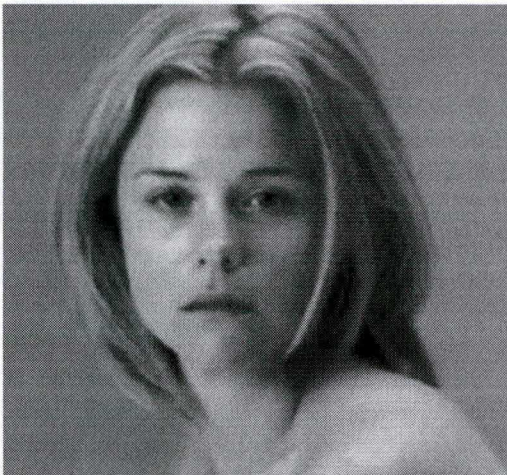


PICTURE [IM]PERFECT: PHOTOSHOP REDEFINING BEAUTY IN COSMETIC ADVERTISEMENTS, GIVING FALSE ADVERTISING A RUN FOR THE MONEY

By, Ashley Brown¹

Introduction

The advent of Photoshop has made a once unattainable image of beauty and perfection much less a figment of the imagination and much more a tangible reality, leaving beauty in the hands of its digital creator.. In the famous words of Aqua, with very little “imagination, life is your creation.”² Photoshop has the power to manipulate an image’s appearance beyond recognition, making it possible to transform an average looking individual into a “Barbie girl, in a Barbie world.”³ This drastic transformation was captured in a thirty-seven second video: “Photoshop makes anything possible.”⁴ The video exemplifies the Barbie-doll ideal aesthetic for women and G.I. Joe aesthetic for men, which has been promulgated by modern retouching.⁵



Before⁶



After⁷

-
1. Ashley Brown, Juris Doctor, Benjamin N. Cardozo School of Law 2014.
 2. Aqua, *Barbie Girl*, Aquarium (MCA Records 1997).
 3. *Id.*
 4. Raul Radulescu, *Photoshop makes anything possible*, YOUTUBE (Oct. 27, 2013), <https://www.youtube.com/watch?v=cPnfjwKfkSk>.
 5. Jessica Seigel, *The Lash Stand: Will new attitude and regulatory oversight hit delete on some photo retouching in print ads?*, ADWEEK (May 29, 2012 at 12:01 AM), <http://www.adweek.com.com/news/press/lash-stand-140785?page=2>.
 6. Taylor, *supra* note 5.
 7. *Id.*

Since the birth of the modern day photograph in 1839,⁸ there have always been techniques to “improve” the captured image.⁹ However, technological advancements have drastically altered the types of modifications that are now achievable.¹⁰ The thirty-seven second YouTube video¹¹ demonstrates that with Photoshop it has become possible, with relatively minimal time and effort, to completely alter a person’s appearance and size to create a life-like Barbie.¹² However, unlike the doll, these subjects are often well-known models and celebrities that add a sense of believability to what is an unattainable beauty.

Now, before an image is ever presented to the public, it can be diluted and digitally manipulated to achieve an unrecognizable result. Such alteration can have drastic consequences on the naïve consumer, especially when it comes to deception in certain types of product advertisements, such as cosmetics.¹³ This vulnerability was recently the subject of much controversy when the self-regulating watchdog of the United States advertising industry, the National Advertising Division (NAD), moved to ban the use of Photoshop in cosmetic advertisements. Specifically, the ban followed a 2012 CoverGirl ad featuring Taylor Swift, in which her eyelashes were airbrushed to exaggerate the effects of mascara.¹⁴ Although the footnote disclaimer in the ad stated, “[I]ashes enhanced in post production,” Andrea Levine, the Director of NAD, labeled the advertisement a “product demonstration,” as the purpose of the product, the mascara, is to “make your eyelashes longer and thicker,” promising “2X more volume” and therefore cannot be digitally enhanced.¹⁵ Consequently, the NAD found the disclaimer to be insufficient and declared the ad unacceptable, forcing Proctor & Gamble into discontinuing it,¹⁶ as it stood in “contradiction to the primary message conveyed by the advertisement.”¹⁷ Although the NAD has publicly stated

8. THOMAS H. WHEELER, *PHOTOTRUTH OR PHOTOFICTION?: ETHICS AND MEDIA IMAGES IN THE DIGITAL AGE* 29 (2003).

9. See HELMUT GERNSEIM, *A CONCISE HISTORY OF PHOTOGRAPHY* (3d. 1986).

10. Kerry C. Donovan, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertisement Retouching*, 26 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 581, 588 (2012) (explaining Photoshop “has resulted in ‘much more extensive trickery [that] is approved without anyone batting a lash: flabby stomachs are tightened, necks and legs are lengthened, and bosoms are reshaped. The result: a flawless body shape no amount of dieting or cosmetic surgery can achieve.’ Images can be manipulated in any way that is desired, from making a model slimmer or taller to changing skin color and swapping body parts.”)

11. Radulescu, *supra* note 4.

12. See Seigel, *supra* note 6 (explaining that “Today, fashion models who appear gaunt can get their pixels plumped to fill in bony joints and jutting ribs. Celebrities, meanwhile, routinely get slimmed down to look more like models.”)

13. See Ann Marie Britton, *The Beauty Industry’s Influence on Women in Society* (Oct. 1, 2012) (unpublished honors thesis, University of New Hampshire) (on file with University of New Hampshire Scholars’ Repository).

14. Seigel, *supra* note 6.

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

16. Edwards, *supra* note 16 (quoting the NAD decision, “[P&G] advised NAD it has permanently discontinued all of the challenged claims and the photograph in its advertisement. NAD was particularly troubled by the photograph of the model – which serves clearly to demonstrate (i.e., let consumers see for themselves) the length and volume they can achieve when they apply the advertised mascara to their eyelashes. This picture is accompanied by a disclosure that the model’s eyelashes had been enhanced post production.”); See also Seigel, *supra* note 5 (explaining, “[i]n a pivotal decision, the National Advertising Division of the Council of Better Business Bureaus late last year found that a CoverGirl mascara ad featuring singer Taylor Swift was not “truthful and accurate” because her luxurious eyelashes were enhanced with airbrushing.”).

17. LOIS F. HERZECA & HOWARD S. HOGAN, *FASHION LAW AND BUSINESS: BRANDS & RETAILERS* 534 (2013).

“advertising self-regulatory authorities recognize the need to avoid photoshopping in cosmetics advertisements where there is a clear exaggeration of potential product benefits,”¹⁸ the landmark CoverGirl decision did not dissuade Photoshop users. If anything, controversy surrounding the issue has been on the rise, and the media is always quick to identify advertisers’ missteps and oversights.¹⁹

Although the potential for consequences is plentiful, a general lack of caution is rampant throughout various industries, not just advertising.²⁰ News organizations, similar to the advertising industry, operate under self-regulating policies that tout an industry standard allowing the “enhancement of photographs for clarity and definition,” but forbidding any change to the photograph’s actual composition.²¹ Moreover, Photoshop has completely saturated all forms of e-commerce to such an extreme that some commentators have begun to satirize the practice.²² For instance, Ellen DeGeneres took her stab when she invited Target model, Tanya Marie Keller, to be a guest on her show.²³ In March of 2014, Target retouchers notoriously butchered Keller’s bikini image, stretching her arms past her knees and cropping out a noticeably large portion of her crotch.²⁴ In the spirit of Ellen’s comedic ways, Keller came on stage wearing arm extensions in a lighthearted attempt to spoof Target’s oversight.²⁵

Photoshop has become so common within the fashion and advertising industry that most have come to approach it with overwhelming indifference, accepting its presence in all images as a fact of life.²⁶ Part I of this Note will focus on the regulatory scheme that is implicated in the Photoshop discussion and whether such improprieties in cosmetic advertisements fall under the purview of the false advertising paradigm. The ramifications of Photoshop’s use in these advertisements are multi-faceted, but are ultimately rooted in two distinct, yet related paths of upheaval: (1) the consumer deception issue that ensues from the unattainable results depicted in the photoshopped advertisements, and (2) the public health issue that stems from manipulating a model’s appearance to a state that is beyond attainable perfection.

Part II will begin by exploring the evolution of photography, and expose it as an art form long plagued by manipulation. The discussion will continue through an overview of the current regulatory status of Photoshop, with a focus on the United States. Then, Part III will provide an overview of the three key sources of false advertising law in the United States—the Federal Trade Commission (“FTC”), the NAD, and the Lanham Act. Part IV will

18. Edwards, *supra* note 18.

19. See, e.g., Olivia Foster, *She's still beautiful! Female fans rally in support of Beyonce after leaked shots reveal her spotty skin in pre-Photoshop L'Oreal ads*, DAILY MAIL, (Feb. 19, 2015) <http://www.dailymail.co.uk/femail/article-2960198/Female-fans-rally-support-singer-leaked-shots-reveal-spotty-skin-pre-Photoshop-L-Oreal-ads.html>.

20. See Frances Morton, *Touch-up: Photoshopping is all around us*, THE NEW ZEALAND HERALD (Sept. 5, 2010), http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=10671260 for the proposition that self-regulation extends to fact providing industries such as the news.

21. *Id.*

22. See Ellen DeGeneres: *Sophia Grace & Rosie, Simon Baker* (NBC television broadcast Apr. 2, 2014), available at <http://www.ellentv.com/episodes/sophia-grace-and-rosie-simon-baker/>.

23. *Id.*

24. ABC News, *Target Apologizes for 'Thigh Gap' Photoshop Fail*, ABC NEWS (Mar. 12, 2014 6:00am), <http://abcnews.go.com/blogs/lifestyle/2014/03/target-apologizes-for-thigh-gap-photoshop-fail/>.

25. *Ellen DeGeneres: Sophia Grace & Rosie, Simon Baker*, *supra* note 23

26. See Morton, *supra* note 21; see also Seigel, *supra* note 6 (quoting Photoshop guru Helene DeLillo stating, “[e]very single company is retouching, even if they say they’re not,” and CoverGirl spokesman, Brent Miller, “[r]etouching is standard, and post-production is standard across all advertising. Everyone does it.”)

apply this information, and analyze why and when cosmetic advertisements manipulated by Photoshop qualify as false advertising. This Note concludes with a brief look at why regulatory change has become necessary in order to keep up with the technological advances of Photoshop and remedy the consumer deception and public health concerns that have arisen in its wake.

I. Background: Photoshop, Advertising Manipulation, Where it All Began

Beginning with the flicker of the first flash, photography is an art form plagued by manipulation. In fact, “photography itself is an inherent manipulation,” and its process is skewed from beginning to end by the “biases and interpretations of the photographer, printer, editor, or viewer.”²⁷ Modern photography is deemed to have been invented in 1839, but traces of the first documented altered photograph appeared as early as 1840.²⁸ As such, pre-production techniques such as lighting, hair, and makeup coupled with post-production dark room tools²⁹ were around long before computers and Photoshop. Although previously a more painstakingly slow and tedious process, pre-Photoshop photographers were able to “retouch” any blemishes or imperfections using brushes.³⁰

A. *The Evolution of Photoshop*

For the remainder of the 19th century, and for the majority of the 20th, photographic technology advanced at a steady rate with the potential for manipulation increasing each step of the way.³¹ However, in 1987, Ph.D. student Tom Knoll revolutionized the world of photography when he developed the computer application: Display.³² Credited as the “unofficial father of Photoshop,”³³ Display surpassed any previous advancement by light years. The program caught the attention of software giant, Adobe, who purchased the program from Knoll in September of 1989.³⁴ Six months later, on February 1, 1990, photography was forever changed with the release of Photoshop 1.0.³⁵ Two decades and 13 versions later, the once simple yet revolutionary program has gone from “basic retouching,” such as digital color editing,³⁶ to the ability to “slim bodies, enlarge heads, narrow waists, and pump breasts and muscles with a click and a drag” thanks to the Liquify tool, introduced in Photoshop 6.0.³⁷

27. WHEELER, *supra* note 9.

28. *Id.* at 29.

29. Kate Betts, *The Man Who Makes the Pictures Perfect*, THE NEW YORK TIMES (Feb. 2, 2003), <http://www.nytimes.com/2003/02/02/style/the-man-who-makes-the-pictures-perfect.html?pagewanted=all&src=pm>.

30. *See id.* (quoting Photoshop connoisseur Pascal Danguin stating, “[i]t’s about changing light. Think of this as a virtual darkroom, where you would expose parts of the photo to make it denser. Only in a darkroom, that would take five hours, and here we do it in an instant.”)

31. *See id.*, (providing examples of manipulation and explaining, “[i]n a culture in which image is a major commodity, the paradox of appearing natural on film is nothing new. As far back as the mid-19th century, the photographer Mathew Brady employed retouchers to improve formal portraits. In the early 20th century, Man Ray used innovative techniques like solarization, and in the 1930’s and 40’s the Hollywood photographer George Hurrell elevated actresses like Jane Russell and Joan Crawford into icons of glamour by lengthening their eyelashes, smoothing every wrinkle and blemish and highlighting their hair.”)

32. *A Quick History of Adobe Photoshop & Cool Facts Behind the Living Legend*, 1STWEBDESIGNER.COM (last visited Apr. 6, 2014), <http://www.1stwebdesigner.com/inspiration/history-of-adobe-photoshop/>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Seigel, *supra* note 6.

Photoshop transformed the formerly tedious retouching process and provided the power of manipulation to anyone capable of turning on a computer. In some ways, it has enhanced and expanded photography exponentially as an art form. For example, it has vastly expanded the different lighting techniques, making the possibilities for different exposure scenarios endless.³⁸ The “harsher aspects of dramatic lighting,” which once impeded photographers from exploring possible exposures in greater depth, are now encouraged and experimented with, transforming a once discounted technique into an enhancement.³⁹ However, although such tools have long been employed, Photoshop has enabled them to evolve and procreate at an alarming rate,⁴⁰ adapting to overcome any small, less than perfect detail.

B. *Photoshop Today: From Dolls to Politicians*

Today, Photoshop is prevalent throughout all aspects of society and its creations are plastered on the covers of magazines.⁴¹ Its reach spans far beyond the fashion and advertising industries, and extends to the beloved dolls that children grow up with and see as role models. Additionally, such development is not limited to girls.⁴² These “beyond human” characteristics are evident in the stereotypical representation of masculinity in the first doll marketed to boys – G.I. Joe.⁴³ The original 1964 version of the strapping soldier was proportionately accurate, but as time continued, the doll’s chemistry noticeably transformed.⁴⁴ The newer versions of G.I. Joe are “increasingly muscular and more sharply defined” and have become less representative of the human male.⁴⁵ Today, if G.I. Joe were a live male, he would look similar to Popeye, with biceps measuring “26 inches in circumference,” which is in stark contrast to the average male bicep, which “measures approximately 12.5 inches when flexed.”⁴⁶ Hint: there is a reason why Popeye is a cartoon character.

Politicians have also employed Photoshop to shape public perception.⁴⁷ Photo manipulation was a popular tactic employed by tyrants like Joseph Stalin and Adolf Hitler during World War II.⁴⁸ These groups would airbrush out former members after their departure to erase any trace of their existence.⁴⁹ Even historically celebrated American heroes such as Abraham Lincoln are implicated in the controversy. It is alleged that the

38. See Betts, *supra* note 30 (quoting Harper’s Bazaar photographer Patrick Demarchelier discussing the “photoshop guru” Pascal Dangin, stating, “Before I met Pascal, I couldn’t do so many different kinds of lighting ...”)

39. *See id.*

40. *Id.*

41. *Photoshopping: Altering Images and Our Minds*, BEAUTY REDEFINED (Mar. 12, 2014) <http://www.beautyredefined.net/photoshopping-altering-images-and-our-minds>.

42. *Id.*

43. 1 MEN & MASCULINITIES, A SOCIAL, CULTURAL, AND HISTORICAL ENCYCLOPEDIA, 354 (Michael Kimmel & Amy Aronson eds., 2003).

44. *Id.*

45. *Id.*

46. *Id.*

47. Noel Lawrence, *Laws Regulating Usage of Photoshop*, EHOW, http://www.ehow.com/list_7347521_laws-regulating-usage-photoshop.html (last visited Mar. 30, 2014 2:02PM).

48. *Id.*

49. *Id.*; see also Delana, *Politics of Photoshop: 15 Shady Edits for Political Purposes*, WEBURBANIST, <http://weburbanist.com/2010/10/27/politics-of-photoshop-15-shady-edits-for-political-purposes/> (last visited Apr. 16, 2014) (comparing photographs in which “a commissar is removed from a photo where he once walked alongside Josef Stalin,” and another of Hitler and Joseph Goebbels, one of Hitler’s closest advisers and a high-ranking Nazi official, who had been removed from a 1937 photograph.) (emphasis added).

President never posed for a particular famous portrait, but rather his head was “pasted onto the body of Southern politician John Calhoun.”⁵⁰

Photoshop has become so embedded within our culture that “consumers are now even airbrushing at home.”⁵¹ From yearbook photos to removing landscape to accurately reflect scenery changes,⁵² photo trickery has become intertwined into the fabric of everyday life. However, despite such permeation, the fashion industry is seen by many as the leading culprit.⁵³ One of the most startling and recent depictions of extreme Photoshop is a Ralph Lauren ad that featured model Filippa Hamilton, which more closely resembled a doll than an actual person. In the photo, Hamilton was digitally altered to the point that her hips were “slimmer than her head,” making her seem more doll-like than human.⁵⁴ Hamilton, who was later fired by the company, claimed Ralph Lauren told her it was because she was overweight.⁵⁵ Although the advertisement only appeared in Japan for a relatively short period of time, its depiction was so startling that it caused controversy all around the world.⁵⁶

C. The Current Status of Photoshop Regulation

The NAD is not alone in its response to deceptive beauty advertisements. In fact, many would argue that the United States lags behind other countries in its regulation of Photoshop.⁵⁷ Currently, digital alteration is unregulated in the United States,⁵⁸ whereas many countries are in the midst of proposing proactive measures to minimize the trickery of Photoshop in advertisements.⁵⁹

In 2009, British Parliament member Jo Swinson lobbied for a complete ban on advertisements targeting children under 16-years-old.⁶⁰ Advertisers were called on to adopt a self-imposed scaled labeling system, which would require a disclaimer to accompany all digitally altered advertisements depending upon the degree of retouching.⁶¹ Under this model, photoshopped advertisements manipulating cosmetic results, such as the Taylor Swift CoverGirl ad, would fall at one end of the spectrum in juxtaposition to minor

50. Delana, *supra* note 50.

51. See Seigel, *supra* note 6 (citing a survey conducted by fashion magazine *Glamour* “in which 60 percent of 1,000 women polled had no problem with retouching personal photos that might appear on Facebook or online dating sites.”)

52. See WHEELER, *supra* note 9, at 53-56 (stating that “In the wake of the September 11, 2001, terrorist attacks in New York and Washington, D.C., actor/director Ben Stiller ordered the digital erasing of the World Trade Center towers from scenes of Manhattan’s skyline in his film *Zoolander*” and also that “Yearbook photos are sometimes manipulated by students (or their parents).”)

53. Katie Ellis, *Photoshop Number One Culprit in ‘Bad Side’ of Fashion Advertising*, THE ROCKET (Sept. 19, 2013) <http://www.theonlinerocket.com/campus-life/2013/09/19/photoshop-number-one-culprit-in-bad-side-of-fashion-advertising>.

54. *Id.*

55. Carrie Melago, *Ralph Lauren model Filippa Hamilton: I was fired because I was too fat!*, NY DAILY NEWS (Oct. 14, 2009, 8:48 AM), <http://www.nydailynews.com/life-style/fashion/ralph-lauren-model-filippa-hamilton-fired-fat-article-1.381093>.

56. *Id.*

57. Lawrence, *supra* note 48.

58. *Id.*

59. *French Politicians Want Photoshop Warning*, CNN (Sept. 24, 2009), <http://scitech.blogs.cnn.com/2009/09/24/french-politicians-want-photoshop-warning>.

60. Eric Pfanner, *A Move to Curb Digitally Altered Photos in Ads*, THE NEW YORK TIMES (Sept. 27, 2009), http://www.nytimes.com/2009/09/28/business/media/28brush.html?_r=0.

61. *Id.*

technical alternations, such as lighting.⁶² In France, Valerie Boyer followed the lead of Jo Swinson and introduced a similar bill in the country's National Assembly.⁶³ In addition, the French bill went one step further than its English predecessor, expanding coverage to editorials as well as print advertisements and placing a steep price on those who failed to comply with fines of almost \$55,000, "or up to 50 percent of the cost of the advertisement."⁶⁴

In Brazil, Congressman Deputy Wladimir Costa proposed a bill,⁶⁵ requiring all digitally manipulated advertisements to have a warning label that would read, "Attention: image retouched to alter the physical appearance of the person portrayed," notifying the consumer that the image had been enhanced.⁶⁶ Last year, Israel went one-step further to ensure that the models in its advertisements embody not only an attainable, but a healthy image by regulating computer-generated changes to advertisements and setting a threshold body mass index ("BMI") requirement for models in its country.⁶⁷ On January 1, 2013, the "Photoshop Law" officially banned the use of underweight models in all advertisements and publications within Israel's borders and required a "warning label" to accompany any advertisement in which models appear thinner due to digital manipulation.⁶⁸ The Photoshop debacle even reached New Zealand after the country's version of the *Next Top Model* television program botched images of the contestants to the point of embarrassment.⁶⁹ At the time of this blunder in September 2010, the New Zealand government had no plans for Photoshop legislation. However, the Women's Affairs Minister, Pansy Wong, took a stance on the issue by urging the media to portray women accurately.⁷⁰

In 2010, the United States skirted the issue with House Bill 4925, created "to establish a national task force to develop voluntary steps and goals for promoting healthy and positive depictions of women in the media to instill a healthier idea of femininity among young people."⁷¹ Although at this point the government had not directly tackled the issue, it was clear that the anti-Photoshop sentiment was shared and growing throughout many aspects of American society.⁷² Aerie, the lingerie brand from American Eagle, became a pioneer in the industry when it chose to follow fellow Canadian retailers by joining the movement with their Spring 2014 ad campaign, Aerie Real, "challenging supermodel standards by featuring unretouched models in their latest collection of bras, undies and apparel."⁷³

62. Donovan, *supra* note 11, at 587.

63. Pfanner, *supra* note 61.

64. *Id.*

65. See Donovan, *supra* note 11, at 586 (explaining the goal of the proposal "is to promote awareness in the consumer that the image has been retouched.")

66. *Id.*

67. Bruno Nota, *Israel Bans Skinny, BMI-Challenged Models*, ABC NEWS (Jan. 3, 2013), <http://abcnews.go.com/International/israeli-law-bans-skinny-bmi-challenged-models/story?id=18116291>.

68. Keeia Lynn, *Israel's "Photoshop Law" Goes in Effect*, BIG THINK, <http://bigthink.com/ideafeed/israels-photoshop-law-goes-into-effect>

69. Frances Morton, *Touch-up: Photoshopping is all around us*, THE NEW ZEALAND HERALD (Sept. 5, 2010), http://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=10671260.

70. *Id.*

71. Lawrence, *supra* note 60.

72. See generally Tamara Abraham, *The Self Esteem Act: Parents Push from Anti-Photoshop Law in U.S. to Protect Teens from Unrealistic Body Image Ideas*, DAILYMAIL UK (Oct. 12 2104 3:02 pm EST)

73. Ellie Krupnick, *Aerie's Unretouched Ads Challenge Supermodel Standards for Young Women*, THE HUFFINGTON POST (1/17/2014 12:04pm EST), http://www.huffingtonpost.com/2014/01/17/aerie-unretouched-ads-photos_n_4618139.html.

At the beginning of 2014, advocates finally got the legislature's attention with the Truth in Advertising Act, a bill supporting legislation that would require the Federal Trade Commission ("FTC") to review the use of altered images of the human body in advertisements.⁷⁴ The Act was introduced by a Florida Congresswoman on March 27, 2014 and has already gained the support of the American Medical Association.⁷⁵

II. Advertising Regulation in the United States

Ultimately, the problem with Photoshop is the deceptive nature of the digitally manipulated advertisements it creates, which could potentially violate the consumer protection laws of the United States, thereby implicating the Federal Trade Commission Act ("FTC Act") and the Lanham Act.⁷⁶ Therefore, in order to accurately understand the implications of any alteration beyond what is attributable to a product's performance, a foundational knowledge of both sources, in addition to the self-regulatory body of the advertising industry, is necessary.

A. *The Federal Trade Commission*

Section 5 of the FTC Act of 1914 covers methods of unfair competition, however, the FTC did not have jurisdiction over "unfair or deceptive acts or practices" until 1938, when the Wheeler-Lea Amendment to Section 5 of the FTC Act was passed. The restated Section 5 states: "[U]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."⁷⁷ Although the cornerstone of this mandate are the terms "unfair" and "deceptive," distinctively two words, it was not until 1964 that such a distinction between the terms actually came to fruition and courts began to employ separate standards.⁷⁸

As advertising evolved out of the power of a message, this notion still frames the FTC's regulation of advertising.⁷⁹ Similarly to most other areas of legal reform, the FTC has not caught up to the advancements in technology. It continues to define deceptive

74. See *New Bill Calls on FTC to Take Action on Photoshopped Images*, TRUTHINADVERTISING.ORG (Apr. 2, 2014), <https://www.truthinadvertising.org/new-bill-calls-ftc-take-action-photoshopped-images/> (further explaining "the bill seeks to get at images that materially change an individual's true shape, color, proportion or size, and is not after banning all Photoshopping.")

75. See *id.* (pointing out that the AMA has previously taken similar efforts when it "adopted a policy in 2011 encouraging advertising associations to help develop guidelines that would discourage the use of such images, especially in teen-oriented publications" after finding that "[a] large body of literature links exposure to media-propagated images of unrealistic body images to eating disorders and other child and adolescent health problems."); See also Seigel, *supra* note 6 (explaining that the "American Medical Association condemning unrealistically retouched models as a public health hazard in 2011, digital doctoring may be entering a new age of regulation.")

76. See Eric Gardner, *Jake Gyllenhaal Claims Defamation By Photoshop*, HOLLYWOOD REPORTER (May 19, 2011), <http://www.hollywoodreporter.com/thr-esq/jake-gyllenhaal-claims-defamation-by-190274>

77. Jef I. Richards & Richard D. Zakia, *Pictures: An Advertiser's Expressway Though FTC Regulation*, 16 GA. L. REV. 77, 86 (Fall 1981).

78. *Id.* at 85 (discussing *FTC v. Raladam Co.* as a "catastrophic setback for the Commission's program for advertising reform," finding that "the advertising regulation proposed by the FTC was outside the purpose of section 5 because the necessary element of competition was lacking. As the Sixth Circuit concluded in that case, the Commission 'came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy, and . . . its lawful jurisdiction [does] not go beyond the limits of fair relationship to that policy.'")

79. See Linda J. Demaine, *Seeing is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719, 722 (Fall 2012) (explaining, "[d]espite the nearly universal paradigm shift from language to visual imagery in advertising, the FTC continues to focus its efforts on linguistic claims and leaves visual imagery almost entirely unregulated").

advertising, regardless of the medium of communication, as advertising that is “likely to mislead consumers acting reasonably under the circumstances.”⁸⁰ The void in the FTC’s regulation of deceptive photoshopped advertising images can partially be attributed to the fact that their focus lies in the speech that an advertisement conveys as opposed to the image, even though the message conveyed through a picture can be just as powerful as one communicated through words.⁸¹

B. *Self-Regulation: The Advertising Self-Regulatory Council (“ASRC”)*

While the FTC handles the more egregious and repeat offenses, as previously mentioned, the United States’ advertising industry is largely self-regulated.⁸² Self-regulation is beneficial for both the consumers and the advertisers.⁸³ The system fosters consumer trust by monitoring emerging issues and trends in the marketplace as well as holding advertisers responsible for practices that fail to meet industry standards.⁸⁴ In the United States, a large majority of advertising regulation is self-imposed by the policies and procedures of the Advertising Self-Regulatory Council (“ASRC”) of the Council of Better Business Bureaus.⁸⁵ Formed by a partnership of advertising agencies in 1971,⁸⁶ the ASRC is comprised of a board of corporate and advertising executives along with attorney staff members.⁸⁷ It houses the National Advertising Division (“NAD”), Children’s Advertising Review Unit, National Advertising Review Board, Electronic Retailing Self-Regulation Program and Online Interest-Based Advertising Accountability Program.⁸⁸ The NAD serves as the “watchdog” of the advertising industry, monitoring all national dissemination in all media, with the goal of maintaining high standards of “truth and accuracy” and providing a speedy and effective mechanism to resolve complaints.⁸⁹ While its rulings are not legally binding, the body’s effectiveness is evident by the fact that 90 percent of companies agree to abide by the terms of its decisions.⁹⁰ This adherence may be attributable to NAD’s close relationship with the FTC, as many members of its staff are often from the Commission.⁹¹ In addition, those who refuse to comply are often referred to the FTC, “which has the power to fine, sue or bring injunctions against companies.”⁹²

C. *False Advertising Under the Lanham Act §43(a)(1)(B)*

80. 15 U.S.C. §55(a)(1) (2012); *see also* Demaine, *supra* note 80, at 722 (“FTC and Lanham Act deceptive advertising cases proceed essentially as though the visual imagery revolution never happened.”)

⁸¹ *See* Demaine, *supra* note 80.

82. *See supra* Part I.

⁸³ ESRP Review Program: General Activity Report, ASRC Advertising Self-Regulatory Council, Jan. 2014, available at <http://www.asrcreviews.org/wp-content/uploads/2014/01/ERSP-General-Activity-Report-2013-.pdf>.

84. *Id.*

85. *Id.*

86. Alene Dawson, *Clamping Down On Beauty Product Claims*, LOS ANGELES TIMES (Oct. 28, 2012), <http://www.latimes.com/features/image/la-ig-beauty-crackdown-20121028,0,4282901.story#axzz2xT3gLaNJ>.

87. Jason Rea, *Actual Results May Vary: Toward Fiercer National Regulation of Digitally Manipulated Cosmetics Advertisements*, 19 WM. & MARY J. WOMEN & L. 161, 165 (2012).

88. ESRP Review Program: General Activity Report, *supra* note 83.

89. ABA Section of Antitrust Law, Consumer Protection Law Developments 679 (2009)

90. Social Media Digest, 2012, available at <http://asrcreviews.org/wp-content/uploads/2013/02/social-media-Digest.PDF>

91. *See* Rea, *supra* note 88, at 166 (quoting a commentator who 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.”)

92. Edwards, *supra* note 16.

Although jurisdiction for false advertising claims generally falls under the purview of the FTC, the Lanham Act provides key concepts for the framework of accessing photoshop liability. Trademarks are the primary subject of the Act; subsequently, its coverage of false advertising is limited to Section 43(a)(1)(B).⁹³ Two categories of false advertising claims exist under this section: (1) those that are literally false, and (2) those that are false by implication, which compels a showing of actual deception.⁹⁴ Both require the plaintiff to show:

- (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
- (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
- (3) the deception is material, in that it is likely to influence the purchasing decision;
- (4) the defendant caused its false statement to enter interstate commerce; and
- (5) the plaintiff has been or is likely to be injured as a result of the false statement.⁹⁵

If the plaintiff successfully substantiates the claim, the Lanham Act grants courts the discretion to institute an appropriate remedy in the form of an injunction as well as damages including (1) defendant's profits, (2) plaintiff's actual damages, and (3) costs of the action.⁹⁶

While the Lanham Act provides federal courts with jurisdiction over false advertising cases,⁹⁷ the FTC is better situated and equipped to handle what can be a complex fact pattern. Therefore, it is unsurprising that in assessing liability for false advertising under the Lanham Act, federal courts have looked to the FTC to dictate the principles they should endorse. However, this does not mean that such analysis is all-inclusive.⁹⁸

IV. Using the False Advertising Framework To Access Photoshop Liability

The seminal historical case for guidance in assessing Photoshop liability is *FTC v. Colgate-Palmolive Co.*, in which the Supreme Court held that the message communicated by a television advertisement for shaving cream deceived consumers by falsely conveying that the product was so powerful that it could shave sandpaper in virtually no time after application.⁹⁹ After seeing the demonstration, consumers chose to rely upon this claim and elected to purchase the product.¹⁰⁰ Colgate's failure to disclose to consumers that the results of the demonstration were not solely attributable to the product was deceptive.¹⁰¹ This constituted a direct violation of Section 5 of the FTC Act, which prohibits "the intentional

93. Lanham Act, 15 U.S.C. §1051-1141n (2006)

94. *Aviva Sports Inc. v. Fingerhut Direct Marketing Inc.*, 829 F. Supp.2d 802, 811 (D. Minn. 2011).

95. *Id.* at 808.

96. *Id.*

98. *See* 15 U.S.C. § 1121(a).

98. Demaine, *supra* note 80, at 741.

99. *See F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 377 (1965) (describing "[t]he evidence before the hearing examiner disclosed that the sandpaper of the type depicted in the commercials could not be shaved immediately following the application of Rapid Shave, but required a substantial soaking period of approximately 80 minutes.")

¹⁰⁰ *Id.* at 393.

101. *See id.* at 386 (finding that "the commercials involved in this case contained three representations to the public: (1) that sandpaper could be shaved by Rapid Shave; (2) that an experiment had been conducted which verified this claim; and (3) that the viewer was seeing this experiment for himself." The Court found "each underlying product claim is true and in each the seller actually conducted an experiment sufficient to prove to himself the truth of the claim. But in each the seller has told the public that it could rely on something other than his word concerning both the truth of the claim and the validity of his experiment.")

misrepresentation of any fact which would constitute a material factor in a purchaser's decision whether to buy."¹⁰²

In reaching this conclusion, the Court outlined criteria for classifying an advertisement as deceptive that was later formulized in the Commission's 1983 Policy Statement on Deception.¹⁰³ Deception most often involves "omissions of material information."¹⁰⁴ When a cosmetic advertisement, such as an anti-wrinkle cream, features a model whose skin has been digitally retouched to a smoothness and perfection beyond any benefit that could be attributable to the product, the consumer is deceived by the false misrepresentation and the advertiser's failure to disclose the product's true capabilities.¹⁰⁵

Common deceptive practices include "false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations."¹⁰⁶ As the Taylor Swift CoverGirl ad demonstrates, the deception in photoshopped cosmetic advertisements results from a "failure to perform promised services."¹⁰⁷ The CoverGirl ad promised to give lashes "2X more volume;" however, the results depicted in the advertisement were not attributable to the mascara itself, but rather a digital enhancement from Photoshop.¹⁰⁸

In evaluating whether an advertisement fits the categories above and falls within the "deceptive" classification, the FTC states that an advertisement must contain "a representation, omission or practice that is likely to mislead the consumer, acting reasonably in the circumstances, to the consumer's detriment."¹⁰⁹

A. Factor One: Likely to Mislead

When analyzing the first factor, the entire advertisement is taken under consideration.¹¹⁰ If "the representation itself establishes the meaning," then actual deception is present, and it is classified as an "express claim." Otherwise, the advertisement must qualify as "likely to mislead" and will constitute what is known as an implied claim.¹¹¹ This

102. See *id.* (leading to the conclusion "that the undisclosed use of plexiglass in the present commercials was a material deceptive practice, independent and separate from the other misrepresentation found.")

103. See FTC Policy Statement on Deception, FEDERAL TRADE COMMISSION, 104 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

104. *Id.* (stating other occurrences as "forms of conduct associated with a sales transaction," and explaining that "[t]he issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.")

¹⁰⁵ See What constitutes "false advertising" of food products or cosmetics within §§ 5 and 12 of the Federal Trade Commission Act (15 U.S.C.A. §§ 45, 52), 50 A.L.R. Fed. 16.

106. *Id.*

¹⁰⁷ Tanzina Vega, *Covergirl Withdraws Enhanced Taylor Swift Ad*, MEDIA DECODER <http://mediadecoder.blogs.nytimes.com/2011/12/21/covergirl-withdraws-enhanced-taylor-swift-ad/>.

¹⁰⁸ <http://mediadecoder.blogs.nytimes.com/2011/12/21/covergirl-withdraws-enhanced-taylor-swift-ad/>.

109. FTC Policy Statement on Deception, *supra* 104.

110. *Id.*

111. FTC Policy Statement on Deception, *supra* note 104; see also Demaine, *supra* note 80, at 745, (explaining that express claims "tend to be relatively straightforward and are the more easily discernible type of deception" and providing an example of one such claim: "An advertiser makes an expressly false claim, for instance, by representing a mineral specimen as natural when it has been artificially enhanced or furniture as antique when it is insufficiently old to warrant the designation." Whereas implied claims "invoke more subtle psychological processes to convey misleading messages," and providing an example of one such: "An advertiser might play the U.S. national anthem in the background during his radio advertisement for clothing actually made in a foreign country. If consumers are likely to infer erroneously that the clothing is made in the United States, the use of the song may constitute an implied claim about its country of origin").

inquiry examines not only the advertisement itself but also the allegations of the complaint, in the context of the transaction to be conducted.¹¹² As the average consumer most likely does not have the expertise of the FTC, this evaluation will be conducted based on the intuitions of the general consuming public. Therefore, if actual deception is not found, evidence of the corresponding “consumers’ expectations” may be required.¹¹³

The Advertising Standards Authority (“ASA”), the United Kingdom’s equivalent to the NAD, recently banned two L’Oreal celebrity advertisements, demonstrating how a consumer is likely to be misled by the false representations of Photoshop.¹¹⁴ The offending ads in question featured model Christy Turlington for Maybelline’s “Eraser” foundation and actress Julia Roberts for Lancome’s “Teint Miracle” foundation.¹¹⁵ The advertisements featured foundations that combined makeup and anti-aging formulas to reduce the visibility of wrinkles while enhancing the skin’s overall shine.¹¹⁶

Similarly to the Taylor Swift CoverGirl advertisement,¹¹⁷ these also contained text to disclaim the image “as an illustrated effect.”¹¹⁸ Maybelline and Lancome attempted to defend the advertisements in a similar fashion as CoverGirl, purporting that the disclaimer provided sufficient warning. However, the ASA ultimately came to the same conclusion as the NAD and banned the advertisements in their digitally altered form.¹¹⁹

While a majority of consumers are aware of the use of Photoshop in advertisements,¹²⁰ it is this inherent understanding that allows this deception to continue. As nearly all advertisements are saturated with digital retouches, it has become nearly impossible for the lay consumer, even with knowledge and understanding of its existence, to know to what extent the qualities portrayed in the advertisement are a result of the product itself or of a graphic designer.¹²¹

Advertisements are intended to serve, in some sense, as a demonstration of a product’s attributes, or in this case the benefits resulting from its use.¹²² Thus, it is unsurprising that consumers would likely believe that by using the product, they could achieve similar results to those demonstrated in the advertisement, i.e. wrinkle-free skin. The FTC only requires a “message’s overall impression” to be misleading, regardless of whether any portion of it states the truth. Therefore, even if the product marginally improved skin quality, this alone

112. See FTC Policy Statement on Deception, *supra* note 104, (explaining, “[i]n cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions”).

113. Demaine, *supra* note 80, at 745, stating that “the FTC pays close attention to claims that consumers are ill-equipped to evaluate, presumably from a lack of requisite knowledge or objectivity.”

114. Pfanner, A Move to Curb Digitally Altered Photos in Ads, THE NEW YORK TIMES (Sept. 27, 2009), http://www.nytimes.com/2009/09/28/business/media/28brush.html?_r=0.

115. Dawson, *supra* note 66.; See also Rea, *supra* note 88, at 161.

117. Tanzina Vega, British Authority bans two ads by L’Oreal, MEDIA DECODER http://mediadecoder.blogs.nytimes.com/2011/07/27/british-authority-bans-two-ads-by-loreal/?_r=0.

117. See *supra* Part I.

118. See Rea, *supra* note 88, at 183, explaining because Maybelline and Lancome refused to provide the advertisements in their original form the ASA could not conclude “that the digital alterations to the ads had not exaggerated the effects the products could achieve,” and therefore “banned the ads in their current form.”

119. Seigel, *supra* note 6.

¹²⁰ Anup Shah, Media and Advertising, Global Issues, <http://www.globalissues.org/print/article/160>.

121. See Rea, *supra* note 88, at 184, (claiming “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”).

122. *Id.* at 162-63.

would not necessarily be enough to overcome the false advertising claim.¹²³ The inability for the reasonable consumer to discern which benefits are attributable to the product itself, as opposed to the advertisement's digital enhancement, results in a naivety and furthers the often-blind acceptance of advertisements as facially true.¹²⁴ Together this yields the conclusion that the L'Oreal photoshopped advertisements are "likely to mislead" without the need of further extrinsic evidence.¹²⁵ In evaluating such a claim, it is presumed that the reasonable consumer understands and evaluates advertisements under a biased notion. Therefore, the fact that the reasonable consumer is aware of the digital manipulation, and is as a result unable to distinguish between reality and falsity, strengthens this factor.¹²⁶

The core of deception in the L'Oreal photoshopped advertisements is simple—"when a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold; when it is not, deception occurs."¹²⁷ The cosmetic products, when enhanced with Photoshop, are no longer "fit for the purpose[s] for which it is sold," and deception has occurred.¹²⁸

B. Factor Two: The Reasonable Consumer

Once it is decided whether an advertisement is considered to likely be deceptive, the test then becomes "whether the consumer's interpretation or reaction is reasonable in light of the claim."¹²⁹ The reasonableness factor must be deduced from a general consensus rather than a single perception, meaning the sentiment must be shared throughout a population.¹³⁰ However, a caveat exists if the advertisement is targeted to a specific audience.¹³¹ In such an instance, the Commission evaluates the claim from the perspective of a "reasonable member of that group."¹³² In most cosmetic settings, women are more than likely the target audience of advertisements. More specifically, in the L'Oreal cases, the reasonable consumer can be specified to middle-aged women who are either taking

123. See Brooke E. Crescenti, *Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?*, 13 J.L. & POL'Y 699, 709 (2005) (stating "if a message's overall impression is misleading, it is no defense that some elements of the communication are true because "words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.")

124. See Rea, *supra* note 88, at 162-63.

125. See Demaine, *supra* note 80, at 745 (stating that "the FTC pays close attention to claims that consumers are ill-equipped to evaluate, presumably from a lack of requisite knowledge or objectivity.")

126. See *id.* (asserting "The FTC and courts presume that the reasonable consumer understands the biased source of these statements, realizes that the claims are not factual, and discounts them accordingly.")

127. FTC Policy Statement on Deception, *supra* note 104.

128. *Id.*

129. *Id.*

130. See *id.* (quoting Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963) "An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim.")

131. *Id.*

132. See *id.* (stating "[w]hen representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond."); see also Demaine, *supra* note 80, at 742 (noting especially vulnerable groups which "require a lower standard of reasonableness. Clearly recognized vulnerable groups include children, who have not yet developed their full cognitive capacity to discern deception, and the elderly and terminally ill, who are presumed to possess diminished objectivity.")

preventative measures to minimize the effects of aging on their skin or are noticing the changes and trying to lessen their visibility.¹³³

Similarly to the first evaluation, this factor also considers the complete advertisement “without emphasizing isolated words or phrases apart from their context.”¹³⁴ This is where the disclaimer categorizing the L’Oreal ads as an “illustrated effect,” and the CoverGirl’s ad stating, “lashes enhanced post production” comes into play.¹³⁵ In providing specific guidance for this factor, the FTC’s Policy Statement states “disclosures must be legible and understandable.”¹³⁶ However, even if they are, they may still be “insufficient to correct misleading representations” as they do not “necessarily correct” the deception, and, therefore, can still result in a violation of the law “even if the truth is subsequently made known to the purchaser.”¹³⁷ Although the aforementioned advertisements contained disclaimers, the miniscule size print coupled with the nature of the advertisement—to demonstrate a cosmetic on a woman’s face—render it deceptive to the reasonable consumer.¹³⁸

The Commission finds that “if consumers understand the[ir] source and limitations practices,” certain subjective claims, such as those inciting “taste, feel, appearance, smell or . . . correctly stated opinions” are unlikely to deceive the reasonable consumer and generally does not take action against such messages.¹³⁹ Within this consideration are claims that are so outlandish that, unless taken seriously by the consuming public or “amount to objective facts,” the general consumer does not take seriously and therefore are generally not actionable as well.¹⁴⁰ The Commission refers to these egregious misrepresentations as puffery and cites examples, such as the term “miracle.”¹⁴¹ In *Time Warner Cable, Inc. v. DIRECTV, Inc.*, the Second Circuit evaluated a DIRECTV advertisement featuring a pixelated image with the words “source matters” plastered in the center.¹⁴² The Court’s analysis in this case shows that visual images can be classified as puffery and, therefore,

133. See generally *In re L’Oreal Wrinkle Cream Marketing and Sales Practices Litigation*, No. 2:12-03571, 2013 WL 6450701.

134. FTC Policy Statement on Deception, *supra* note 104.

135. See Rea, *supra* note 88, at 162-63 and 185-186.

136. FTC Policy Statement on Deception, *supra* note 104.

137. See *id.* (explaining “[i]n evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission’s Statement of Enforcement Policy regarding clear and conspicuous disclosures.”)

138. See Rea, *supra* note 88, at 184.

139. FTC Policy Statement on Deception, *supra* note 104; see also Rebecca Tushnet, *Looking at the Lanham Act*, 48 HOUSTON L. REV. 862, 908 (2011) (explaining “[a] nonactionable puffery. A visual depiction of a product can be so grossly exaggerated that no reasonable buyer would take it at face value.”)

140. See generally FTC Policy Statement on Deception, *supra* note 104 (providing an example of when even exaggerating claims are actionable: “For instance, in rejecting a respondent’s argument that use of the words “electronic miracle” to describe a television antenna was puffery, the Commission stated: Although not insensitive to respondent’s concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of “electronic miracle” in the context of respondent’s grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae.”) (quoting Jay Norris, 91 F.T.C. 751, 847 n.20 (1978)), *aff’d*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); see also Donovan, *supra* note 11 (reasoning that puffery cannot include objective facts because they are subjective opinions).

141. FTC Policy Statement on Deception, *supra* note 104.

142. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 149 (2d Cir. 2007).

could serve as potential defense to a false advertising claim of a photoshopped advertisement, adding an interesting element to the Photoshop debate.¹⁴³

As previously mentioned, the use of Photoshop in advertisements is not actually unknown by the average consumer. In the digital age of today, the general population is aware of Photoshop's manipulation, as it has become so embedded within our culture that "consumers are now even airbrushing at home."¹⁴⁴ From yearbook photos to removing landscape to accurately reflect scenery changes,¹⁴⁵ photo trickery has become intertwined with the fabric of everyday life. However, the use has become so widespread that consumers, even with this requisite knowledge, have become incapable of distinguishing which enhancements are attributable to the product advertised and which are the result of a digital paintbrush.¹⁴⁶ As "puffery cannot distort consumer decisions,"¹⁴⁷ this void is especially crucial when it comes to cosmetics because the core of the product is the results a consumer hopes to gain from its use; when it is impossible to discern what those are, the deception is further exacerbated and cannot be chalked up to mere puffery. This analysis also demonstrates why a warning label, such as that mandated by Israel's "Photoshop Law" or the one proposed by the Brazilian Congressman, would be rendered ineffective.¹⁴⁸ No disclaimer, such as the one in the L'Oreal or CoverGirl advertisements, would be sufficient enough because consumers, while aware of the manipulation, they are just unable to tell which enhancements result from it.

In the *Time Warner Cable* case, the court classified the heavily pixelated DIRECTV ad as puffery because no reasonable consumer could confuse it for "a true representation about cable's image quality."¹⁴⁹ Applying the Second Circuit's analysis to the photoshopped cosmetic advertisement does not lead to the same conclusion because the fact that consumers are aware of the manipulation is not enough if the misrepresentation is not exaggerated to the point where its deception is easily perceived.

C. Factor Three: Materiality

After determining whether the reasonable consumer is likely to be deceived, the materiality of the deception is then considered. The FTC defines a material misrepresentation as "one which is likely to affect a consumer's choice of or conduct regarding a product."¹⁵⁰ In the case of Photoshop, this would mean that the consumer's decision to purchase the product was a result of the misrepresentation caused by the use of

143. See Tushnet, *supra* note 140 (discussing the *Time Warner* case stating, "representation would simply be apparent. In the case at bar, no reasonable consumer could mistake the defendant's heavily pixelated image for a real representation about cable's image quality." Photoshop is different here because the reasonable consumer can easily mistake a photoshopped cosmetics advertisement for a real representation of the product's quality.)

144. See Seigel, *supra* note 6 (citing a survey conducted by fashion magazine *Glamour* "in which 60 percent of 1,000 women polled had no problem with retouching personal photos that might appear on Facebook or online dating sites.")

145. See WHEELER, *supra* note 9, (stating that "In the wake of the September 11, 2001, terrorist attacks in New York and Washington, D.C., actor/director Ben Stiller ordered the digital erasing of the World Trade Center towers from scenes of Manhattan's skyline in his film *Zoolander*," and for the proposition that "Yearbook photos are sometimes manipulated by students (or their parents).")

146. See Tushnet, *supra* note 140.

147. *Id.* at 907.

148. See *supra* Part III.

149. See *TimeWarner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007).

150. FTC Policy Statement on Deception, *supra* note 104.

digital retouching in the advertisement. In assessing what sources of information are material, the FTC advises to presume that certain categories are such.¹⁵¹

At the top of this list are express claims in which materiality is inherent “because the manufacturer intended the information or omission to have an effect.”¹⁵² In addition, when proof of an implied claim has been substantiated, materiality is inferred as well.¹⁵³ Furthermore, claims that “significantly involve health, safety or other areas with which the reasonable consumer would be concerned” are also deemed material.¹⁵⁴

The three photoshopped advertisements discussed above are all for cosmetics, an area in which the reasonable consumer is a woman, are not just concerned, but consumed. In a world filled with advertisements that feature an “idealized, airbrushed and unattainable physical beauty,” it becomes impossible to escape the cold, hard truth – we are constantly judged on the basis of our appearance.¹⁵⁵ This truth can be difficult to cope with today as Photoshop has created an artificial perfection that has not only created an unattainable ideal but has subsequently resulted in growing public health concerns with damaging consequences.¹⁵⁶

The economic repercussions of such a state are startling as \$7 billion is spent each year on cosmetics.¹⁵⁷ The ramifications of such an unrealistic portrayal of beauty run deeper than the surface. Over ten years, from 1997 to 2007, the overall number of cosmetic surgical and non-surgical procedures increased a startling 500%, with women accounting for 91% of the population of recipients in 2007.¹⁵⁸ The modeling industry has long been targeted for advancing an unhealthy aesthetic that sends the wrong message to vulnerable youths who look up to these figures as role models and aspire to craft their appearance accordingly.¹⁵⁹ However, the rise of Photoshop has elevated this problem to new heights as mostly every image now disseminated in the media, even on personal social networking sites such as Facebook, has been digitally enhanced.¹⁶⁰ A 2008 survey from the YWCA, one of the largest and oldest women’s organization in the United States,¹⁶¹ shows that these

151. *See id.* (quoting a recent Supreme Court decision stating, “[i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.” And for the further explanation of express claims, “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect. Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.”)

152. *See id.* (further explaining that “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.”)

153. *See id.*, (further detailing that, “[d]epending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose, safety, efficacy, or cost, of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.”)

154. *See Id.* at 6.

155. *See Beauty at Any Cost, The Consequences of America’s Beauty Obsession on Women & Girls*, YWCA (August 2008), available at <http://www.ywca.org/atf/cf/%7B711d5519-9e3c-4362-b753-ad138b5d352c%7D/BEAUTY-AT-ANY-COST.PDF>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

developments yield tangible health problems that surface at a very young age.¹⁶² According to the YWCA, as many as 80% of women are dissatisfied with their appearance.¹⁶³ In addition, out of the 10 million women who suffer from one of the most common mental health problems of girls and women—eating disorders—nearly 40% of newly-diagnosed cases “are in girls 15-19 years old, but symptoms can occur as young as kindergarten.”¹⁶⁴ There are secondary consequences to these statistics as well. For example, the quest towards an unrealistic physical appearance is often accompanied by low self-esteem and depression.¹⁶⁵

“A finding of materiality is also a finding that injury is likely to exist because of the representation.”¹⁶⁶ And while in some false advertising claims the injury may be less apparent, it is evident from the statistics above that the grave injury resulting from the use of Photoshop only further advances this factor’s analysis. Because consumers chose to purchase products based on the false results in a photoshopped advertisement and would have likely “chosen differently but for the deception,” it can be concluded that injury exists and that the claim is material.¹⁶⁷

D. *The Lanham Act Evaluation*

As previously explained, when evaluating Lanham Act claims, courts have looked to the FTC for guidance.¹⁶⁸ However, the Lanham Act differs slightly from the FTC in its approach to deceptive advertising. First, if a plaintiff fails to establish actual deception on the face of the offending advertisement itself, then extrinsic evidence is required to support the allegation that an advertisement is misleading.¹⁶⁹ This creates an additional burden for a plaintiff because “false claims may be prohibited without extrinsic evidence of consumer reaction.”¹⁷⁰ Such evidence is “usually in the form of an expensive consumer survey,” and can be of concern in dissuading people from bringing an action.¹⁷¹

The reasonable consumer is included in the Lanham Act analysis, but it has not been evaluated uniformly throughout the courts.¹⁷² In some courts, the reasonable consumer has received minimal consideration, and the discussion has been limited to “judicial references.” While other courts apply a harsher standard requiring that “the ad deceive a ‘substantial segment’ of the intended audience.”¹⁷³ When evaluating this standard, courts generally rest their conclusion on the “overall impression created by the advertisement,” and, similar to the FTC, agree “that disclaimers, disclosures, and other parts of ads that convey accurate information may correct claims that would be deceptive if viewed in

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. FTC Policy Statement on Deception, *supra* note 104.

167. *See Id.*

168. Demaine, *supra* note 80, at 741.

169. *See Id.* at 745.

170. *See Tushnet, supra* note 140, at 909-10.

171. *Id.* at 910.

172. Demaine, *supra* note 80 at 742-44.

173. *Id.* at 742 (stating “[i]n Lanham Act cases, the courts also incorporate a reasonableness requirement into their decision-making. Similar to FTC cases, this requirement sometimes manifests in judicial references to reasonable consumers, whereas at other times the courts require that the ad deceive a “substantial segment” of the intended audience.”)

isolation.”¹⁷⁴ Finally, the materiality analysis is quite similar to that of the FTC but slightly less detailed.¹⁷⁵

V. The Wrath of Photoshop: A Blaze of Fury

In recent years, as the potential for digital manipulation has grown astronomically and the concept of beauty has developed with it, there has been a growing concern as to whether the average consumer knows that such results are largely unattainable.¹⁸⁰ This has caused a rise in this type of litigation in which the cosmetic industry has found itself at the forefront.¹⁷⁶

In the latest case on point, twelve plaintiffs brought a class-action lawsuit for the false advertising of anti-wrinkle creams from the cosmetic giant, L’Oreal.¹⁷⁷ In their complaint, the plaintiffs specifically allege “L’Oreal photoshops images to give prospective customers a false impression of their products’ efficacy” knowing that “its products cannot provide the promised age-negating results.”¹⁷⁸

This complaint followed a similar consumer class-action suit filed in federal court early in 2013 against Avon alleging that, in addition to the company’s deceptive promise of “superior results,” the product advertising compounded the wrongdoing with “the use of computer software such as Photoshop and high end digital editing equipment.”¹⁸³ This “allows Defendant to present images of flawless skin, when the reality is likely far different.” The complaint asserts that this manipulation adds an additional “layer of deception,” further altering “the perception of consumers.”¹⁸⁴

The Complaint described a “central theme” of “false, misleading, and/or deceptive marketing campaign” to be the tactic of L’Oreal’s campaign.¹⁷⁹ Applying the false advertising framework and analyzing the materiality, the reasonable consumer, and likely to mislead factors lends a conclusion of culpability. First, the advertisements are likely to cause deception because the consumers, unable to distinguish which aspects are the result of Photoshop and which are of the product itself, will likely accept the claims advanced in the advertisement as of the product’s benefit, thereby being deceived into believing they will be able to achieve similar results as well.¹⁸⁰

Next, as the target of the advertisement is most likely an adult female, the reasonable consumer factor would be evaluated using this subset as the target audience. As explained in the previous section, no matter the sophistication of the reasonable consumer, when it comes to cosmetics, it becomes impossible within this specialized category to discern the product’s true benefits as opposed to those that can only be achieved through digital manipulation.

174. *Id.* at 744.

175. *Id.* at 747.

176. Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 321 (Winter 2007).

177. *See In re L’Oreal Wrinkle Cream Marketing and Sales Practices Litigation*, No. 2:12-03571, 2013 WL 6450701, at *1.

178. *See Id.* at *2,

179. *See Id.* at *2 (stating “[t]he Complaint does not just allege that L’Oreal made one or two false or misleading claims. Instead, the Complaint describes a “false, misleading, and/or deceptive marketing campaign” whose “central theme” was that L’Oreal anti-wrinkle products were “the product of vigorous scientific research and resulting discoveries.”)

180. *Id.*

The materiality prong of the deception is satisfied because L'Oreal's misrepresentations are objectively material to the reasonable consumer who relied upon the product's depiction in the advertisement in their decision to purchase the products in question.¹⁸¹ Furthermore, one plaintiff even did "so based on a before and after photo of a woman's face that 'purported to demonstrate the dramatic results that would be achieved from using [L'Oreal] products.'"¹⁸² It can reasonably be assumed that the reasonable consumer would not have purchased and used the product but for L'Oreal's misrepresentations.

VI. Conclusion

The Supreme Court's analysis in *FTC v. Palmolive-Colgate Co.* remains prevalent today, and it has been used to assess deceptive photoshopped advertisements. For example, the NAD employed the standard in their evaluation of the Taylor Swift CoverGirl ad demonstrating that advertisers can be culpable for deceptive photoshopped advertisements when they mislead consumers about a product's benefits. FTC precedent, in conjunction with the decisions from the NAD, lends guidance in framing a working assessment for analyzing photoshop liability. Applying the reasonable consumer test employed in *FTC v. Colgate-Palmolive Co.*, and described further by the FTC, leads to the conclusion that photoshopped advertisements could be treated as deceptive if they are likely to mislead consumers acting reasonably under the circumstances¹⁸³ and that deception was a material factor in the consumer's decision to purchase.¹⁸⁴

The Photoshop epidemic has left consumers in a state of flux when it comes to cosmetic purchases as they are no longer able to ascertain the benefits of the products they are considering purchasing. This deception, which has been furthered by digital enhancement in advertisements, has made regulatory action a much-needed remedy. This already exists within the law, but guidance on its application to this technical subject area is necessary for uniform enforcement.

181. *Id.*

182. *See id.* (discussing both Lancome and L'Oreal products. Lancome is a luxury brand L'Oreal.)

183. Demaine, *supra* note 80, at 760.

184. *Id.* at 746.

Copyright of Texas Review of Entertainment & Sports Law is the property of University of Texas at Austin School of Law Publications and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.