumers' interest in receiving the price information outweighed the State's interest in "maintaining a

153. *Id.*
154. *Id.*
155. *Id.* at 763.
156. *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64. The Court also noted that in this context pricing information is not merely a "convenience," but "could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 764.
157. *Id.* at 764.
158. *Id.* at 765.
159. *Id.* at 765 (citations omitted).

high degree of professionalism on the part of licensed pharmacists."[160] The Court in large part based its decision on two beliefs: first, its belief that even if the pharmacists were allowed to advertise prices of prescription drugs, other state provisions ensured that the quality of their care would remain unaffected;[161] and second, that the First Amendment requires the free flow of information in order to help people make informed decisions.[162] In contrast, the current system was one in which the people were kept in ignorance of prices and therefore of how their money would be best spent.[163]

The Court emphasized that its holding that commercial speech is protected by the First Amendment did not mean that commercial speech can never be regulated.[164] The Court stated, "[t]he First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow *cleanly* as well as freely."[165] The Court also noted that "a different degree of protection is necessary [for commercial speech] to insure that the flow of truthful and legitimate commercial information is unimpaired."[166] The Court also suggested that the special considerations for commercial speech "may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[167] Thus, we see in *Virginia State Board of Pharmacy* the foundations of the tension between First Amendment protection for, and regulation of, commercial speech.[168] However, in all of the false advertising tests that come later, the premise that the Court set out in this case remains the highest concern: that

160. *Id.* at 766. The Board argued for the State's interest by asserting that free advertising of prescription drug prices would lead to competitive pricing between pharmacies, and as a result lead to pharmacists employing cost-cutting measures that jeopardized the quality of their drugs and services. *Id.* at 767–68. As a result, the more "conscientious pharmacist" would be forced to engage in the same cost-cutting practices or risk going out of business. *Id.* However, the Court reasoned that strict regulations on pharmacists would prevent the decline in quality of care that the Board felt certain would ensue. *Id.* at 768.

161. *Id.* at 766–70.

162. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

163. *Id.* at 770.

164. *Id.* at 770–72.

165. *Id.* at 771–72 (emphasis added).

166. *Id.* at 771 n.24.

167. *Id.* at 772.

168. Chief Justice Burger observes that "the differences between commercial price and product advertising . . . and ideological communication allow the State a scope in regulating the former that would be unacceptable under the First Amendment with respect to the latter." *Va. State Bd. of Pharmacy*, 425 U.S. at 774. (C.J. Burger, concurring) (citations and quotations omitted).

consumers are able to access information that helps them make *well-informed* decisions.[169]

Several years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court set out a test for determining when the First Amendment protected commercial speech.[170] Recognizing the factors of key import in *Virginia State Board* and subsequent cases, the Court came up with the following four-step inquiry: (1) the commercial speech must concern lawful activity and not be misleading; (2) the asserted government interest in restricting the speech must be substantial; (3) the regulation must directly advance the government interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.[171] This test is known as the *Central Hudson* test.[172] These four factors once again balance the State's interest in restricting commercial speech against the public's interest in receiving accurate information.

However, in order to better understand precisely what constitutes "commercial speech," we must look to yet another Supreme Court case, *Bolger v. Youngs Drug Products Corp.*[173] *Bolger* set out the most commonly used test for determining whether or not a particular message counts as commercial speech.[174] In *Bolger*, the Court listed three factors, none of which is sufficient on its own, to establish that a message constitutes commercial speech: (1) the message is an advertisement, (2) the message references a specific product, and (3) the speaker has an economic motivation for disseminating the information.[175] This is known as the *Bolger* test.[176]

IV. WHY MAKEUP ADS ARE A LOGICAL FIRST STEP

Makeup ads are a logical first step in imposing stricter regulations on advertisements because they provide a strictly legal ground—misleading commercial speech under the *Bolger* and *Central Hudson* tests—on which consumers can seek redress and we can begin to cast out idealistic images of women from the media.[177]

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169. *See id.* at 765.
170. 447 U.S. 557, 566 (1980).
171. *Id.*
172. *See* Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever Be Noncommercial?*, 37 AM. J.L. & MED. 388, 390–91 (2011).
173. *See* 463 U.S. 60, 66–67 (1983).
174. *See* Cortez, *supra* note 172, at 393.
175. *Bolger*, 463 U.S. at 66–67.
176. See Cortez, *supra* note 172, at 393.
177. I would like to emphasize once again, the regulations proposed in this note are intended to be merely a first step in the right direction.

As described above, makeup advertisements that employ digital retouching to exaggerate the effects of their products perpetuate and reinforce the societal notion that women should look a certain way (namely, like the model in the ad) and use makeup to achieve that look.[178] Digital retouching, however, makes the cycle worse by depicting "results" that no woman could possibly attain in the non-cyber world.[179] Therefore, makeup advertisements, such as those banned in the United Kingdom, wrong women in two ways. On a psychological level, the advertisements set the consumer up for failure because the makeup product will literally never look as good on them as it does on the model in the advertisement; then, on a more tangible, ordinary level, the advertisements mislead the consumer about how effective the product is.[180] It is this second level which can offer women a remedy in the law because the wrong in the latter case is tangible, even financial, rather than merely psychological.

If we apply the *Bolger* test to cosmetics advertisements, we find that they overwhelmingly meet the three factors: (1) they are advertisements; (2) they reference a specific product; and (3) the speaker (i.e., the company) has an economic motivation for disseminating them.

More importantly, if we apply *Central Hudson* test to my proposed regulations on depictions of product results in cosmetic advertisements, the proposed regulations meet the requirements of the common law test.[181] If we take for granted that advertisements such as those for the Teint Miracle[182] and Eraser[183] are misleading, they do not even meet the threshold inquiry of the *Central Hudson* test, and as such are not protected by the First Amendment and therefore can be restricted extensively. This once again goes back to the foundational principle in *Virginia State Board of Pharmacy* that commercial speech must be accurate so as to help the consumer make an informed decision.[184] Cosmetics advertisements that use

178. *See* Preston, *supra* note 67, at 20–23.

179. *See Women 'Suffer Poor Self-Esteem Due to Airbrushing in Advertising,' supra* note 85.

180. *See, e.g.*, *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4; *ASA Adjudication on The Eraser Foundation*, *supra* note 5; Preston, *supra* note 67, at 23.

181. For ease of reference, the *Central Hudson* test states that in order to be fully protected under the First Amendment: (1) The commercial speech must concern lawful activity and not be misleading; (2) the asserted government interest in restricting the speech must be substantial; (3) the regulation must directly advance the government interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

182. *See ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

183. *See ASA Adjudication on The Eraser Foundation*, *supra* note 5.

184. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc., 425 U.S. 748, 765 (1976).

digital manipulation to replace or to augment the actual product's effects do not help the consumer make an informed decision because they do not depict the actual product's results; they are merely illustrative or "aspirational."[185]

Nevertheless, in order to proceed through the *Central Hudson* test, we will presume for the moment that either these advertisements are not misleading because they inform the consumer by showing "illustrative" results, or that there are more borderline cases where the digital manipulation is not as extreme. If we make such a presumption, the advertisements would meet the first requirement of the *Central Hudson* test because buying makeup is lawful and, suspending reality, the ads are not misleading. We would then proceed to the next step of the test.

The next step is to determine whether the asserted government interest in restricting the speech is substantial. Based on the studies and concerns discussed above,[186] the government has a substantial interest in regulating advertisements that objectify women and create impossible ideals for women to aspire to (i.e., having flawless, pore-less skin), thereby causing, in the aggregate, an increase in low self-esteem, eating disorders, sexual harassment, gender discrimination, and violent crimes against women. Further, the more limited application of this regulation that is proposed in this Note meets the third and fourth requirements of the *Central Hudson* test, which state that: (3) the regulation must directly advance the government interest asserted; and (4) the regulation must not be more extensive than is necessary to serve that interest.[187]

I do not propose banning all advertisements that objectify women or perfect them artificially regardless of the product being advertised.[188] Instead, the government should restrict cosmetics advertisers to using images that capture the actual results of the product advertised, rather than the results of digital manipulation. Such regulations would directly advance a government interest while being only as narrow as is necessary to advance that interest. The interest is two-fold: protecting women from the harms described above and protecting consumers from advertisements that do not accurately depict the results of the product. This proposed regulation meets the

185. *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

186. *See supra* Part II.

187. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

188. At least, not as a first step. In order to comply with the *Central Hudson* test and to give the proposed regulations the highest possible chance of success, the regulations I would tailor them as narrowly as possible to start with, such that there would need to be a correlation between the digital manipulation and the product being advertised.

requirements of the fourth factor of the test by limiting regulation to as narrow a class of advertisements as possible: cosmetics advertisements that (1) depict women, (2) employ digital manipulation and/or artificial perfection, (3) in order to amplify the results of the product that is being advertised, (4) to such an extent that an average consumer cannot distinguish the difference between the actual results of the product and the digital augmentation of those results with the naked eye.

In this way, my proposed regulations would meet the requirements of the *Central Hudson* test even if the advertisements themselves were not deemed misleading. Nevertheless, because the regulations have a better chance of approval the more narrowly tailored they are, I would propose the same regulations even if the advertisements were determined to be misleading in the first place.

Now we return to the presumption that cosmetics advertisements such as those for the Teint Miracle and Eraser Foundation *are* misleading. It will be established that that presumption is true by taking a closer look at how the courts view false or misleading advertising claims.

There are three categories of false advertising claims: "false," that is, literally false; "misleading"; and "false by necessary implication."[189] Sarah Samuelson explains the difference between "misleading" and "false by necessary implication" as follows:

> Under the "false by necessary implication" doctrine, courts examine the context of the full advertisement, rather than looking at the claim in isolation. Claims that appear to be facially true, but are "false by necessary implication," are then treated as if they are literally false. Therefore, courts may order removal of "false by necessary implication" advertisements without considering extrinsic evidence of consumer deception (as they would for misleading claims) . . . . A "misleading" claim is usually one that seems to be true on its face, but may convey other meanings that are false . . . . In such a case, the parties must provide survey evidence showing whether consumers were actually misled, and the court's decision generally turns on this evidence.[190]

A semblance of the "false by necessary implication" doctrine seems to be what Jo Swinson and the ASA applied to the Teint Miracle and

189. Sarah Samuelson, Note, *True or False: The Expanding "False by Necessary Implication" Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem*, 30 CARDOZO L. REV. 317, 318 (2008) (naming three categories of false advertising claims).

190. *Id.* at 320–21.

The Eraser advertisements. Although the fine print may have distinguished certain features of the photographs as an "[i]llustrative [e]ffect,"[191] the very fact that the photographs were being used to advertise foundations that reduced the appearance of lines and wrinkles or created a glowing undertone implied that the effects in the photographs were the result of the use of that product. Notably, as Samuelson explained, in contrast to traditional "misleading" advertising claims in which the Court considers extrinsic marketing research to determine how consumers actually perceived the advertisement, in "false by necessary implication" claims, the Court does not require evidence that consumers actually interpreted the advertisement in the misleading way.[192] This element of the doctrine in particular helps raise the claim above the threshold of what might be common sense, but certainly should not be: namely, that cosmetics companies routinely digitally retouch their advertisements in order to exaggerate the actual effects that a product might have on the consumer. In reality, most women probably know that advertisements are digitally retouched.[193] However, the issue is that the retouching makes it impossible to distinguish between what is real and what is false—between what is the actual result of the product and what is the result of computer wizardry. Further, the deeper issue is that depictions of artificially perfected women are harmful on a psychological, physical, and societal level.[194] By relying on this application of the false by necessary implication doctrine, my proposed regulations would pass the "common sense" test.

Incorporating this latest doctrine of false advertising, a final statement of my proposed regulation would be: cosmetics advertisements that (1) depict women, (2) employ digital manipulation and/or artificial perfection, (3) in order to amplify the results of the product that is being advertised, (4) to such an extent that an average consumer cannot distinguish the difference between the actual results of the product and the digital augmentation of those results with the naked eye are deemed to be false by necessary implication.

CONCLUSION

Imposing stricter regulations on cosmetics products advertisements can help us rehabilitate women's place in society as coequals

191. *See ASA Adjudication on the Eraser Foundation*, *supra* note 5.
192. Samuelson, *supra* note 189, at 330.
193. *See, e.g.*, Sara Benincasa, *I'm Shocked! Beauty Ads Lie?*, CNN OPINION (July 30, 2011, 10:31 AM), http://www.cnn.com/2011/OPINION/07/30/benincasa.ads.uk/index.html.
194. *See supra* Part II.

and create more honesty in advertising by limiting makeup advertisements to using images that capture the results of their actual product. While we cannot completely eradicate the sexist images of women in the media, the unattainable standards promulgated by these media by using existing legal remedies to ban advertisements that are false by necessary implication due to digital manipulation.

By relying on long-standing Supreme Court decisions like *Virginia State Board*,[195] *Central Hudson*,[196] and *Bolger*,[197] we can ensure that proposed regulations have a solid legal basis in the common law. By combining accepted commercial speech doctrines with emerging studies and growing concerns about the negative effect of the media on women, we can propose legislation that is lawful, popular, and ethically appealing.[198] New regulations on cosmetics advertising, such as the ones I propose,[199] that meet these criteria have a reasonable chance of success in the near future—especially if our regulatory agencies take note of how the United Kingdom's ASA handled the Lancôme and Maybelline advertisements.[200] Whether the new regulations must be forced on advertisers by the FTC depends on the ASRC's willingness to increase its advertising standards of its own accord.

In fact, changes are already beginning to manifest in the NAD's self-regulation. In December the NAD banned a CoverGirl mascara ad featuring musician Taylor Swift because the ad used excessive Photoshopping.[201] The NAD explicitly stated that in doing so, it was

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195. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

196. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y., 446 U.S. 557 (1980).

197. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

198. Many others have been calling for years for the same type of reform that I propose here. One of the most recent proposals, dating to October 2011, is the Self Esteem Act by Seth and Eva Matlins. The Self Esteem Act does not seek to make advertisements more honest by limiting digital manipulation, as my proposal does, but merely to make the advertisements more honest by requiring disclaimers that the models have been digitally altered. Off Our Chests, *The Self-Esteem Act*, FEEL MORE BETTER (Aug. 25, 2011), http://www.feelmorebetter.com/the-self-esteem-act/. *See also* Tamara Abraham, *The Self Esteem Act: Parents Push for Anti-Photoshop Law in U.S. to Protect Teens from Unrealistic Body Image Ideals*, MAIL ONLINE (Oct. 12, 2011, 3:02 PM), http://www.dailymail.co.uk/femail/article-2048375/Self-Esteem-Act-US-parents-push-anti-Photoshop-laws-advertising.html. A similar bill was just recently proposed in Arizona. *See Arizona Considers Anti-Photoshop Law*, PDNPULSE (Feb. 23, 2012, 4:18 PM), http://pdnpulse.com/category/photo-manipulation.

199. *See supra* Part IV (laying out my proposed regulations in detail).

200. Benincasa, *supra* note 193.

201. *See* Lindsey Hunter Lopez, *Taylor Swift's CoverGirl Ad Pulled*, CNN: THE MARQUEE BLOG (Dec. 21, 2011, 3:28 PM), http://marquee.blogs.cnn.com/2011/12/21/taylor-swifts-covergirl-ad-pulled/?hpt=hp_c2.

following the lead of the ASA decisions in the United Kingdom.[202] The fact that the advertisement contained a disclaimer that the model's eyelashes were digitally enhanced in post-production was not enough to prevent the NAD from banning it, just as Maybelline and Lancome's claims that the results of their products were "illustrative" and "aspirational" were not enough to prevent the ASA from banning those advertisements.[203] After the decision, Andrea Levine, NAD's director stated, "You can't use a photograph to demonstrate how a cosmetic will look after it is applied to a woman's face and then—in the mice type— have a disclosure that says 'okay, not really.'"[204]

One can only hope that the NAD's decision in this instance represents an enduring change in attitude that narrows the acceptable use of digital manipulation and artificial perfection in cosmetics advertisements, paving the way for fiercer federal regulations.

JASON REA*

202. Edwards, *supra* note 36. The NAD also stated, "[a]dvertising self-regulatory authorities recognize the need to avoid photoshopping in cosmetics advertisements where there is a clear exaggeration of potential product benefits." *Id. See also* Sebastian Anthony, *US Watchdog Bans Photoshopping in Cosmetics Ads*, EXTREMETECH (Dec. 16, 2011, 9:47 AM), http://www.extremetech.com/extreme/109375-us-bans-photoshop-use-in-cosmetics-ads.

203. Edwards, *supra* note 36; *ASA Adjudication on The Eraser Foundation*, *supra* note 5; *ASA Adjudication on Teint Miracle Foundation*, *supra* note 4.

204. Edwards, *supra* note 36.

* J.D. Candidate 2013, William & Mary School of Law; B.A. 2010, English and Latin, *cum laude*, Wheaton College. The author would like to thank his wife Lauren, his parents and brother, and all of his family and friends for their support and encouragement. He would also like to thank all of his teachers, past and present, especially Professor Michael Drout, who is always as generous with his knowledge as he is with his time. Finally, the author would like to thank the editors and staff of the *William & Mary Journal of Women and the Law* for this opportunity.