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Not-So-Sweet Smell of Success: When Does Ambient Scent Marketing Become a Deceptive Trade Practice?

"Earth & Table" Law Reporter

Scent marketing is as old as a realtor baking cookies in a house up for sale and as new as Oscar Mayer's "bacon" alarm clock. Harnessing the primal power of smell represents a final frontier of subliminal advertising.

Appealing to our sense of smell excites marketers precisely because smells trigger an immediate emotional response by a consumer—rather than a thoughtful one. "With all other senses, you think before you respond, but with scent, your brain responds before you think," per Pam Scholder Ellen, a Georgia State University marketing professor.



The phrase *scent marketing* is defined as using scents "to set a mood, promote products or position a brand."^[1] While scents most often are primary product attributes (e.g., perfumes and deodorizers) or secondary product attributes (e.g., the smell of Ivory soap or Play-Doh), the use of *ambient* scent marketing is growing fast. Airlines, hotels, retail stores, and casinos are increasingly injecting scents—*sensory signatures*—into the environment's atmospherics, believing this will enhance the customers' mood, translating into more favorable evaluations and higher sales.^[2]

Because scents invade our space simply as a function of our breathing, consumers cannot easily escape ambient scent marketing. We can more readily control or avoid looking at or hearing marketing messages. In this regard, scent marketing undercuts a consumer's "perceptual"

defenses. In further contrast to scent marketing, sights and sounds are processed by more analytical parts of our brains; whereas olfaction is "our phylogenetically oldest and most primitive sense."[\[3\]](#)

A consumer's inability to avoid or discern ambient scent marketing or process it intellectually raises a novel legal issue: when does foisting ambient scents on consumers become a deceptive trade practice?

Odors, Emotions, and the Brain

On average, you breathe 20,000 times a day. Recent research indicates that your olfactory system can discriminate among and between at least one trillion different smells.[\[4\]](#)

And each of these smells takes on associations in our lives. We are all acquainted with the "Proustian" effect, *i.e.*, of the floodgate of memories triggered when the novelist Marcel Proust ate a madeleine (a small sponge cake) dunked in tea. For research scientists studying consumer psychology, the ability of a scent to trigger secondary associations is known as a "superadditive" effect. This latter term applies to "scent's ability to enhance the imagery value of a memory trace."[\[5\]](#)

In plainer terms, olfactory cues "are hardwired into the brain's limbic system, the seat of emotions, and stimulate vivid recollections" per Professor Gerald Zaltman, author of *How Customers Think* (2003). Once a scent is embedded in one's memory, visual cues can cause it to be resurrected and "experienced." These "memory markers" help promote product recall. Hence, watching a person savor the smell of cup of coffee on TV can cause the viewer to experience these same olfactory sensations.[\[6\]](#)

Olfaction and emotion are deeply connected by neuroevolution." The "emotional and associative learning substrates of the brain grew out of tissue that was first dedicated to processing the sense of smell."[\[7\]](#) Professor Rachel Herz, a leading scientific expert in olfactory psychology, explains:

[T]he informational significance of emotion and olfaction is functionally the same. The most immediate responses we have to an odor are simple binary opposites: like or dislike, approach or avoid. Emotions convey the same message: approach what is good, joyful, loving; avoid what is bad, fearsome, or liable to cause grief.[\[8\]](#)

Consumer marketing departments have taken these research findings to heart. In his book *Emotional Branding* (2001), Mark Gobe argues that every brand should have an associated smell.[\[9\]](#)

Scent Marketing as a Potential Deceptive Trade Practice?

Business ethicists are now debating whether "objective ambient scents" within a retail environment violate consumer information norms and hence constitute a deceptive trade practice.^[10] Objective ambient scents are defined as the "application of ambient scent technology with the intention of affecting the attitude and behavior of consumers for the benefit of the retailer."^[11]

Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive when: (1) a representation, omission or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission or practice is considered reasonable under the circumstances; and (3) the misleading representation, omission or practice is material. Many states embrace these same principles in their consumer protection laws.

The FTC rules are most readily applied to visual and aural marketing, where the information being presented is mediated by the thalamus portion of the brain, the principal integration locus for sensory information. The consumer can thoughtfully respond to visual/aural stimuli and respond appropriately.

Scent stimuli operate differently and raise unique consumer deception concerns. Olfactory information is mediated directly by the amygdala-hippocampal complex of the brain. "None of the other senses have this direct and intimate connection with the areas of the brain that process emotion, associative learning and memory."^[12]

In the typical visual/aural marketing interaction, the marketer and consumer both understand the basic operating norms for evaluating a marketing pitch:

- The consumer understands who is engaging in the persuasion attempt (advertiser or manufacturer).
- The consumer understands what product is being sold.
- The consumer understands how the persuasion attempt is occurring and what tactics are being used.

Objective ambient scents arguably violate consumer information norms. The consumer may not know from whom the scent is emanating or what product is even being sold. "Typically, consumers develop and use perceptual defenses to manage their cognitive capacities so they are not overwhelmed by stimuli in the marketplace."^[13] This defensive mechanism breaks down as it pertains to scent marketing because consumers are not sufficiently aware of the marketer's persuasion efforts to put up defenses.

A more pointed case can be made for classifying a *covert* objective ambient scent ("COAS") as a deceptive trade practice:

The key factor that makes COASs different from an objective ambient scent is that it is developed to motivate an action or influence below the consumer's absolute threshold of consciousness. * * * [T]he consumer does not even know that the scent is present and, accordingly, cannot engage in any perceptual defenses. It is important to note that research shows that covert ambient scents can affect attitude object likability ratings even though the subject is not consciously aware of the introduction of scent to the environment.^[14]

Retailers may be employing objective ambient scents to their own peril. Because consumers respond emotionally to odors, retailers can anticipate an emotional backlash to odors that some consumers may find offensive. An example of a poorly received scent marketing campaign was the California Milk Producer Board's decision to imbue bus shelters with the scent of chocolate chip cookies. The scents were removed in days due to a crescendo of complaints from bus riders.^[15] Workplace prohibitions about overuse of scented personal care products abound.

Covert scent marketing efforts may spark consumer outrage: "Once consumers perceive they are being manipulated into making a certain choice in a retail store, they not only think less of the store they are visiting, but also think more negatively of the source of the persuasion attempt and of themselves upon learning that they were deceived or duped (which could lower self-esteem)."^[16]

Precedent for regulating scent marketing already exists. In connection with subliminal advertising, the Federal Communications Commission issued a notice in 1974 on this topic.^[17] The FCC defined subliminal advertising as "any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold level of normal awareness." The FCC stated that the use of such subliminal advertising techniques is contrary to the public interest. "Whether effective or not, such broadcasts clearly are intended to be deceptive."^[18]

Conclusion

A growing enthusiasm for ambient scent marketing must be checked against the cognitive inability of consumers to evaluate this marketing information. Covert objective ambient scents could become an up-and-coming deceptive trade practice battleground.

[1] M. Morrin, "Scent Marketing: An Overview," p. 76, from *Sensory Marketing: Research on the Sensuality of Products* (2010), edited by A. Krishna.

[2] *Id.*

[3] R. Herz, "The Emotional, Cognitive, and Biological Basics of Olfaction," p.91, *Sensory Marketing: Research on the Sensuality of Products* (2010), edited by A. Krishna.

[4] C. Bushdid, et al., "Humans Can Discriminate More Than 1 Trillion Olfactory Stimuli," *Science*, Vol. 343, at p.1370 (March 21, 2014).

[5] M. Lwin, *et al.*, "Exploring the superadditive effects of scents and pictures on verbal recall: An extension of dual coding theory," 20 *Journal of Consumer Psychology* 317, 318 (2010).

[6] See "Does Your Marketing Smell? From Neuromarketing: Where Brain Science and Marketing Meet (July 30, 2007), accessed on 5/8/14 at <http://www.neurosciencemarketing.com/blog/articles/does-your-marketing-smell.htm>.

[7] See fn. 3, p. 91.

[8] *Id.*

[9] See fn. 6.

[10] See K. Bradford, "The Use of Scents to Influence Consumers: The Sense of Using Scents to Make Cents," 90 *Journal of Business Ethics*, 141, 143, 146 (2009).

[11] *Id.*, p. 143

[12] See fn. 3, p. 91.

[13] See fn. 10, p. 146.

[14] *Id.*, p. 147.

[15] See fn. 1, p. 76.

[16] See fn. 10, p. 147.

[17] See Public Notice Concerning the Broadcast of Information By Means of "Subliminal Perception" Techniques, 44 FCC 2d 1016, 1017 (1974). The FCC notice concerned a television advertisement for a product which included the statement "Get It" of such short duration that most viewers were apparently unaware of it. In addressing the issue, the FCC hearkened back to a 1957 notice regarding subliminal advertising that was undoubtedly spawned by Vance Packard's popular work about that subject, *The Hidden Persuaders* (1957).

[\[18\]](#) *Id.*