

Winter 2022

I'm a Celebrity, Don't Get Me Out of Here: How Law and Celebrity Advocacy can Protect Young People from Miracle Weight Loss Products' Advertising on Social Media

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Recommended Citation

Nicholas Cardaci, Marilyn Bromberg, and Kathy Luong, *I'm a Celebrity, Don't Get Me Out of Here: How Law and Celebrity Advocacy can Protect Young People from Miracle Weight Loss Products' Advertising on Social Media*, 33 *Hastings Women's L.J.* 29 (2022).

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I'm a Celebrity, Don't Get Me Out of Here: How Law and Celebrity Advocacy can Protect Young People from Miracle Weight Loss Products' Advertising on Social Media

Nicholas Cardaci, Dr. Marilyn Bromberg,* and Dr. Kathy Luong**

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I. INTRODUCTION AND BACKGROUND

“If you consume this special drink, you will lose 10 pounds in a week!”

What would you think if you saw an advertisement on social media with these words? Would you think that it was too good to be true? Would you think that the drink is healthy? What if a 13-year-old girl saw this advertisement? How would she react?

These are questions that are now more relevant than ever in the modern world, with the rise of a convenient alliance between social media platforms, influencers, and manufacturers of *miracle weight loss products* (“MWLP”). This profitable trifecta has created a situation in which young people are viewing social media, and consequently having products marketed to them with promises of unrealistic (or impossible) weight loss.

The authors’ proposed solution to these questions is two-fold for law and celebrity advocacy to combat MWLP advertising on social media. Ultimately, it argues that both the law and celebrity advocacy can and *should* help ensure that social media does not show MWLP advertisements to young people.

This article proceeds as follows: after this introductory section, it provides background on social media and marketing thereon. The article then explains what MWLP are and how they are marketed. Then, it will evaluate the psychological impact of social media content, including MWLP advertisements, on adolescents. The article then explores how the law regulates MWLP advertising in the United States and United Kingdom. Afterwards, some observations of these countries’ laws, as well as possible reforms, are provided. The article then changes gears to show how celebrity advocacy could also be an instrument for combating MWLP advertising to young people (and more generally) on social media.

The authors believe this is the first article to examine both the law and celebrity advocacy in this important area, but hope it will not be the last.

II. SOCIAL MEDIA: PROLIFERATION AND MARKETING TRENDS

Social media¹ has dramatically increased in popularity over the past decade, especially among youth.² This has been facilitated by increased ease of access to social media due to the proliferation of powerful networked devices. Today, an individual can access their social network

1. Social media is an umbrella term for “internet applications that allow user-generated content and multi-directional exchange of information.” *Guidelines on Social Media Policies*, L. SOC’Y OF NEW SOUTH WALES (2021), <https://www.lawsociety.com.au/resources/resources/my-practice-area/legal-technology/guidelines-social-media>.

2. Jennifer S. Mills et al., “*Selfie*” Harm: Effects on Mood and Body Image in Young Women, 27 *BODY IMAGE* 86, 86 (2018) (citing Perloff 2014).

through various networked devices such as PCs, laptops, tablets and smartphones.³

Social media platforms such as YouTube, Facebook, Instagram and Twitter give users an (albeit, often distorted) window into the life of other users. Not all users are made equal, and some garner far more attention and goodwill than others, typically through generating content that the site's users find interesting. These high-profile social media personalities may or may not be celebrities but have a large following⁴ and high engagement rates with their following.⁵ These users are commonly referred to as *social media influencers* (or "influencers" for short).⁶

To monetize their followings, many influencers choose to advertise products on their profiles or in their content. This can be done when the influencer contracts (often called "partnering" or "collaborating") with a third-party brand with a product to sell.⁷ Under this arrangement, the influencer gets paid to advertise the brand's product.⁸

In terms of the actual content of the advertisements, influencers typically create videos, posts or images with 'aspirational' text, photos and hashtags.⁹ Influencer marketing also is highly interactive like social media itself,¹⁰ meaning viewers and influencers themselves can subsequently respond to advertisements, or other such responses, with comments, resharing, and emotes.

Influencer marketing has become a very popular form of advertising since the rise of digital marketing in the 2000s,¹¹ and influencer marketing has proven attractive to marketers due to its efficacy. Today, 86% of marketers utilize influencers for advertising, with 92% of those marketers finding such use is tremendously positive for the marketer.¹² It should also be noted that marketing on social media is very effective on adolescents, as they are highly impressionable due to significant changes during puberty, especially to their self-esteem.¹³

3. *Id.*

4. I.e. having 'subscribers' on YouTube or many 'followers' on Facebook.

5. Vanessa G. Rijo, Comment, *Sipping the (Detox) Tea: The Rise in Advertisements for Non-FDA Approved Supplements on Social Media & Regulations (or Lack Thereof) That Govern*, 5 ADMIN. L. REV. ACCORD 153, 165 (2020).

6. Asal Ozgoli, *The Liability of Social Media Influencers to Consumers in Australia: Recommendations for Reform*, 29 AUSTL. J. COMPETITION & CONSUMER L. 73, 73 (2021).

7. *Contra id.* at 77 (explaining that some influencers have their own product which they advertise to their followers and in turn generate revenue from product sales).

8. Rijo, *supra* note 5; Ozgoli, *supra* note 6, at 76.

9. Ozgoli, *supra* note 6.

10. *Id.*

11. Ozgoli, *supra* note 6.

12. Rijo, *supra* note 5.

13. See Heather Cleland Woods & Holly Scott, *#Sleepyteens: Social Media Use in Adolescence Is Associated with Poor Sleep Quality, Anxiety, Depression and Low Self-Esteem*, 51 J. ADOLESC. 41, 41-42 (2016).

The rise of social media and influencer marketing has profoundly changed how the public is exposed to advertisements. Instead of seeing advertisements in traditional media forms, such as magazines or television commercials, many people primarily experience advertisements through social media. As such, this article's focus is on social media advertising.

III. MIRACLE WEIGHT LOSS PRODUCTS AND THEIR MARKETING

As mentioned in this article's introduction, MWLP are products that, when used, ostensibly enable unrealistic or impossible weight loss. MWLP often take the form of dietary supplements, such as pills, capsules, powders, energy bars, and liquids.¹⁴ In recent years, they have also taken the form of teas (e.g. FitTea, FlatTummy Shakes, SkinnyTea, and BooTea) and lollipops.¹⁵ They are often intended to work as an appetite suppressant and/or contain ingredients that forcefully induce weight loss, such as laxatives.¹⁶ These products are taken by users in the hope of achieving unrealistic weight loss and perfection, which is exactly what the products' manufacturers typically promise.

Perhaps unsurprisingly, MWLP are not approved or indicated by pharmaceutical agencies or authorities as weight loss prophylactics. Notwithstanding, the manufacturers advertise them as aiding weight loss and enabling unrealistic weight loss (i.e. substantial weight loss in "record time").¹⁷ In terms of specific representations made by manufacturers, the Federal Trade Commission ("FTC") advises that there are seven false representations that recur in MWLP advertising. These representations are that the advertised product(s):

- Cause weight loss of two pounds or more a week for a month or more without dieting or exercise;
- Cause substantial weight loss, no matter what or how much the consumer eats;
- Cause permanent weight loss, even after the consumer stops using product;
- Block the absorption of fat or calories to enable consumers to lose substantial weight;
- Safely enable consumers to lose more than three pounds per week for more than four weeks;

14. Rijo, *supra* note 5, at 158, 167 n.84.

15. *Id.* at 159, 166-67.

16. *Id.* at 159.

17. *Id.*

- Cause substantial weight loss for all users; or
- Cause substantial weight loss by wearing a product on the body or rubbing it into the skin.¹⁸

MWLP and their advertisements prey upon the developed world's "hunger for the easy fix to overweight and obesity."¹⁹ Young people in particular are susceptible to being influenced to buy these products, as approximately one in five of supplement users aged 18-34 years old take dietary supplements for weight management.²⁰ This susceptibility is perhaps exacerbated for young people that are economically underprivileged. Spending on dietary supplements *increased* during America's 2009 recession, which suggests people's susceptibility to these products' marketing is inverse to socioeconomic wellbeing.²¹ This can be attributed to economic challenges causing people to use supplements to manage their health to avoid expensive doctor visits and prescription medications.²²

Traditionally, MWLP advertising operates by displaying the "idealized" beauty standard prominent in much advertising,²³ and promising that consumers of the product can achieve that standard. Often, this manifests by displaying a person embodying the idealized beauty standard with the product.²⁴ Unsurprisingly, influencer marketing of MWLP follows this traditional method. Influencers promise stunning weight-loss results while displaying someone who represents the idealized beauty standards. To achieve the display, a conventionally attractive influencer may pose with the MWLP in a photo or video for the

18. FED. TRADE COMM'N, *Gut Check: A Reference Guide for Media on Spotting False Weight Loss Claims* (Jan. 2014), <https://www.ftc.gov/tips-advice/business-center/guidance/gut-check-reference-guide-media-spotting-false-weight-loss>.

19. FED. TRADE COMM'N, STAFF REPORT: WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS 30 (Sept. 2002), https://www.ftc.gov/sites/default/files/documents/reports/weight-loss-advertising-an-analysis-current-trends/weightloss_0.pdf.

20. Rijo, *supra* note 5, at 159.

21. FEDERAL TRADE COMM'N, Prepared Statement of the Federal Trade Commission on Deceptive Marketing of Dietary Supplements FTC Enforcement Activities, 2 (May 26, 2010), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-deceptive-marketing-dietary-supplements/100526dietarysupplementstatement.pdf.

22. *Id.*

23. Amy Roeder, *Advertising's Toxic Effect on Eating and Body Image*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Mar. 18, 2015), <https://www.hsph.harvard.edu/news/features/advertisings-toxic-effect-on-eating-and-body-image/>.

24. For an archetypal example, see the advertisement for "Sensa," which was subject to a successful FTC enforcement action. *See, Sensa and Three Other Marketers of Fad Weight-Loss Products Settle FTC Charges in Crackdown on Deceptive Advertising*, FED. TRADE COMM'N (Jan. 7, 2014), <https://www.ftc.gov/news-events/press-releases/2014/01/sensa-three-other-marketers-fad-weight-loss-products-settle-ftc>.

advertisement.²⁵ This appears alongside any other aspirational text, images, and hashtags that characterize influencer marketing.²⁶

MWLP advertising is now and will continue to be a pervasive phenomenon on social media,²⁷ through both traditional internet advertising and influencer marketing.²⁸ Such marketing can have adverse psychological impacts on young people on top of the existing impacts social media causes. These impacts are now explored.

IV. EFFECT OF SOCIAL MEDIA ON YOUNG PEOPLE

Young people, as a demographic, are active on social media. Adolescents are among the millions of users who consume social media content. They are one of the largest cohorts of users online, over 90% use the internet daily.²⁹ Young people spend about 54% of their online time using social media,³⁰ and at least 1 hour and 11 minutes daily.³¹ As a result, young people are exposed to marketing on social media, including influencer marketing.

It is already well established that social media use can negatively affect the general mental wellbeing of young people, especially adolescents. Negative effects can manifest in mood disorders such as anxiety and depression.³² For mood disorders specifically, several studies found a positive correlation between the length of time adolescents spent on social media and developing mood disorders.³³

Unlike traditional forms of advertisements on media platforms, social media differs because it is always accessible, with live communication and feedback.³⁴ This constant availability has the potential to greatly exacerbate stress associated with its usage; this is especially true in impressionable adolescents struggling with self-esteem.

25. See, e.g., *FTC's Teami Case: Spilling the Tea About Influencers and Advertisers*, FED. TRADE. COMM'N (Mar. 6, 2020, 11:22 AM) (discussing the influencer marketing advertisements for Teami's "detox tea," which was the subject of a successful enforcement action by the FTC), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers>.

26. Ozgoli, *supra* note 6.

27. Rijo, *supra* note 5, at 166–67; Katie Bond, *Tracing FTC's Line on Commercial Speech: What Makes an Ad an Ad and Why Does It Matter?*, 71 *FOOD & DRUG L.J.* 211, 211 (2016).

28. See Rijo, *supra* note 5, at 154–55, 160, 164–67. The FTC requires such paid promotions to clearly indicate that they are paid promotions and advertisements. This can be done, for example, by adding #paid or #ad hashtags, or a "paid partnership" tag. See Rijo *supra* note 5, at 165–66.

29. Woods & Scott, *supra* note 13, at 41.

30. Woods & Scott, *supra* note 13 at 42.

31. Yalda T. Uhls, Nicole B. Ellison & Kaveri Subrahmanyam, *Benefits and Costs of Social Media in Adolescence*, 140 *PEDIATRICS* S67, S67 (Supp. 2017).

32. Woods & Scott, *supra* note 13, at 42.

33. *Id.*

34. *Id.*

A. PSYCHOLOGICAL IMPACTS RELATING TO BODY IMAGE

Other than these general psychological impacts of social media use, there are unfortunate psychological impacts on young people from viewing social media and its MWLP advertisements, particularly on young people's body image.³⁵ This is because as adolescents undergo a critical period of physical growth and development during puberty, social media and advertisements online significantly impact how they perceive their bodies and those around them.³⁶

The current ideal body image that social media portrays for women is lean, tall, and without imperfections, as they are often photoshopped to unrealistic standards.³⁷ For men, the portrayed ideal is similar, but with an expectation of muscularity.³⁸ Social media displays and *emphasizes* both the male and female beauty standards frequently. This occurs through users posting photos and videos of themselves. Further, because the infamous practice of users carefully posting only the most flattering imagery of themselves, and editing their imagery,³⁹ social media is dominated by photos of beauty. Ultimately, this leads to social media being filled with users only showing "one-sided" versions of their lives and themselves that are unrealistically positive and beautiful.⁴⁰

This tendency of social media to display the idealized beauty standard does not help the many adolescents feeling overwhelmed with current ideal beauty standards, particularly young females.⁴¹ On the contrary, it is certainly part of why the internet and social media can have a negative impact on an adolescent's body image.⁴² One study identified that the internet can be related to adolescent women developing body image concerns,⁴³ and found a positive correlation in the relationship between internet use and developing body image issues as young adolescent

35. Francisco Nataniel Macedo Uchôa et al., *Influence of the Mass Media and Body Dissatisfaction on the Risk in Adolescents of Developing Eating Disorders*, 16 INT'L. J. ENV'T. RES. PUB. HEALTH 1508, 1508–09 (2019) (noting that mass media influences body image, which it defines as an individual's thoughts, perceptions, and feelings regarding their own body).

36. Seyed Alireza Hosseini & Ranjit K. Padhy, *Body Image Distortion*, STATPEARLS (July 25, 2021) <http://www.ncbi.nlm.nih.gov/books/NBK546582/>.

37. Mills et al., *supra* note 2, at 87.

38. *Body Image - Men*, BETTER HEALTH CHANNEL (Nov. 14, 2019), <https://www.betterhealth.vic.gov.au/health/healthyliving/body-image-men>; Hosseini & Padhy, *supra* note 36, Social Media.

39. Hosseini & Padhy, *supra* note 36, Social Media.

40. Kelly Oakes, *The Complicated Truth About Social Media and Body Image*, BBC FUTURE (Mar. 11, 2019), <https://www.bbc.com/future/article/20190311-how-social-media-affects-body-image>.

41. Marika Tiggemann & Amy Slater, *NetGirls: The Internet, Facebook, and Body Image Concern in Adolescent Girls*, 46 INT'L. J. EATING DISORDERS 630, 632 (2013).

42. Mills et al., *supra* note 2, at 87.

43. Tiggemann & Slater, *supra* note 41.

females.⁴⁴ The same study found a positive association between social media use duration, developing body image concerns, and internalizing the ideal body image portrayed online.⁴⁵ Other studies have produced similar findings: that social media engagement can negatively influence body image and is associated with body dissatisfaction.⁴⁶

These results can be explained by the evidence-supported proposition that exposure to ideal beauty standards contributes to body image misperception and body dissatisfaction.⁴⁷ According to Hosseini and Padhy, exposure to such ideals on social media has a similar effect, with the ideal beauty standard being internalized by users as a standard for their own bodies.⁴⁸ Subsequently, body dissatisfaction can result if the users' bodies fall short of the now-internalized ideal.⁴⁹

The presence of MWLP advertising on social media exacerbates the risk of developing poor body image for adolescents. As mentioned earlier, influencer marketing of MWLP typically displays the idealized beauty standard in a photo of the relevant product. As such, influencer marketing of MWLP only *increases* the volume of content displaying such a standard.

These body image concerns are alarming because people with poor body image can develop a level of body image distortion that puts them at risk of developing a related psychiatric disorder; body dysmorphic disorder.⁵⁰ This disorder is characterized by an obsession with the deficits in an individual's own appearance compared to another, which impairs one's wellbeing and quality of life.⁵¹ Females suffer more than males from body dysmorphia. Even prior to social media, female adolescents suffered from body dysmorphia and overall self-dissatisfaction more than males.⁵²

Most often, adolescents begin to experience body dysmorphia by altering their eating habits and/or missing meals, and excessively exercising.⁵³ In more severe cases, adolescents induce vomiting and seek assistance by using pharmaceuticals, such as laxatives, to induce bowel

44. *Id.* at 630; Siân A. McLean et al., *Photoshopping the selfie: Self Photo Editing and Photo Investment are Associated with Body Dissatisfaction in Adolescent Girls*, 48 INT'L J. EATING DISORDERS 1132, 1132 (2015).

45. Tiggemann & Slater, *supra* note 41, at 631–32.

46. Hosseini & Padhy, *supra* note 36, Social Media; Oakes, *supra* note 40.

47. Hosseini & Padhy, *supra* note 36, Media.

48. *Id.*, Social Media.

49. *Id.*

50. *Id.*; *Body Image*, OFF. ON WOMEN'S HEALTH (Mar. 27, 2019), <https://www.womenshealth.gov/mental-health/body-image-and-mental-health/body-image>.

51. Himanshu et al., *Rising Dysmorphia Among Adolescents: A Cause for Concern*, 9 J. FAM. MED. & PRIMARY CARE 567, 567 (2020).

52. Beate Herpertz-Dahlmann, MD, *Adolescent Eating Disorders: Update on Definitions, Symptomatology, Epidemiology, and Comorbidity*, 24 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 177, 184 tbl.1 (2015).

53. Uchôa et al., *supra* note 35, at 1509.

movements, or diuretics to remove excess water retention.⁵⁴ This can result in malnutrition, the full consequences of which are explored later in the article.

Proper treatment of body dysmorphic disorder can include several techniques including cognitive-behavioral therapy, fitness training interventions, and, tellingly, teaching patients to be media literate and to critically evaluate body image ideals.⁵⁵ Enhancing a patient's self-esteem to improve their body image is also effective.⁵⁶

Poor body image and the resulting body image distortion also put people at risk of eating disorders.⁵⁷ Eating disorders, such as anorexia nervosa and bulimia nervosa, are highly prevalent amongst female adolescents in Western countries.⁵⁸ Eating disorders can be described as existing on a spectrum - from anorexia nervosa, to bulimia nervosa, and binge-eating disorders. These disorders are characterized by fear of gaining weight and an obsession with altering one's lifestyle to mediate this fear.⁵⁹ Eating disorders are the third most common long-term illness in adolescents, after asthma and childhood obesity.⁶⁰ It is imperative that children develop a healthy sense of body image and self-esteem to prevent developing these conditions.

The health consequences of an eating disorder on an adolescent can be dire. Compared to a healthy adult, children and adolescents have less body fat, making them more susceptible to the negative effects of malnutrition or dietary restrictions due to a distorted body image.⁶¹ Pubescent adolescents also experience more severe effects because of their restricted diet during this significant growth period.⁶² The malnutrition resulting from an eating disorder can negatively affect many body parts, including skin, muscles, heart, bones⁶³ and the brain.⁶⁴ When certain areas of the brain do not develop properly, there may be negative impacts on a person's memory and learning ability.⁶⁵ This can further impact their ability to function at school and undertake daily activities.

Since the consequences of adolescents dieting can impact all aspects of growth and development into adulthood, it is crucial to treat eating

54. *Id.*

55. Hosseini & Padhy, *supra* note 36, Treatment / Management.

56. *Id.*

57. BETTER HEALTH CHANNEL, *supra* note 38; *Body Image and Diets*, BETTER HEALTH CHANNEL (Aug. 11, 2019), <https://www.betterhealth.vic.gov.au/health/healthyliving/body-image-and-diets>.

58. Uchôa et al., *supra* note 35, at 1509.

59. Herpertz-Dahlmann, *supra* note 52, at 180.

60. *Id.* at 177.

61. *Id.* at 186.

62. *Id.*

63. *Id.* at tbl.2.

64. *Id.* at 188.

65. *Id.*

disorders as soon as possible. Treating eating disorders is based on managing each complication that develops due to the eating disorder. Apart from family-based therapy, there are few evidence-based treatment options available to help with adolescent eating disorders as a whole.⁶⁶ Effective interventions for this condition aim to identify the condition early, with prevention and support as primary measures.⁶⁷

The authors raise the possibility and consequences of adolescents developing body image issues and subsequent disorders, the likelihood of which social media increases, for good reason. The risk of body dysmorphia and eating disorders in adolescents is very real. Adolescents are one of the most susceptible cohorts to developing these disorders as they experience puberty and begin to recognize their own bodies,⁶⁸ and so are put at significant risk by body image distorting social media content. The current younger generation has unlimited access to social media, including to advertisements.⁶⁹ Yet, one of the most likely successful strategies to prevent the psychological and physiological effects of restrictive diets and distorted body image is preventing body image distortions and identifying body image distortions early on. To achieve this, it is important to limit young people's exposure to diet-related social media content, including MWLP advertisements.

Now that this article has discussed how damaging body dysmorphia and eating disorders can be for adolescents, and the role that social media plays in these disorders' development, it will outline the laws that combat MWLP advertising in the United States and United Kingdom. These two jurisdictions both employ different, but seemingly effective, anti-MWLP regulatory models. This article will demonstrate how the United States employs general federal consumer law to combat these advertisements.⁷⁰ This article will further show that the United Kingdom's model is, at first glance, similar to the United States' because it employs a general consumer law statute to combat MWLP advertising.⁷¹ However, for non-broadcast advertising (e.g., social media advertising), the law is in practice supplementary to mandatory self-regulatory rules created and administered

66. *Id.* at 191.

67. *Id.*

68. Uchôa et al., *supra* note 35, at 1509.

69. Woods & Scott, *supra* note 13, at 42.

70. FED. TRADE. COMM'N, *supra* note 19, at 25; Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1914).

71. Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277 (UK).

by an advertising industry body.⁷² Thus, the United Kingdom has adopted a self-regulatory model, with the law serving only as a “backstop.”⁷³

V. THE LAW IN THE UNITED STATES

There are two federal regulators responsible for administering the laws relating to dietary supplements and other MWLP. These are the FTC, and the Food and Drug Administration (“FDA”). The agencies have a long-standing partnership to regulate the dietary supplement industry⁷⁴ and distinct jurisdictions on that subject matter.

The FTC has recognized that the FDA has primary jurisdiction over labelling over-the-counter (“OTC”) drugs and supplements.⁷⁵ However, regulating advertising is different. The FDA lacks jurisdiction to implement standards on advertising for dietary supplement advertisements,⁷⁶ including weight loss products.⁷⁷ Instead, the FTC is primarily responsible for advertisements that promote supplements and OTC drugs.⁷⁸ It has jurisdiction to regulate advertising of consumer goods, which includes over-the-counter drug products, devices, and dietary supplements.⁷⁹

Given the primacy of the FTC in regulating advertising for weight loss products, this article focuses on how the FTC regulates MWLP advertising through enforcement of the *Federal Trade Commission Act of 1914* (“FTC Act”).⁸⁰

A. OVERVIEW OF THE FEDERAL TRADE LEGISLATION

The key statutory provisions prohibiting deceptive or misleading advertising are FTC Act Sections 5 and 12. Collectively, these sections prohibit ‘false advertising’ and ‘deceptive acts and practices’ in the

72. *Extension of the remit of the Advertising Advisory Committee*, OFCOM 2.9-2.11 (2019), https://www.ofcom.org.uk/__data/assets/pdf_file/0034/169864/statement-extension-of-the-remit-of-the-aac.pdf (last visited Oct 30, 2021). While the industry body can make referrals to Trading Standards agencies for enforcement action, this is “rarely necessary”. See *Self-regulation and co-regulation*, ADVERT. STANDARDS AUTH. <https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html> (last visited Oct 30, 2021); LORRAINE CONWAY, REGULATION OF ADVERTISING BY THE ASA 16 (2020).

73. *Trading Standards*, ADVERT. STANDARDS AUTH., (Nov. 12, 2016), <https://www.asa.org.uk/resource/trading-standards.html> (last visited Oct 30, 2021).

74. Rijo, *supra* note 5, at 181.

75. FED. TRADE. COMM’N, *supra* note 19, at 25.

76. Rijo, *supra* note 5, at 163–164.

77. *Id.* at 181.

78. *Id.* at 157.

79. FED. TRADE. COMM’N, *supra* note 19, at 25; 15 U.S.C. §§ 41-58 (1914).

80. 15 U.S.C. §§ 41-58 (1914).

marketing and sales of most consumer products, and authorize the FTC to take enforcement action against such conduct.⁸¹

False or deceptive advertising violates these sections if it is false, misleading or unsubstantiated.⁸² An advertisement is considered false or misleading if it contains an, “objective, material representation that is likely to deceive consumers acting reasonably under the circumstances.”⁸³ An advertisement is ‘unsubstantiated’ if it lacks a reasonable basis for its contained representations.⁸⁴ The FTC also regulates influencer endorsements. Influencers must make it clear when they have a financial or other relationship with a product.⁸⁵

The FTC typically argues, in its enforcement actions relating to these products, that the advertiser’s claims lack adequate substantiation.⁸⁶ Thus, “the key to understanding the legal standards for weight-loss claims is to understand the requirement for substantiation.”⁸⁷ In determining the specific level and type of substantiation required, the FTC considers the six ‘Pfizer factors’:

- The type of product;
- The type of claim;
- The benefits of a truthful claim;
- The cost of developing substantiation;
- The consequences of a false claim; and
- The amount of substantiation that experts in the field believe is reasonable.⁸⁸

81. Bond, *supra* note 27. Section 5(a) of the FTC Act provides that ‘unfair or deceptive acts or practices in or affecting commerce’ are ‘unlawful.’ Federal Trade Commission Act § 5(a), 15 U.S.C. §§ 41-58 (1914).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N (2019), <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>; Paige Leskin, *Detox Tea Maker Fined \$1 Million over “Deceptive” Instagram Influencer Ads Claiming its Tea Could Help you Lose Weight and Fight Cancer*, BUS. INSIDER AUSTRALIA (Mar. 9, 2020), <https://www.businessinsider.com.au/instagram-influencers-teami-detox-tea-sponsored-posts-ftc-settlement-2020-3>.

86. Edward Correia, *The Federal Trade Commission’s Regulation of Weight-Loss Advertising Claims*, 59 FOOD & DRUG L.J. 585, 586–87 (2004).

87. *Id.* at 587.

88. *Id.*; FED. TRADE. COMM’N, *Enforcement Policy Statement on Marketing Claims for OTC Homeopathic Drugs*, 2, https://www.ftc.gov/system/files/documents/public_statements/996984/p114505_otc_homeopathic_drug_enforcement_policy_statement.pdf (last visited July 30, 2021); *In re Pfizer, Inc.*, 81 F.T.C. 23 (1972).

The FTC has consistently made use of its mandate to crack down on MWLP advertising for decades. The first case brought by the FTC against such a product was in 1927.⁸⁹ Since then, the FTC filed over 160 similar cases from 1927 to 2002,⁹⁰ and such cases continue to this day. In 2014, the FTC reported that it successfully took action against ‘fad’ weight loss products as a part of its ‘Operation Failed Resolution.’⁹¹

B. CASE STUDIES: FTC ACTION ON ‘SKINNY PILL’ AND ‘SENSA’

This article will now discuss two case studies focusing on American legislation to demonstrate how the law operates in relation to MWLP advertising.

One instructive case study is *FTC v. Fountain of Youth Group*.⁹² Beginning in 2000, the defendants marketed dietary supplements, including Skinny Pill AM, Skinny Sleep PM capsules, Skinny Carbs capsules, and the Skinny Pill For Kids.⁹³ In response, the FTC sued the defendants⁹⁴ alleging they made deceptive claims contravening FTC Act, Sections 5 & 12, by advertising each of these products.⁹⁵ The impugned advertisements *inter alia* claimed that the ‘Skinny Pill’ products increased fat burning and sped up the rate at which fat is released from fat storage.⁹⁶ For allegations relating to Skinny Pill in particular,⁹⁷ the FTC alleged that the products’ advertisements were false,⁹⁸ scientifically unsubstantiated⁹⁹ or lacking a reasonable basis.¹⁰⁰

Consequently, the FTC and the defendants settled with a stipulated judgment that included a \$6 million fine against the defendants, and injunctions against the continued sale of these products or marketing of new products with similar representations.¹⁰¹

A more recent, and similarly illustrative, case study is *FTC v. Sensa*.¹⁰² In 2014, the FTC filed a complaint against Sensa Products, LLC, its parent

89. FED. TRADE. COMM’N, *supra* note 19, at 25.

90. *Id.* at 26.

91. Fed. Trade. Comm’n, *supra* note 24.

92. See Correia, *supra* note 87, at 591; Complaint for Injunctive & Other Equitable Relief, Federal Trade Comm’n. v. Fountain of Youth Grp., LLC (M.D. Fla. 2004) (3:04-CV-47-J-99HTS).

93. Complaint for Injunctive & Other Equitable Relief, *supra* note 92, ¶ 1.

94. The Fountain of Youth Group, LLC and Edita Kaye, an officer of the company.

95. Complaint for Injunctive & Other Equitable Relief, *supra* note 92, ¶ 15-31.

96. *Id.*

97. *Id.* at ¶ 15-21.

98. *Id.* at ¶ 19.

99. *Id.* at ¶ 21.

100. *Id.* at ¶ 17.

101. Stipulated Final Order for Permanent Injunction, Federal Trade Comm’n v. Fountain of Youth Grp., LLC (M.D. Fla.) (3:04-CV-47-J-99HTS).

102. Complaint for Permanent Injunction & Other Equitable Relief, Federal Trade Comm’n v. Sensa Prods., LLC (N.D. Ill. 2014) (14-cv-72). For a summary provided by the FTC, which has assisted in this article’s summary, see Fed. Trade Comm’n, *supra* note 24.

company (Sensa Inc.), and two individuals, Adam Goldenberg (former CEO of Sensa Inc.) and Dr. Alan Hirsch (part-owner of Sensa Products, LLC). The FTC brought its complaint under the FTC Act, Sections 5 & 12 when the defendant advertised a powdered food additive (Sensa). The defendants marketed¹⁰³ the products with customer testimonials and claims that Sensa makes users feel full faster (so that users eat less), and causes weight loss without changing diet or exercise.¹⁰⁴

The FTC alleged that the defendants' marketing was false or deceptive due to a lack of evidence to support the health claims¹⁰⁵ and Dr. Hirsch's endorsement,¹⁰⁶ and the deceptive nature of their representations about a scientific study¹⁰⁷ and testimonials.¹⁰⁸ Ultimately, the FTC and the defendants reached a settlement, and the court entered a stipulated order.¹⁰⁹ Under the order, the defendants were:

- Barred from making weight loss claims about dietary supplements, foods, or drugs unless they were supported by two adequate and well controlled human clinical studies;¹¹⁰
- Barred from making any other health claims not supported by competent and reliable scientific evidence;¹¹¹
- Barred from misrepresenting scientific evidence;¹¹² and
- Required to disclose material connections to:
 - Endorsers of products or programs; or
 - Anyone conducting or participating in a study of a product or program.¹¹³

One order specifically barred Dr. Hirsch from giving endorsements as an expert unless he used adequate scientific evidence and his own expertise.¹¹⁴ The order also imposed a \$46.5 million penalty, though \$26.5 million was suspended due to the defendants' inability to pay.¹¹⁵

103. Through channels including radio, print, infomercials, and the internet.

104. FED. TRADE COMM'N, *supra* note 24; Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 102.

105. Complaint for Permanent Injunction & Other Equitable Relief, *supra* note 102, at ¶ 31-34.

106. *Id.* at ¶ 44-45.

107. *Id.* at ¶ 41-43.

108. *Id.* at ¶ 38-40.

109. Stipulated Final Judgment & Order for Permanent Injunction & Other Equitable Relief, *Federal Trade Comm'n. v. Sensa Prods., LLC* (N.D. Ill. 2014) (14-cv-72).

110. *Id.* at 8-9.

111. *Id.* at 8-10.

112. *Id.* at 10.

113. *Id.* at 11.

114. *Id.* at 11-12.

115. *Id.* at 13-16.

VI. THE LAW IN THE UNITED KINGDOM

In the United Kingdom, the statutory backstop against misleading advertising is the *Consumer Protection from Unfair Trading Regulations 2008* (UK) (“CPR 2008”). The CPR 2008 came into force on May 26, 2008 and domestically implemented the European Union’s Unfair Commercial Practices Directive of 2005.¹¹⁶ The CPR 2008 prohibits “unfair marketing to consumers, including misleading or aggressive advertising.”¹¹⁷ The most relevant provision of the CPR 2008 is regulation 5, titled ‘Misleading actions.’ This is a comprehensive and wide-ranging provision that prohibits, *inter alia*, commercial practices that give false information that could deceive or would likely deceive.¹¹⁸

However, the enforcement of the CPR 2008 through a statutory body is not the primary means through which advertising is regulated in the UK. Instead, two non-statutory bodies named the Advertising Standards Authority (“ASA”) and the Committee of Advertising Practice (“CAP”) are the frontline incorporated industry bodies regulating MWLP advertising. The United Kingdom is unusual compared to the United States, as it uses a self-regulatory model where statutory authorities delegate rule-making and enforcement to industry bodies in relation to non-broadcast advertising.

The relevant statutory bodies retain the jurisdiction to step in when necessary. For instance, local governments’ trading standards departments can take enforcement action under legislation, including the CPR 2008.¹¹⁹

A. OVERVIEW OF THE ADVERTISING STANDARDS AUTHORITY, CAP AND CAP CODE

The first key industry body to consider is the CAP. The CAP is a self-regulatory entity responsible for writing the UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing (“CAP Code”).¹²⁰ The CAP drafts and updates the CAP Code, and publishes authoritative guidance on the CAP Code’s rules. The CAP’s members are private

116. OFF. OF FAIR TRADING (UK), *Consumer Protection from Unfair Trading Regulations 2008*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/of1008.pdf; 2005 O.J. (L 149) 22-39.

117. *CAP Code: Appendix 1 the CPRs and BPRs*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/type/non_broadcast/code_section/appendix-1.html (last visited Nov. 15, 2020).

118. *The Consumer Protection from Unfair Trading Regulations 2008: Part 2 Prohibitions 2008*, SI 2008/1277, 5(1), 5(2)(a) (UK).

119. *CAP Code: Preface*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/type/non_broadcast/code_folder/preface.html (last visited Nov. 15, 2020); *Reporting to Trading Standards*, CITIZENS ADVICE BUREAU (November 11, 2019), <https://www.citizensadvice.org.uk/consumer/get-more-help/report-to-trading-standards/>; *Trading Standards*, CITY OF LONDON, <https://www.cityoflondon.gov.uk/supporting-businesses/business-support-and-advice/trading-standards> (last visited June 29, 2020).

120. *CAP Code: Preface*, *supra* note 119.

industry organizations which in turn represent many commercial enterprises in the business of advertising, sales promotion, direct marketing and media, among others.¹²¹ These industry organizations contractually agreed to promote compliance with the CAP Code by their own members and take appropriate action to ensure compliance when a member fails to observe the relevant Code.¹²²

The other key industry entity is the ASA. The ASA is a group of two corporate entities each limited by guarantee. The first of these entities is the Advertising Standards Authority Limited (“ASAL”), which regulates non-broadcast advertising. The other entity is the Advertising Standards Authority (Broadcast) Limited (“ASABL”), which regulates broadcast (i.e. television and radio) advertising.¹²³

Both the ASAL and ASABL have a board of directors referred to as their ‘Councils.’¹²⁴ The Councils of the ASAL and ASABL each have 12 members. Two-thirds of the Councils must be independent of the advertising industry.¹²⁵ These arrangements ensure that the ASA is ‘independent of both the government and the advertising industry.’¹²⁶

Turning to the ASAL, specifically, which is the relevant entity for online advertising; the executive branch of the ASAL investigates complaints of breaches of the CAP Code, where those complaints are credible.¹²⁷ Then, the ASAL Council will deliver a finding on alleged breaches that are referred to it by their executive after the latter’s investigation.¹²⁸ A finding that the complaint’s subject has breached the CAP Code can be handed down with directions to cease the breaching conduct (usually by pulling the breached ad) and refrain from making specific representations or other conduct again.¹²⁹

121. *Cityfibre Ltd., R (on the application of) v. The Advertising Standards Authority Ltd. & Anor* [2019] EWHC (Admin) 950, [12], [2019] WLR(D) 278 [hereinafter *Cityfibre*]; *CAP Code: Preface*, *supra* note 119.

122. See *Cityfibre*, *supra* note 121, at [12], [14]-[15]; *CAP Code: Preface*, *supra* note 119.

123. *Cityfibre*, *supra* note 121, at [10].

124. *Id.* at [11].

125. *Id.*

126. *Id.* at [18].

127. *Sainsbury’s Supermarkets Ltd., R (on the application of) v. The Independent Reviewer of Advertising Standards Authority Adjudications* [2013] EWHC (Admin) 3680 [27] [hereinafter *Sainsbury’s*]; *Non-broadcast Complaint Handling Procedures* ADVERT. STANDARDS AUTH. ¶¶ 26-36 (2021), <https://www.asa.org.uk/static/171eb506-b4ef-4fec-bdcec62dc49e0be2/489511a8-3786-4611-8552d660d99cece9/Non-Broadcast-Complaint-Handling-Procedures.pdf>.

128. *Cityfibre*, *supra* note 121 at [11]-[12]; *Nonbroadcast Complaint Handling Procedures*, *supra* note 127 at ¶¶ 38-39; *Sainsbury’s*, *supra* note 127, at [24], [27].

129. *ASA Ruling on Protein Revolution Ltd.* ADVERT. STANDARDS AUTH. (Oct. 23, 2019), <https://www.asa.org.uk/rulings/protein-revolution-ltd-A19-564759.html>; *ASA Ruling on ASC Twelve Ltd t/a Simple as Fat*, ADVERT. STANDARDS AUTH. (Feb. 13, 2019), <https://www.asa.org.uk/rulings/asc-twelve—ltd-a18-465666.html>; *Sanctions*, ADVERT. STANDARDS AUTH. (2020), <https://www.asa.org.uk/codes-and-rulings/sanctions.html>.

Note that a non-binding independent review can be sought from an independent reviewer appointed by the ASAL,¹³⁰ and judicial review of the finding is also available.¹³¹

B. THE CAP CODE: APPLICATION, PURPOSE AND PROVISIONS

The CAP Code provides an extensive set of rules for advertisers that are “primarily concerned with the content of marketing communications and not with terms of business or products themselves.”¹³² The intention behind these rules is to facilitate “legal, decent, honest and truthful” marketing,¹³³ as well as “accurately reflect EU and domestic consumer protection legislation in respect of misleading and unfair advertising.”¹³⁴

The CAP Code applies to non-broadcast advertisements, sales promotions, and direct marketing communications in the UK.¹³⁵ In 2011 the ASAL’s remit expanded to include advertising on a marketer’s “own website and in other non-paid-for space online under its control, for example, its social media accounts.”¹³⁶ The specified scope of the CAP Code dictates that it applies to an expansive range of media including traditional print, electronic communication and internet advertising.¹³⁷

Section three of the CAP Code states several rules that generally prohibit misleading or deceptive advertising which are relevant to MWLP advertising. These general rules include rules against misleading communications, unsubstantiated claims, excessive puffery, and unqualified statements. These rules are analogous to the prohibitions that the FTC Act sections 5 and 12 explored earlier in this article. The key rule that MWLP advertisers should be wary of is that marketing communications must not materially mislead or be likely to do so.¹³⁸

Section 13 of the CAP Code is titled ‘Weight Control and Slimming.’ This chapter contains additional rules that apply to marketing MWLP. It broadly covers the typical forms of MWLP and beyond, including “marketing communications for weight control and slimming foodstuffs,

130. Sainsbury’s, *supra* note 127, at [28]-[29]; *Nonbroadcast Complaint Handling Procedures*, *supra* note 127 at ¶¶ 47-49, 57.

131. Cityfibre, *supra* note 121, at [18]-[19].

132. *CAP Code: Preface*, *supra* note 119.

133. *Id.*

134. Sainsbury’s, *supra* note 127, at [24]; *CAP Code: Preface*, *supra* note 119.

135. *CAP Code: Preface*, *supra* note 119.

136. Cityfibre, *supra* note 121, at [12].

137. *Scope of the Code: CAP Code*, ADVERT. STANDARDS AUTH. (2010), https://www.asa.org.uk/type/non_broadcast/code_folder/scope-of-the-code.html; *Like, comment and comply – YouTube and the CAP Code*, ADVERT. STANDARDS AUTH. (June 26, 2020) <https://www.asa.org.uk/news/like-comment-and-comply-youtube-and-the-cap-code.html>; *Influencing your choice of influencer*, ADVERT. STANDARDS AUTH. (July 31, 2019), <https://www.asa.org.uk/news/influencing-your-choice-of-influencer.html>.

138. *13 Weight Control and Slimming*, 13.1, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/type/non_broadcast/code_section/13.html (last visited Nov. 15, 2020).

aids (including exercise products that make weight-loss or slimming claims), clinics and other establishments, diets, medicines, treatments and the like.” According to the section’s introduction, the rules were created to apply sufficient scrutiny to advertising for MWLP.¹³⁹ The key relevant rules from section 13 are that weight-loss claims in relation to a product or service must be backed by rigorous trials on people.¹⁴⁰ Advertisers also must not give the impression that dieters cannot fail or eat as much as they want,¹⁴¹ or represent that a food product can cause a specific rate or amount of weight loss.¹⁴²

Section 15 of the CAP Code contains rules which govern advertising of foods (including drinks)¹⁴³ and food supplements which make health claims. A ‘health claim’ is “any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health.”¹⁴⁴

These rules must be read in conjunction with the EU’s nutrition and health claims regulation of 2006 (“NHCR”).¹⁴⁵ The NHCR achieved EU-wide harmonization to permit nutrition and health claims made on foods, as the NHCR requires health claims to be authorized before market entry. This regulation establishes an EU Register of nutrition and health claims (“EU Register”). The EU Register lists all authorized nutrition and health claims, as well as unauthorized (i.e. prohibited) for given products or ingredients.

For a claim to be authorized, an application for a claim to be added to the EU Register must be made to the European Food Safety Authority (“EFSA”). After a scientific assessment by the EFSA, and if their pre-approval is given, the NHCR requires the European Commission to authorize the claim applications.¹⁴⁶ However, the EFSA does not often pre-approve health claim applications because they are not supported by sufficient scientific evidence.¹⁴⁷

139. *13 Weight Control and Slimming*, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/type/non_broadcast/code_section/13.html (last visited Nov. 15, 2020).

140. *Id.* at Rule 13.1.

141. *Id.* at Rule 13.8.

142. *Id.* at Rule 13.10.1.

143. *15 Food, Food Supplements and Associated Health or Nutrition Claims*, Definitions, ADVERT. STANDARDS AUTH., https://www.asa.org.uk/type/non_broadcast/code_section/15.html (last visited Nov. 15, 2020).

144. *Id.*

145. 2006 O.J. (L 404) 9-25.

146. Igor Pravst et al., *Recommendations for Successful Substantiation of New Health Claims in the European Union*, 71 *TRENDS FOOD & SCI. TECHNOL.* 259, 259–263 (2018).

147. *Id.* at 260.

CAP Code Part 15 begins by providing some general rules about health claims that can be made in marketing communications.¹⁴⁸ The first and arguably most significant of these rules is that marketing containing health claims must be supported by documentary evidence showing the claims are allowed by the EU Register, and the claims must be presented clearly and without exaggeration.¹⁴⁹

These CAP Code rules mean that nutrition and health claims generally cannot be made unless they are authorized by the EU Register. If there are no authorized claims for a product, no health or nutrition claims can be used to market it.¹⁵⁰ If advertisers want to make a claim that is not listed on the EU Register, they must submit the evidence to EFSA for admission to the EU Register.¹⁵¹ Nonetheless, even where a claim is authorized, this ‘does not give advertisers carte blanche’ to use it.¹⁵² The authorized claims should generally not be modified or reformulated, per CAP Code Rule 15.1.1. Making a health claim that is similar, yet different to an authorized health claim risks breaching that rule.

This article will now discuss two case studies showing the implementation of the UK legislation through the ASAL’s complaint-resolution procedures.

C. CASE STUDY: PROTEIN REVOLUTION LTD

The first United Kingdom case study involves Protein Revolution Ltd. ASAL recently upheld a complaint against Protein Revolution Ltd for posts on the Instagram pages of Team v24 (operated by the defendant) and Georgia Harrison (TV personality).¹⁵³ The posts were seen on March 13, 2019, and promoted V24’s ‘weight loss gummies’. The description of the posts in the ruling are as follows:

Post A: A post on Team v24’s Instagram page stated, “#v24gummies help keep hunger and cravings at bay through the natural plant extract glucomannan . . . #weightloss #fatloss #weightlossnourney [sic] . . . #healthylifestyle #fitness #fitnessmodel . . . #loveisland . . . #beachbody . . . #lean”; and

Post B: A post on Georgia Harrison’s Instagram page stated:

Paid partnership with v24team . . . V24 Gummies are great at helping you loose [sic] weight . . . V24 Gummies made dieting so much easier. They’re delicious and when taken with water they

148. *15 Food, Food Supplements and Associated Health or Nutrition Claims*, *supra* note 143.

149. *Id.* at 15.1 and 15.1.1.

150. *Food: Health Claims*, ADVERT. STANDARDS AUTH. (Dec. 23, 2015), <https://www.asa.org.uk/advice-online/food-health-claims.html#>.

151. *Id.*

152. *Id.*

153. *ASA Ruling on Protein Revolution Ltd*, *supra* note 129.

suppress your hunger cravings. Which is critical to stay on diet . . . They Contain [sic] glucomannan which is clinically proven to help with weight loss. You have to try them. You can get them on @V24Team website and if you use code: loveisland you will get 30% off . . . #diet . . .’¹⁵⁴

The main ingredient of V24 Weight Loss Gummies was glucomannan (according to the defendant),¹⁵⁵ and the claim that ‘[g]lucomannan, in the context of an energy restricted diet, contributes to weight loss’ was an authorized claim on the EU Register.¹⁵⁶

In consideration of Posts A and B, ASAL noted that the authorized health claim was not exactly reproduced in either ad.¹⁵⁷ ASAL also considered that the health claims in the advertisements did not communicate the same information as the authorized health claim, citing that Post B’s claim that glucomannan was clinically proven to help with weight loss was not authorized by the EU Register, and lacked the authorized claims’ context that this ingredient contributes to weight loss *while dieting*.¹⁵⁸ Further, Posts A and B referred to glucomannan suppressing hunger cravings, which is not an authorized claim.¹⁵⁹ In addition, the authorized claim was authorized only for one gram of glucomannan, rather than for the product as a whole.¹⁶⁰ For these reasons, among others, the ASA determined that Posts A and B breached CAP Code rules 15.1, 15.1.1, and 15.2 and directed that the ads are not displayed again, and future ads complied with the NHCR.¹⁶¹

D. CASE STUDY: SIMPLE AS FAT

The second UK case study concerns marketing a weight-loss diet plan on Twitter.¹⁶² ASAL considered seven tweets from the defendant’s ‘Simple As Fat’ Twitter account,¹⁶³ which promoted the ‘Simple as Fat’ (“SAF”) diet plan. For this article’s purposes, the following three tweets are relevant:
Tweet C:

154. *Id.*

155. *Id.* at Response.

156. *Id.* On the EU Register, the ‘Entry ID[s]’ given for this claim are 854, 1556, 3725. See *Nutrition and Health Claims*, EUROPEAN COMMISSION, https://ec.europa.eu/food/safety/labelling_nutrition/claims/register/public/?event=search (last visited Oct 30, 2021).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Cityfibre, *supra* note 121.

163. The ASA labelled these seven tweets alphabetically. See *ASA Ruling on ASC Twelve Ltd t/a Simple as Fat*, *supra* note 129.

Please have a listen to my new FREE Podcast. You can cure Type 2 Diabetes with real food NOT more pills. You can cure #obesity get #weightlosstransformation with #LCHF NOT a 'magic pill' LISTEN'. A 'before' and 'after' image of Jon Gaunt was captioned 'Simple as Fat. Freedom from Obesity and Type 2 Diabetes;

Tweet E:

New SAF member Jon learned that @jongaut is right when he says not to rely only on the scales. Jon was a little disappointed with the lbs (yes plural lbs) lost in his first week eating #LCHF, until he looked at a photo taken the previous week. What a difference a week makes!'. The text was accompanied by two images of a man's face, labelled 'WEEK 1' and 'WEEK 2';

Tweet F:

Has your #Type2diabetes led to erectile dysfunction? Don't be embarrassed, do what @jongaut did and fix it. Find out how'. An embedded video was captioned with the text 'Welcome to Simple as Fat Discover how Jon Gaunt lost 70lbs, reversed his Type 2 diabetes and turned his life around, while eating real food and never feeling hungry.¹⁶⁴

The ASAL considered rule 13.1 in this case.¹⁶⁵ The defendant did not present ASAL with evidence that Simple As Fat's diet plan could result in weight loss. As such, ASAL concluded these three tweets breached rule 13.1.¹⁶⁶ The lack of evidence to support the defendant's claims about the SAF diet plan was in violation of other CAP Code rules.¹⁶⁷

ASAL also concluded that the advertisements (Tweets A, B, and C) breached general provisions that apply to all advertisements.¹⁶⁸ In particular, ASAL considered that Tweets A, B, and C also violated earlier-mentioned prohibitions against misleading advertising (rule 3.1), and unsubstantiated claims (rule 3.7).¹⁶⁹

Consequently, the ASA directed the defendant not make certain representations again (e.g. that their diet plan was a treatment for obesity or other medical conditions).¹⁷⁰

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

E. SANCTIONS AND ENFORCEMENT

Where the ASA finds a breach of the CAP Code has occurred and directions have been given to the offender, most advertisers agree to obey the directions.¹⁷¹ For advertisers that do not comply, the ASA may take measures such as revoking privileges and advising advertising space providers to turn down an offender's advertisements.¹⁷² Further, uncooperative advertisers can be referred to local Trading Standards authorities¹⁷³ or the Office of Communications for enforcement action.¹⁷⁴

VII. OBSERVATIONS AND POTENTIAL REFORM

As discussed above, the United States and United Kingdom have similar statutory frameworks for combating MWLP, but they operate differently in practice. The United States relies on a single federal regulator, the FTC, for cracking down on MWLP advertising, whereas the United Kingdom has a self-regulatory model in which State authorities are more of a backstop to industry bodies (the ASA and CAP).¹⁷⁵ The United Kingdom also has non-statutory roles that are *specifically* directed against MWLP advertising, which are formulated and enforced by these two industry bodies collectively.¹⁷⁶

These are very different models, but both seem to have success in combating MWLP advertising. Notwithstanding, opportunities exist for potential reform in these jurisdictions that apply equally in other jurisdictions. One potential reform is to employ *statutory* rules prohibiting the specific false and misleading representations (i.e. promises of unrealistic weight loss) that are typical in MWLP advertisements.¹⁷⁷ This would make it easier for regulators to sue MWLP advertisers, whose specific representations would be *explicitly* illegal. Making such representations *explicitly* illegal would likely have a deterrence effect, reducing the amount of advertising using such representations.

In the United States and United Kingdom this could be done by legislating them via statute or regulation. There is precedent for this in

171. Cityfibre, *supra* note 121.

172. *Id.*

173. See e.g., City of London, *supra* note 119; *Trading Standards enforcement policy*, SURREY COUNTY COUNCIL <https://www.surreycc.gov.uk/business-and-consumers/trading-standards/about/trading-standards-policies-and-plans/trading-standards-enforcement-policy> (last visited Aug 27, 2021); *Trading Standards for Businesses*, WALSALL COUNCIL, https://go.walsall.gov.uk/business/trading_standards_for_businesses (last visited Aug. 27, 2021).

174. *ASA Ruling on ASC Twelve Ltd t/a Simple as Fat*, *supra* note 129.

175. *Trading Standards*, ADVERT. STANDARDS AUTH. (Nov. 12, 2016), <https://www.asa.org.uk/resource/trading-standards.html>.

176. *CAP Code: Preface*, *supra* note 119.

177. See *13 Weight Control and Slimming*, *supra* note 139 at 13.10.1, 13.8 (stating some of these specific typical representations).

Australia with its *Therapeutic Goods Advertising Code (No. 2)*.¹⁷⁸ This statutory regulation¹⁷⁹ includes prohibitions in advertising prophylactics. Most relevantly, there are prohibitions on weight management product advertising¹⁸⁰ which ban *inter alia* representations that a product can reverse the effects of overeating.¹⁸¹ Alternatively, this may be done by affording legal weight and enforceability of self-regulatory rules in judicial systems. There is precedent for this in Australia, although not specifically for MWLP advertising. In Australia, the Listing Rules¹⁸² of securities exchanges, such as the Australian Securities Exchange,¹⁸³ are enforceable in court under federal Australian legislation.¹⁸⁴

Despite the possibility for reform, this article has demonstrated that law plays an important role in regulating advertisements for MWLP. Still, in addition to law, celebrity advocacy plays its own role in combating the exposure of young people to MWLP.

VIII. CELEBRITY ADVOCACY

To discuss celebrity advocacy, it is helpful to consider who celebrities are. Turner states that people are celebrities when others give more attention to their private lives than their professional ones.¹⁸⁵ Collins Dictionary states that a celebrity is ‘someone who is famous, especially in the areas of entertainment such as films, music, writing or sport’.¹⁸⁶ Increasingly, celebrities are adopting the social media influencer model to supplement their traditional methods of public exposure.¹⁸⁷

178. *Therapeutic Goods Act 1989* sub-s 42BAA(1) (*‘Therapeutic Good Advertising Code’* No. 2) (Austl.).

179. This is a statutory instrument enabled by legislation, and enforceable by Australia’s Therapeutic Goods Administration, which is Australia’s equivalent to the FDA. *See id*; see also Marilyn Bromberg & Nicholas Cardaci, *Playing with Fire: Why Australian Legislators Must Legalise E-Cigarettes*, 24 QUINNIPIAC HEALTH LAW J. 125, 171 (2021). See also *Therapeutic Goods Act 1989* s 42BAA (Austl.).

180. *Therapeutic Goods Act 1989* s 26 (Austl.).

181. *Id.* at s 26(2).

182. See e.g., *ASX Listing Rules*, AUSTRALIAN SECURITIES EXCHANGE, <https://www2.asx.com.au/content/asx/home/about/regulation/rules-guidance-notes-and-waivers/asx-listing-rules-guidance-notes-and-waivers.html> (last visited Aug 27, 2021).

183. These rules are intended to maintain the integrity and reputation of Australia’s securities exchanges. *Introduction* AUSTRALIAN SECURITIES EXCHANGE 1 (2016), <https://www2.asx.com.au/content/dam/asx/rules-guidance-notes-waivers/asx-listing-rules/rules/introduction.pdf>.

184. *Corporations Act 2001* (Austl.) ss 674, 777, 793C, 1101B (Austl.); *Introduction*, *supra* note 182.

185. GRAEME TURNER, *UNDERSTANDING CELEBRITY* 3 (2nd ed. 2004).

186. *Celebrity definition and meaning*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/celebrity> (last visited July 16, 2021).

187. E.g., Will Smith, YOUTUBE, <https://www.youtube.com/c/willsmith> (last visited Oct. 1, 2021); e.g., Kim Kardashian West (@kimkardashian), INSTAGRAM, <https://www.instagram.com/kimkardashian/> (last visited Oct. 1, 2021).

Celebrities may play an important role in advocacy of important causes. They may raise awareness¹⁸⁸ for social justice¹⁸⁹ and political campaigns,¹⁹⁰ since many people view celebrities as role models and want to be like them.¹⁹¹ Kylie Minogue and Angelina Jolie are examples of celebrities who have raised awareness for important causes, and their preventative mastectomies led to an increase in people seeking breast cancer screens.¹⁹² Many celebrities support charities,¹⁹³ and celebrities can influence others even after their death. People may promote the cause or causes that a deceased celebrity supported before they passed away to keep their memory alive. For example, donations were made to causes that Princess Diana and Steve Irwin supported after their deaths.¹⁹⁴

Celebrity advocacy is longstanding. Audrey Hepburn's involvement with UNICEF is an early example of a celebrity becoming involved with political activism.¹⁹⁵ In the 1980s, musician Bob Geldof and other musicians commenced Band Aid to raise money for the Ethiopian famine in 1984.¹⁹⁶ During this time, Nelson Mandela hosted concerts, Amnesty International held a tour, and Comic Relief commenced.¹⁹⁷ Celebrities became involved with development challenges, such as the Save Darfur campaign in 2004, the Make Poverty History Campaign in 2005, and the Live Earth concerts in 2007.¹⁹⁸ In 2006, the website Look to the Stars was created, which lists the work celebrities undertake for positive causes.¹⁹⁹ In 2008, MTV created a website called *Think MTV* for its activist viewers.²⁰⁰

Many charities employ celebrity liaison officers who try to create lasting relationships between celebrities and the organizations that they

188. Alexandra Cosima Budabin, *Celebrities as Norm Entrepreneurs in International Politics: Mia Farrow and the 'Genocide Olympics' Campaign*, 6 *CELEBR. STUDS.* 399, 400 (2015).

189. Tim Markham, *Celebrity Advocacy and Public Engagement: The Divergent uses of Celebrity*, 18 *INT. J. CULT. STUD.* 467, 468-469 (2015).

190. Matthew D. Atkinson & Darin DeWitt, *Does Celebrity Issue Advocacy Mobilize Issue Publics?* 67 *POLIT. STUD.* 83, 83 (2019).

191. Sandra Wagemakers & Frederik Dhaenens, *The Power of Celebrities: Past Experiences, Current Status, and a Friendly Encounter as Key Components to Transform Young Individuals in it Gets Better*, 6 *CELEBR. STUDS.* 568, 577 (2015).

192. Markham, *supra* note 189, at 470.

193. Dan Brockington & Spensor Henson, *Signifying the Public: Celebrity Advocacy and Post-Democratic Politics*, 18 *INT. J. CULT. STUD.* 431, 432 (2015).

194. Sejung Park & Cynthia A. Hoffner, *Tweeting about mental health to honor Carrie Fisher: How #InHonorOfCarrie reinforced the social influence of celebrity advocacy*, 110 *COMPUT. HUM. BEHAV.*, Sept. 2010, at 1, 1.

195. April Biccum, *Marketing Development: Celebrity Politics and the 'New' Development Advocacy* 32 *THIRD WORLD Q.* 1331, 1336 (2011).

196. Dan Brockington, *The Production and Construction of Celebrity Advocacy in International Development*, 35 *THIRD WORLD Q.* 88, 94 (2014).

197. *Id.* at 94-95.

198. *Id.* at 95.

199. *Id.* at 96.

200. *Id.*; Kenneth Li, *MTV to Launch Activism Social Network*, *REUTERS* (2007), <https://www.reuters.com/article/us-mtv-socialnetwork-idUSN1946445220070920>.

work for.²⁰¹ They subscribe to databases that contain celebrities' contact information.²⁰² In the UK, the majority of development and non-governmental organizations have celebrity ambassadors. Celebrity ambassadors go on field trips with considerable publicity, such as Beverley Knight's trip to Malazi for Christian Aids.²⁰³ Some of the ambassadors promote general awareness or fundraising or specific types of campaigns. Others attend events to reward current supporters. Some celebrities create their own foundations and organizations to support causes that they believe in.²⁰⁴ Nearly all UN agencies, including UNICEF, have a celebrity ambassador.²⁰⁵ Also, American federal legislators invited hundreds of celebrities to testify at Congressional hearings even when the testimony had nothing to do with their jobs.²⁰⁶

Celebrities may receive hundreds of requests weekly to work for free for charities. Most refuse many of the requests that they receive. Celebrity agents often tell their clients that they should choose three or less organizations to support and volunteer for them for a maximum of twelve days annually.²⁰⁷

Some academics criticize celebrities for advocating for development causes.²⁰⁸ Some believe that the celebrities take attention away from the causes of inequality.²⁰⁹ Now that this article has generally discussed celebrity advocacy, it will specifically discuss banning MWLP advertisements from being shown to minors.

A. FACEBOOK AND INSTAGRAM'S BANS ON MWLP ADVERTISEMENTS TO MINORS

Actor Jameela Jamil is an example of a celebrity who advocates for a cause. Jamil struggled with body dysmorphia and an eating disorder in the past.²¹⁰ She created a 'radical inclusivity' group called 'I Weigh'²¹¹ to protest "harmful online content promoting unhealthy beauty standards for

201. Brockington, *supra* note 196, at 97.

202. Brockington & Henson, *supra* note 193, at 432.

203. Brockington, *supra* note 196, at 94.

204. *Id.* at 92.

205. *Id.* at 94.

206. Sarah L. Steele & Tyler Shores, *More Than Just a Famous Face: Exploring the Rise of the Celebrity Expert-Advocate Through Anti-trafficking Action by the Demi and Ashton Foundation*, 10 CRIME MEDIA CULT. INT. J. 259, 263 (2014).

207. Brockington, *supra* note 196 at 97.

208. Brockington and Henson, *supra* note 193, at 434.

209. *Id.*

210. Frances Ryan, *Jameela Jamil is well-meaning, but slim, pretty women can't smash the diet culture alone*, THE GUARDIAN (Sept. 3, 2019), <https://www.theguardian.com/commentisfree/2019/sep/02/jameela-jamil-is-well-meaning-but-slim-pretty-women-cant-smash-the-diet-culture-alone>.

211. Hannah Sparks, *The Kardashians' 'miracle' diet posts targeted in new Instagram policy*, N.Y. Post (Sept. 19, 2019), <https://nypost.com/2019/09/19/the-kardashians-miracle-diet-posts-targeted-in-new-instagram-policy/>.

women”.²¹² She also started a petition in 2019 to ask Instagram to ban ‘harmful weight loss posts’, which received over 245,000 online signatures.²¹³ That year, Facebook and Instagram banned advertisements of MWLP to people under the age of 18.²¹⁴ Jamil worked with Instagram on the ban, and stated that this action ‘sends an important message out to the world.’²¹⁵ Instagram also worked with external experts to make this change, such as Dr Ysabel Gerrard, who researches social media at the University of Sheffield.²¹⁶

B. WHY BOTH LAW AND CELEBRITY ADVOCACY ARE NECESSARY TO COMBAT MWLP ADVERTISEMENTS

Law and celebrity advocacy have been successful and have a role to play in combating MWLP, and both are necessary. The law can give finality and certainty; it can proactively prevent MWLP advertising from being shown to youth by administering significant sanctions against users who post them. Additionally, law can send a serious message to advertisers, media and social media platforms that displaying MWLP advertisements is serious.

On the other hand, celebrities present a different opportunity. As Jameela Jamil demonstrates, celebrities can *pressure social media platforms to ban MWLP advertising, and combat MWLP advertising’s effectiveness on young people*. The article will now explain how this can be done in the future, and why it is a viable option for protecting young people from MWLP advertising.

Many young people are attentive to celebrities, which gives the latter significant practical ability to distribute health information and have it internalized by the public. This is true on and off social media. This ability has been demonstrated, regrettably in ugly ways, during the Covid-19 crisis. The pandemic was accompanied by an ‘infodemic’ of dodgy

212. Jeena Sharma, *Instagram Bans Promotion of Toxic Diet Ads to Minors*, PAPER (Sept. 19, 2019) <https://www.papermag.com/instagram-diet-ads-2640439097.html?rebellitem=9#rebellitem9>.

213. Cara Rosenbloom, *Instagram and Facebook Ban ‘Miracle’ Diet Posts, but There’s Much More Work to Do*, WASH. POST (Sept. 24, 2019) https://www.washingtonpost.com/lifestyle/wellness/instagram-and-facebook-ban-miracle-diet-posts-but-theres-much-more-work-to-do/2019/09/23/0829a872-de26-11e9-b199-f638bf2c340f_story.html. The petition had 247,027 signatures as of July 16, 2021. See Jameela Jamil, *Stop Celebrities Promoting Toxic Diet Products on Social Media*, CHANGE.ORG, <https://www.change.org/p/instagram-facebook-twitter-and-snapchat-stop-celebrities-promoting-toxic-diet-products-on-social-media>.

214. *Instagram clamps down on diet and cosmetic surgery posts*, BBC NEWS (Sept. 19, 2019) <https://www.bbc.com/news/technology-49746065>.

215. Zoe Victoria, *Why Instagram’s Crackdown on Diet Ads Won’t Work*, SBS VOICES (Sept. 19, 2019) <https://www.sbs.com.au/topics/voices/health/article/2019/09/19/opinion-why-instagrams-crackdown-diet-ads-wont-work>; Sparks, *supra* note 211.

216. Sharma, *supra* note 212.

misinformation about Covid-19 circulated and believed on social media.²¹⁷ The authors of this article would prefer to see instead an 'infodemic' of good health information that is critical of MWLP (i.e. anti-MWLP messaging). To this end, NGOs, institutions and governments can contract with influencers to promote good health advice and campaigns, as they have in Australia and the United Kingdom.²¹⁸ Such campaigns can also include explicitly anti-MWLP messaging; warning young people of their ineffectiveness and the psychological tricks employed by the adverts to induce purchases; and demanding the social media platforms ban MWLP advertising.

It is likely such strategies would yield success in steering young people away from MWLP due to the greater reach of celebrities on youth-dominated platforms. It would likely disincentivize young people from purchasing when a celebrity criticizes such products and encourages social media platforms to ban or limit MWLP advertising.

Celebrities are well placed to spread anti-MWLP messaging because celebrity discourse can be better understood by the public, compared to the complexities of legal discourse, which generally includes legal jargon that may be difficult for those outside of the legal profession to comprehend. As a result, there is greater clarity and unified message portrayed to the public, allowing for a deeper understanding of the issue through increased accessibility of language. Such an understanding is difficult to achieve through law alone, as it is generally inaccessible for the general population.

Celebrity advocacy regarding MWLP can raise considerable awareness of the MWLP problem quickly, particularly if the celebrity is very famous or if many celebrities are involved. Broad engagement by celebrities has the potential to reach young people from different demographics. For example, celebrity influencers who post weight loss videos are in a unique position to speak against MWLP and their marketing to those under 18. However, in this space, there is also a role for those not involved in the health and wellness sphere, as was demonstrated through the advocacy of Jameela Jamil.²¹⁹ Subsequently, the message is able to reach many different audiences, with potential repeat exposure through far-reaching celebrity support creating engagement with young people.

217. Matteo Cinelli et al., *The COVID-19 social media infodemic*, 10 *SCI. REP.* 16598 (2020) at 1.

218. *Federal Health Minister Greg Hunt Has Ordered His Department to Stop Paying Social Media Influencers*, ABC NEWS (July 20, 2018), <https://www.abc.net.au/news/2018-07-21/stop-payment-to-influencers/10021134>; Elvira Bolat, *Opinion: Why the UK Government is Paying Social Media Influencers to Post about Coronavirus*, THE CONVERSATION (Sept. 9th, 2020) <https://theconversation.com/why-the-uk-government-is-paying-social-media-influencers-to-post-about-coronavirus-145478>. Though the Australian program has now ceased this is a reminder that such attempts must be demonstrably cost-effective or risk failing.

219. Ryan, *supra* note 210.

The speed at which celebrities can operate compared to regulators is also highly appealing. An advantage of celebrity advocacy is that they may be able to foster social change more quickly than courts and legislators, as they work outside of formal legal processes. If a social media platform employs the changes sought by celebrity advocacy, this can result in considerable positive media coverage of the social media platform, subsequently encouraging greater usage and engagement. Conversely, if a social media platform fails to implement changes as campaigned by celebrities, it can result in negative coverage and criticism by both the celebrity and broader media, leading to a reduction in using the platform. Subsequently, social media platforms are driven to create change to prevent criticism by the public. Without celebrity advocacy, there would be insufficient pressure placed on these platforms to create change.

In terms of specific methods, celebrity advocacy through influencer methods will likely yield results. Influencer's posts are comparable to word-of-mouth opinions that young people are likely to be receptive to,²²⁰ and influencers often enjoy high levels of perceived credibility among the public.²²¹ As such, if celebrities want to have the greatest impact, they should consider advocating using influencer methods.

Given the foregoing, celebrity advocacy has significant potential to reduce young peoples' MWLP purchases, or even views of MWLP advertisements, partnered with legislation restricting the exposure to MWLP advertising itself. In this way, the law and celebrity advocacy can create the greatest change when used together.

Celebrity advocacy is a better option for combating MWLP than online review systems, where ordinary consumers review products or services. Typically, consumer reviews are posted on a vendor's website, a third-party marketplace, or a dedicated online review platform.²²² In theory, online reviews 'can provide a low cost means for consumers to make informed purchasing decisions' and reduce 'consumer reliance on business controlled advertising.'²²³ However, online reviews have significant drawbacks. Young people do not give much consideration to online reviews, with Sensis' Social Media Report finding only 19% of Australian 18–29-year-olds consulted online reviews prior to making purchases in 2017.²²⁴ In addition, online reviews are often subject to manipulation by

220. Rijo, *supra* note 5, at 165.

221. Ozgoli, *supra* note 6, at 73.

222. Sarah Court, Commissioner, Australian Competition and Consumer Commission, The Australian Consumer Law and Young Consumers at the Rights of the Child Consumer Conference (Nov. 20, 2015).

223. *Id.*

224. SENSIS, CHAPTER 1: AUSTRALIANS AND SOCIAL MEDIA, SOCIAL MEDIA REPORT 3, 45 (2017), https://irp-cdn.multiscreensite.com/535ef142/files/uploaded/Sensis_Social_Media_Report_2017-Chapter-1.pdf.

vendors and are not a solution for guiding young people away from MWLP. This issue of manipulation was outlined by Sarah Court.²²⁵

Reliance on online reviews is only beneficial to the extent that the review is accurate. The importance of positive reviews means that there can be an incentive for unscrupulous businesses to seek to manipulate the review process, either through fake positive reviews for their businesses or fake negative reviews for competitors.²²⁶

Celebrity advocacy should not operate in isolation, and there remains a key role for the law in this space. While celebrities can pressure social media organizations and spread anti-MWLP health messaging, law is essential to codify requirements and provide consequences for failed compliance. In the absence of legal capacity through which to challenge organizations for wrongful conduct, celebrity advocacy alone may fail due to the lack of consequences for a guilty organization. In this way, it is evident that both the law and celebrity advocacy are necessary.

IX. CONCLUDING REMARKS

Former U.S. President Barack Obama remarked, “Whether we like it or not, we are a celebrity-obsessed culture. When we get a movie star involved, people pay more attention.” In the same year that celebrity Jameela Jamil created a petition to stop Facebook from showing images of MWLP to people under 18, Facebook and Instagram implemented this ban.²²⁷ For nearly 100 years previously, courts made decisions which resulted in bans of such advertisements. Both celebrity advocacy and the law have made, and can continue to make, great advances in this area.

This article discussed the psychological impact of social media content on adolescents and the physiological impact of dieting on adolescents. It also discussed MWLP, their marketing on social media, and the relevant law in the United States and United Kingdom. Afterwards, it provided some observations on these jurisdiction’s extant laws and possibilities for reform.

Given the importance of protecting adolescents’ psychological and physiological development and body image, research in this area is crucial. Further research directions include an in-depth assessment of the anti-MWLP legal frameworks in the United Kingdom and United States as well as considering other jurisdictions such as Australia and New Zealand. The potential effectiveness of state-contracted influencers promoting good health and anti-MWLP messaging is also worthy of investigation.

This article started by asking what you would think of an advertisement with these words: “If you take this special drink, you will lose 10 pounds in a week!” After reading this article, hopefully you think these words

225. Court, *supra* Note 222.

226. *Id.*

227. Rosenbloom, *supra* note 213.

describe an MWLP with a false promise that could have a negative impact upon young people's health. Going forward, law and celebrity advocacy may protect young people from exposure to these dangerous advertisements.