

drop high-risk products such as off-road vehicles, medical implants, football helmets, drugs, and vaccines, some of which are valuable to society. An unknown number of new products and innovations never come to market because their liability potential scares manufacturers. In the pharmaceutical industry, funds that might go into developing new drugs are regularly diverted to litigation expenses. In other cases, liability insurance and litigation costs are simply passed on to consumers—like an extra tax on the products they buy. Sometimes liability costs even have the perverse effect of reducing safety. Extension ladders for home use now carry such a high price premium for product liability costs that many people just go on using deteriorating older ladders.<sup>66</sup>

## CONCLUDING OBSERVATIONS

*Consumerism* is a word with two meanings. It refers both to an ideology and to a protective movement. In this chapter we discuss trends related to both meanings. First, consumerism as a way of life is spreading around the world because the conditions that support it are becoming more common. Where it is already established, it is strengthening its grip. Second, consumers in the United States are now more protected from injury, fraud, and other abuses than in the past because of stronger government regulation and more consumer-friendly common law doctrines.

These trends seem likely to continue. As the ideology of consumerism tightens its hold, responsible governments will expend more resources on issues raised by shopping for, purchasing, using, and displaying material objects. These issues will be more complex as populations grow, product choices expand, new technologies change products, and marketing becomes more amplified and pervasive.

<sup>66</sup> Michael Krauss, "Tort-Eating Contest," *The Wall Street Journal*, May 2, 2007, p. A20.

---

## Alcohol Advertising

Anheuser-Busch had high hopes for Spykes. When the product was introduced in 2005, the giant brewer was losing market share to distilled spirits. In 2001 spirits makers had ended a long-standing voluntary policy against aggressive advertising. Liquor ads filled cable channels, then appeared on network affiliates. At NASCAR races lettering for Jim Beam and Jack Daniels appeared on the cars. More drinkers, notably young adults between 21 and 30 years old, found novelty in new brands, drinks, and mixes marketed by the distillers. Drinking tastes were changing. The trend in bars and clubs was moving away from domestic beers such as Anheuser-Busch's Budweiser.

Chairman August A. Busch III thought the company needed something "fun and new and innovative" to

put into the hands of young drinkers.<sup>1</sup> That product was Spykes, a caffeinated malt liquor beverage that was 12 percent alcohol. It came in a 1.7-ounce bottle for \$0.75 or a 2-ounce bottle for \$1. Spykes included caffeine to capitalize on the popularity of mixing energy drinks with alcohol and it came in multiple flavors—Spicy Lime, Spicy Mango, Hot Melons, and Hot Chocolate. Drinkers could down it as a shot or experiment by mixing the flavors in beer or cocktails.

Anheuser-Busch tried to build the brand slowly through word of mouth at the local level. It set up a

<sup>1</sup> Quoted in Victor Reklaitis, "Anheuser-Busch Unveils Product Aimed at 21- to 30-year Olds," *Daily Press-Newport*, December 2, 2005, p. 1.

brightly colored Web site with recipes for Spykes. "Try it as a shot. Spice up your beer. Invent a new cocktail. Mix two or more together for a new flavor."<sup>2</sup> Visitors downloaded music mixes, ringtones, and screen savers. A message board let users interact with the site. One exchange of ideas was, "I wonder if it still tastes good if you heat it up lol," followed by, "I'm gonna try putting one in the microwave . . . lol."<sup>3</sup>

By early 2007 Spykes had been rolled out in 32 states. Then a mighty eruption rose from the precincts of those self-appointed to protect the public from the evils of alcohol. It began with a press release from the Center for Science in the Public Interest, a watchdog group founded by Ralph Nader. In it, George A. Hacker, head of the group's alcohol campaign, unloaded a vicious attack on Spykes, calling it "the latest attempt by Anheuser-Busch to get children interested in alcohol." "This is a shameful ploy to market malt liquor to the Lunchables set," he said. "It's hard to imagine an adult purchasing this beverage, unless they were bringing it for a surprise date with Chris Hansen on Dateline NBC."

The evidence that Spykes targeted underage drinkers included its sweet flavors, the lack of age-verification and "teen-friendly" attractions on its Web site, and its caffeine (because energy drinks are popular with teenagers). Hacker called on the company to "immediately pull Spykes off of shelves, apologize to parents, and hope that in the meantime, no young person wraps his or her car around a tree after being Spyked once too often at the prom."<sup>4</sup>

The Center for Science in the Public Interest is at the forefront in a coalition of antialcohol groups that faults the alcoholic beverage industry for social problems caused by drinking. Others in this coalition piled on. Project Extra Mile, which fights underage drinking, expressed concern that minors could hide small Spykes bottles in pockets and purses.<sup>5</sup> Another

leading antialcohol group, the Marin Institute, called the product "egregious."<sup>6</sup>

Anheuser-Busch was taken by surprise. "Frankly," said a spokeswoman, "we're perplexed at this criticism. These professional critic groups need to stop the fear mongering and focus on reality."<sup>7</sup>

Concern spread. The Michigan State Police put its officers on alert for small bottles of Spykes, especially in women's purses. A county coroner in Illinois warned parents to "check your teen on prom night" because Spykes can "fit easily into a tux jacket pocket or . . . a purse for prom night 'fun.'"<sup>8</sup> The attorneys general of 28 states wrote to Anheuser-Busch expressing "serious concern" about Spykes and its marketing. Soon after receiving this letter, the company gave up. Due to what it called "unfounded criticism" by "perennial anti-alcohol groups" it announced the end for Spykes.

In fact, Spykes was just the opening skirmish in a war over caffeinated alcoholic beverages. It was an important product innovation in a highly competitive industry. Its success had illuminated a lucrative niche market. In fact, Anheuser-Busch had two similar caffeinated brands, Tilt and Bud Extra. MillerCoors was readying a brand named Sparks. And by 2008 more than two dozen smaller companies marketed products with colorful names such as Liquid Charge, Max Fury, Evil Eye, Joose, Four Loco, and Moonshot.

This proliferation was a red flag for antialcohol activists who felt caffeinated alcoholic beverages posed serious risks. ~~These drinks contained less caffeine than a cup of coffee and met federal guidelines of 200 parts per million or less for caffeine in soft drinks.~~ Nonetheless, the critics believed that caffeine stimulated drinkers, leading them to drink more and leaving them less aware they were impaired by alcohol. Studies confirm this. A professor in Florida, for example, found that patrons in a college bar district ~~who consumed alcohol mixed with energy drinks were three times more likely to leave a bar highly~~

<sup>2</sup> Donna Leinwand, "Beermaker Urged to Pull Spykes," *USA Today*, April 10, 2007, p. A3.

<sup>3</sup> Quoted in Kari Huus, "A Booze Buzz for Teenyboppers?" *MSNBC*, April 3, 2007 at [www.msnbc.msn.com/id/17862137/37273872](http://www.msnbc.msn.com/id/17862137/37273872).

<sup>4</sup> "CSPI Urges Nationwide Recall of Spykes 'Liquid Lunchables,'" Center for Science in the Public Interest, April 4, 2007, at [www.cspinet.org](http://www.cspinet.org).

<sup>5</sup> Jim Osborn, "Tiny Flavored Drink a Worry," *Columbus Telegram*, May 4, 2007, p. 1.

<sup>6</sup> David Lazarus, "Spykes Is No Longer Buzzing," *San Francisco Chronicle*, May 27, 2007, p. G1.

<sup>7</sup> Francine Katz, Anheuser-Busch vice president of communications, quoted in "Anheuser-Busch Product Criticized," *AFX News Limited*, April 6, 2007.

<sup>8</sup> Blog of Dr. Richard Keller, "Live from the Coroner's Office: Spykes, May 4, 2007, at <http://coronerlakecountyil.blogspot.com/>.

intoxicated and four times more likely to drive home.<sup>9</sup> Critics thought marketing claims duped young drinkers into complacency and they engaged in more risky behavior, from sexual aggression to drunk driving. The products were dangerous, their marketing execrable.

After Spykes, Anheuser-Busch was an easy target. In 2008 it was attacked by 11 state attorneys general who alleged that the labels on Tilt and Bud Extra failed accurately to disclose health risks and that ads for the products illegally targeted minors. The company agreed to reformulate the products, removing caffeine. MillerCoors was next. The attorneys general subpoenaed documents on Sparks, a new caffeinated brand MillerCoors was prepared to market. The Center for Science in the Public Interest sued the company, alleging it used unapproved ingredients that posed health and safety risks for consumers. Eventually MillerCoors gave in and agreed to remove caffeinated ingredients from Sparks.

Next in line was Constellation Brands, which sold a caffeinated schnapps, named Wide Eye. It was advertised with images of a woman boxer. One ad said, "this is your wake-up call." Another stated: "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life."

After receiving complaints from "consumers," the Federal Trade Commission issued a complaint against Constellation Brands, accusing it of saying "expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol" and charging the statements were "false and misleading."<sup>10</sup> In a settlement the company agreed to stop making misleading claims. In fact, it had already stopped producing the brand.

Late in 2009 the Food and Drug Administration, responding to pressure from activists, sent a letter to 27 companies still making caffeinated alcoholic beverages asking them to explain why they believed caffeine is a safe ingredient. The agency reminded the companies that the Federal Food, Drug, and Cosmetic Act gave it jurisdiction over ingredients added

to drinks and that unless the companies provided data showing caffeine was "generally recognized as safe," it had the power to ban its use.<sup>11</sup>

They failed to do so and a year later the FDA notified them that the caffeine added to their beverages was an "unsafe food additive." The agency cautioned consumers to avoid caffeinated brands. Some of the companies continued to market them anyway, inviting the FDA to proceed toward a ban. If it does, it will write the final chapter in the caffeinated alcoholic brand story.

No matter, the industry and its opponents carry on a ceaseless cat-and-mouse game in which companies find new product and marketing innovations to replace initiatives blunted by critics and regulators. A new fight will emerge.

## THE ATTACK ON ALCOHOL MARKETING

In the late 1800s temperance groups launched a noble crusade against the evils of alcohol. Eventually, they dragged the nation into a brief Prohibition era. In 1919 the Eighteenth Amendment banned production and sale of "intoxicating liquors," but the widely evaded ban lasted only until 1933, when the Twenty-First Amendment repealed it. Since then, prohibition attitudes have faded, but not vanished.

Since the end of Prohibition the majority of Americans have been drinkers. In a 1939 Gallup poll 58 percent of adults reported they drank alcohol. The number is a little higher today, 64 percent in a 2010 Gallup poll, and virtually unchanged over a decade.<sup>12</sup> Of the 33 percent who abstain about a third are neoprohibitionists who believe that drinking alcohol "can never be justified."<sup>13</sup>

The alcoholic beverage industry must live with these opponents. Although prohibition is a moribund idea, a strong, well-organized antialcohol movement marches on. Its strength lies in dozens of church,

<sup>11</sup> See, for example, the letter to City Brewing, undated, at [www.fda.gov/Food/FoodIngredientsPackaging/ucm190387.htm](http://www.fda.gov/Food/FoodIngredientsPackaging/ucm190387.htm).

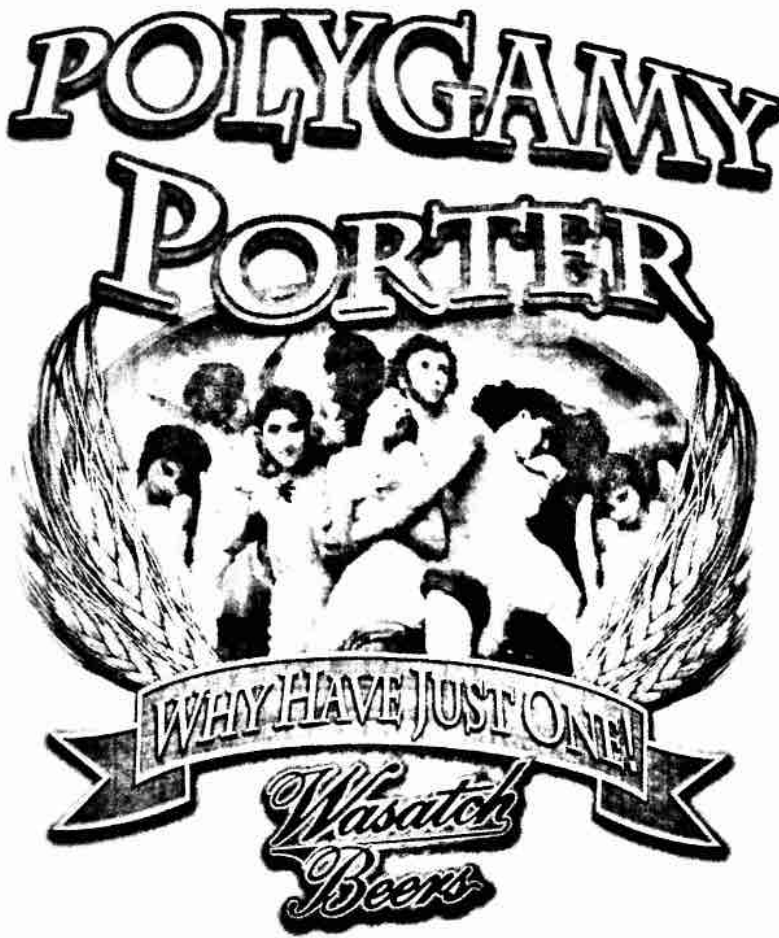
<sup>12</sup> Gallup Poll, "Alcohol and Drinking," July 8-11, 2010, at <http://www.gallup.com/poll/1582/alcohol-drinking.aspx>.

<sup>13</sup> Princeton Survey Research Associates International, "Pew Forum 10 Nation Survey of Renewalists," USPSRA, 100506RENEW R29F, November 7, 2006.

<sup>9</sup> Dennis L. Thombs, et al., "Event-Level Analysis of Energy Drink Consumption and Alcohol Intoxication in Bar Patrons," *Journal of Addictive Behaviors* 11, no. 4 (2009).

<sup>10</sup> Federal Trade Commission, Complaint in the matter of Constellation Brands, Inc., No. C-4266, (2009), pp. 2-3.

polygamy  
Porter, a brand  
marketed by  
Wasatch  
Brewing Co.,  
is a parody of  
the Mormon  
custom, now  
banned, of  
taking multiple  
wives. The ad  
campaign fea-  
tures the slogan  
"Why have just  
one!" This kind  
of appeal is  
condemned by  
the antialcohol  
movement for  
encouraging  
more consump-  
tion. Source:  
Courtesy of  
Wasatch Brew  
Pub.



health, consumer, and citizens' groups such as Mothers Against Drunk Driving. Its greatest successes have been getting all states to raise the legal drinking age to 21 and establishing a national drunken-driving standard of .08 blood alcohol content. It persists in trying to ban or restrict alcoholic beverage advertising. The movement's indictment against alcohol ads is based on four beliefs.

✓ *First, advertising increases consumption.* Many ads are designed to attract new drinkers and promote additional drinking. Miller Lite's classic "Tastes Great-Less Filling" spots attempted to reposition beer as a competitor to soft drinks, telling consumers that light beer is a low-calorie drink that can be consumed more often than regular beer. The Michelob beer campaign based on the slogan "Put a little weekend in your week" encouraged weekend social drinkers to think of all days of the week as drinking occasions. And Polygamy Porter states, "Why Have Just One!"

Studies of the effect of advertising on consumption produce mixed evidence. Generally, national studies find no correlation between overall spending

for alcohol ads and consumption.<sup>14</sup> The number of drinkers in the United States reached an all-time high of 71 percent in 1976, and per capita consumption reached its all-time high of 28.8 gallons a year in 1981. Although ad spending by the industry has steadily risen since then, the percentage of drinkers and per capita consumption have fallen. Some studies of local areas and small groups show that increased advertising does raise consumption. For example, a study of 139 women in Central Harlem found that alcohol dependence and abuse were associated with the density of outdoor alcohol ads in their neighborhoods.<sup>15</sup> Specific ad campaigns may

<sup>14</sup> See Henry Saffer, "Studying the Effects of Alcohol Advertising on Consumption," *Alcohol Health & Research World* 20, no. 4 (1996); and Hae-Kyong Bang, "Analyzing the Impact of the Liquor Industry's Lifting of the Ban on Broadcast Advertising," *Journal of Public Policy & Marketing*, Spring 1998.

<sup>15</sup> Naa Oyo A. Kwate and Ilan H. Meyer, "Association Between Residential Exposure to Outdoor Alcohol Advertising and Problem Drinking Among African American Women in New York City," *American Journal of Public Health*, February 2009.

also be successful. Recently, Heineken created an on-line virtual universe named Heineken City. Participants could buy apartments there with awards earned from playing branded games. Apartment owners received "keys" by mail and invitations to special events. They also could send free e-mail through a special domain, @heicity.com. According to the agency behind the campaign, it created 10,000 new Heineken drinkers.<sup>16</sup> Overall, however, no firm conclusion about the effect of advertising on consumption is warranted.

Second, ads encourage underage drinking. Underage alcohol consumption is a serious problem. Survey data show that by the 12th grade 72 percent of students have experimented with alcohol and 55 percent have been drunk at least once. Binge drinking, defined as five or more drinks in a row in the previous week, is reported by 8 percent of 8th graders, 16 percent of 10th graders, and 25 percent of 12th graders. About 40 percent of college students report binge drinking.<sup>17</sup> Overall, youth under 21 years old consume about 20 percent of all alcoholic drinks, forming an \$8 billion market for the \$40 billion industry.<sup>18</sup>

Each year some 5,000 underage drinkers die of alcohol-related injuries, most in car crashes, homicides, and suicides. Underage drinking is associated with academic failure, risky sexual behavior, and illicit drug use. New evidence shows that alcohol has pernicious effects on the developing adolescent brain.<sup>19</sup>

There is little proof that alcohol advertisers target minors in a calculated way, but there is enough evidence on which to base at least some suspicion. For example, all three segments of the alcohol industry—beer, wine, and distilled spirits—have agreed to voluntary media guidelines that require companies to buy ad placement only when at least 70 percent of the audience is expected to be 21 years of age or

older. A study of alcohol ads on television found that companies did an outstanding job following the 70 percent guideline. However, each 1 percent rise in adolescent viewers in the audience was associated with 7 percent more beer ads, 15 percent more spirits ads, and 22 percent more "alcopop" ads, suggesting that some alcohol companies were seeking at least the youngest audiences they could reach while still complying with the media guidelines.<sup>20</sup>

In addition, expenditures for digital marketing are rising. Alcohol companies are putting more alcohol ads on the Internet, a realm heavily trafficked by an underage audience. There are many Internet marketing tactics. Viral marketing has been used for Miller Lite, Bud Light, Absolut, Captain Morgan, Smirnoff, and other brands. A YouTube video titled "Banned Super Bowl 2007 Bud Commercials" had 9 million views.<sup>21</sup> Alcohol advertisers also create sponsored sites and social networking sites with games, applications, widgets, blogs, music, screen savers, drink recipes, and other hooks. Although they often use age verification screens, these are easily bypassed. When viral campaigns work, the online community sends the advertising message. The advertiser is no longer able to screen recipients for age.

Activists claim that companies target underage drinkers not only with advertising but also with products designed to attract youth. These include flavored malt beverages like Spykes, often called "alcopops," single-serving vodka and tequila cocktails with names such as Yellin Melon Balls and Blue-Dacious Kamikaze, and novelty products such as cups of strawberry gelatin containing vodka. Other questionable marketing gimmicks include spring break promotions, brand placements in films seen by children, and brand logos on T-shirts and toys. A recent study showed that elementary school children who played with alcohol-themed toys tended to start drinking earlier.<sup>22</sup>

<sup>16</sup> "Heineken: "Heineken City," *Advertising Age*, September 15, 2008, p. S4.

<sup>17</sup> Figures are from Lloyd D. Johnson, et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2008*, Vol. II (Bethesda, MD: National Institutes of Health, 2009), pp. 22–23.

<sup>18</sup> Leslie B. Snyder, et al., "Effects of Alcohol Advertising Exposure on Drinking among Youth," *Archives of Pediatric and Adolescent Medicine*, January 2006, p. 18.

<sup>19</sup> Department of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Reduce Underage Drinking: 2007* (Rockville, MD: Office of the Surgeon General, pp. 1–11 and 19–20.

<sup>20</sup> Paul J. Chung, et al., "Association Between Adolescent Viewership and Alcohol Advertising on Cable Television," *American Journal of Public Health*, March 2010, p. 555.

<sup>21</sup> Jeff Chester, Kathryn Montgomery, and Lori Dorfman, *Alcohol Marketing in the Digital Age* (Oakland, CA: Public Health Institute, May 2010), p. 10.

<sup>22</sup> Erica Weintraub Austin, "Why Advertisers and Researchers Should Focus on Media Literacy to Respond to the Effects of Alcohol Advertising on Youth," *International Journal of Advertising* 25, no. 4 (2006), p. 542.

Research about the effect of alcohol advertising on youth points to caution. A review of seven studies following the drinking behavior of 13,000 subjects aged 10 to 26 found that "exposure to alcohol advertising in young people influences their subsequent drinking behavior" and the greater the exposure the greater the frequency of drinking. Yet the study concluded that the effect of advertising was "generally modest."<sup>23</sup> Another study of 200 adolescents found that exposure to advertising influenced subsequent drinking frequency, but very little. It was responsible for only about 1 percent of variation. Peer influence was the strongest factor in drinking behavior, followed by parental influence.<sup>24</sup>

✓*Third, sophisticated lifestyle advertising used by alcohol makers is manipulative because it locks into inner drives.* Informational advertising presents details about a product, for example, its price, availability, and quality. In contrast, lifestyle advertising positions a product to fulfill emotional needs. Pictures and copy associate alcohol with fulfillment of desires for popularity, success, sophistication, rebellion, romance, and sexual conquest. The ads endow commodity products such as vodka or lager beer with brand images. Then by drinking that brand, the consumer adopts and projects the brand image. These ads convey little or no objective information about the beverage, only an emotional theme. Sexual images are a staple of alcohol marketing. However, one study of alcohol ads in magazines during a 14-year period found that other appeals predominated over sexual imagery. In *Life*, for example, prestige and social acceptance were more frequent themes.<sup>25</sup> Whatever the image, critics believe that since lifestyle ads play on emotion, they are highly manipulative. Consumers who respond to them are being tricked into fulfilling inner needs by drinking.

<sup>23</sup> Lesley A. Smith and David R. Foxcroft, "The Effect of Alcohol Advertising, Marketing and Portrayal on Drinking Behavior in Young People: Systematic Review of Prospective Cohort Studies," *BMC Public Health*, February 2009, p. 11.

<sup>24</sup> Brian R. Kinard and Cynthia Webster, "The Effects of Advertising, Social Influences, and Self-Efficacy on Adolescent Tobacco Use and Alcohol Consumption," *Journal of Consumer Affairs*, March 2010, p. 39.

<sup>25</sup> Geng Cui, "Advertising of Alcoholic Beverages in African-American and Women's Magazines: Implications for Health Communication," *Howard Journal of Communications*, October 2000, p. 288.

✓*Fourth, alcohol advertising is targeted not only at young drinkers but, sometimes inappropriately, at other groups too.* Critics object, for example, to endless ads for malt liquors in inner-city black neighborhoods and in black media. Malt liquor has a higher alcohol content than regular beer, and advertisements for it appeal to drinkers seeking inebriation. United States Beverage Company faced this criticism when it introduced a new brand named Phat Boy with graffiti-style ads for a "new malt liquor with an attitude." Phat Boy came in 40-ounce bottles, each having as much alcohol as a six-pack of regular beer. After an outcry by activists, the company dropped the brand. Hispanics are also targets. Perhaps because 40 percent of Hispanics in the United States are under 21 years old, Hispanic neighborhoods are filled with beer billboards. In Chicago, neighborhoods of elementary schools with more than 20 percent Hispanic children have 6.5 times more alcohol advertising than those with lower percentages.<sup>26</sup>

Young women are also targeted. Companies have introduced sweet-flavored drinks appealing to their tastes. Barton Brands sells a brand of vodka martini called Cocktails by Jenn in Blue Lagoon, Lemon Drop, and Appletini flavors. The drinks come in four-packs instead of six packs because they are lighter and easier for women to carry. Around their necks, the bottles have small metal charms such as a high-heeled shoe, diamond ring, or perfume bottle.<sup>27</sup> Only about 25 percent of women drink beer, so they are a huge growth market for brewers, who target them with lighter and flavored malt beverages such as Molson Coors' orange-flavored wheat beer Blue Moon and Anheuser-Busch's blueberry-flavored Wild Blue.

## ALCOHOL MARKETERS DEFEND THEIR ADVERTISING

Alcoholic beverages are a mature industry. Due to population aging and health consciousness, per capita consumption is in a slow, long-term decline, dropping by an average 4 percent a year from 1998 to 2008. Still, Americans today drink a lot of alcohol,

<sup>26</sup> Keryn E. Pasch, et al., "Does Outdoor Alcohol Advertising Around Elementary Schools Vary by the Ethnicity of Students in the School?" *Ethnicity & Health*, April 2009.

<sup>27</sup> "Welcome to the World of Cocktails by Jenn," at [www.ropesacreative.com/cbj/cocktails\\_750\\_d.htm](http://www.ropesacreative.com/cbj/cocktails_750_d.htm).

about 26 gallons per capita in recent years, compared with 24 gallons of coffee and 21 gallons of milk.<sup>28</sup> And because the population is growing, industry sales grew from \$29 billion in 1998 to \$40 billion in 2008, a 39 percent increase.<sup>29</sup>

Amid overall market growth, industry segments compete fiercely for market share. Beer dominates, but since 1998 its sales have dropped from 63 percent of all alcoholic beverages to 49 percent. The wine sector picked up 10 percentage points to 34 percent and distilled spirits added 4 percentage points, rising to 17 percent.<sup>30</sup> Two implications of these figures for advertising are clear. First, if per capita consumption is stagnant but the overall population is growing, ads to recruit new and younger drinkers pay off. Second, if sales of industry segments are in flux, ads that promote brand loyalty can be used to protect or seize market share. Both conclusions lie behind the industry's heavy advertising. It defends its ads against the attacks of critics with these basic arguments.

*First, ads are not the cause of alcohol abuse.* As noted, studies fail to show that advertising increases consumption. So commercials and billboards cannot be blamed for car accidents, teen suicides, sexual aggression, spousal abuse, binge drinking, and alcoholism. Alcoholism, for example, is a complex disease caused by personality, family, genetic, and physiological factors rather than by viewing ads. Restraints would only deprive moderate drinkers of product information, not relieve social problems. As one advertising executive noted, trying to stop problem drinking with an ad ban "makes as little sense as trying to control the Ku Klux Klan by outlawing bed linens."<sup>31</sup> Ad restrictions would also muzzle a competitive weapon. Without advertising, starting a new national brand would be almost impossible and established brands would have an insurmountable advantage.

<sup>28</sup> Department of Agriculture, Economic Research Service, "Data Sets: Beverages," February 1, 2010, at [www.ers.usda.gov/Data/FoodConsumption/Spreadsheets/beverage.xls](http://www.ers.usda.gov/Data/FoodConsumption/Spreadsheets/beverage.xls). Figures are for 2008.

<sup>29</sup> Department of Commerce, *Annual Survey of Manufactures, 2002 and 2009* (Washington, DC: Bureau of the Census, 2002 and 2009), sector 31.

<sup>30</sup> *Ibid.*, sector 31.

<sup>31</sup> James Kuras of McCann-Erickson, quoted in Eric Clark, *The Want Makers* (New York: Viking Press, 1988), p. 285.

*Second, antialcohol groups assume the public is too stupid to decide responsibly.* The idea of curbing ads is condescending. Consumers are intelligent and skeptical. They are not duped by the association of alcohol with attractive images. Does anyone expect brewers and vintners to associate their products with root canals, traffic congestion, or taxes? The rejection of lifestyle advertising is also condescending. If a marketer positions a brand to satisfy emotional needs for sophistication, popularity, or sexual attractiveness, who is to say the consumer who finds gratification in the brand is wrong? No one would criticize a woman for feeling glamorous while she is wearing perfume, though the perfume is simply a chemical, nonessential to healthy life, and the glamour is created by imagery. Advertising also has the power to endow alcoholic beverages with emotional benefits for drinkers. The critics assume there is no merit to a product beyond its utilitarian qualities. What a dull world it would be if all products were marketed and used on this basis.

*Third, the beer, wine, and spirits industries have voluntary codes to regulate advertising behavior.* The policies in these codes are extensive and specific. For example, the Beer Institute's Advertising and Marketing Code prohibits depictions of excessive consumption, intoxication, and drinking while driving. Models in beer ads must be over 25 and "reasonably appear" to be over 21 years old. Beer ads should never have "any symbol, language, music, gesture, or cartoon character intended to appeal primarily to persons below the legal purchase age." No depictions of Santa Claus or sexual promiscuity are permitted.<sup>32</sup> The Wine Institute's Code of Advertising Standards has similar guidelines. It also prohibits showing the Easter bunny.<sup>33</sup> The Distilled Spirits Council of the United States' Code of Good Practice for Distilled Spirits Advertising and Marketing is similar to the two other codes. It allows advertisers to "depict affection or other amorous gestures," but forbids them to "rely upon sexual prowess or sexual success as a selling point," perhaps a fine distinction.<sup>34</sup>

<sup>32</sup> At [www.beerinstitute.org/tier.asp?bid=249](http://www.beerinstitute.org/tier.asp?bid=249), January 2006 edition.

<sup>33</sup> At [www.wineinstitute.org/initiatives/issuesandpolicy/adcode](http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode), revised September 2005.

<sup>34</sup> At [www.discus.org/pdf/61332\\_DISCUS.pdf](http://www.discus.org/pdf/61332_DISCUS.pdf), January 2009, p. 8.

DISTINCTIVE SINCE 1953



Although the distiller's advertising code warns advertisers not to "rely upon sexual prowess or sexual success as a selling point," this ad links a brand of gin with Hugh Hefner, mastermind of the *Playboy* philosophy.

Source: © The Advertising Archives.

All three codes are backed by mechanisms to investigate possible violations. The Distilled Spirits Council, for example, convenes a 10-member Code Review Board to look at complaints. All the board members are industry executives and its rulings can be gentle, but it raps knuckles too. Recently it received a complaint from a company about a vodka print ad run by White Rock Distilleries. The ad depicted a man in a rabbit costume and two women in bikinis around a card table drinking vodka and playing strip poker. As the man smiled one woman removed her top. The complaint alleged that the ad violated the industry code's prohibition against using "sexual prowess or sexual success as a selling point." The board decided the ad violated the code "insofar as the female models are either partially clad or completely unclad in a strip poker game where the male model is fully

clad in a rabbit costume with a lascivious facial expression."<sup>35</sup> White Rock Distilleries stopped running the ad.

Fourth, alcohol makers promote responsible consumption. Companies broadcast public service announcements to preach moderation and safe driving. They sponsor designated-driver programs such as Anheuser-Busch's Alert Cab, which gives free taxi rides to restaurant and bar patrons who have been drinking. The Distilled Spirits Council funds college programs in which students teach other students about moderation. It also trains bartenders to serve drinks responsibly. These efforts, while important, do not get nearly the funding of brand advertising.

<sup>35</sup> Distilled Spirits Council of the United States, *Semiannual Code Report*, 10th ed. (Washington, DC: DISCUS, September 2009), p. 9.

According to one study by an activist organization, responsibility ads are only 2 percent of the alcohol advertising budget and youths see 239 product ads for every message about safe driving.<sup>36</sup>

Finally, targeting respects diverse audiences. The industry agrees that it targets younger drinkers, minorities, women, and other groups with advertising themes. Young adult drinkers find value in advertising that informs them of new products and creates images that fulfill their emotional needs. The puzzle faced by companies is that young adults aged 21 to 25 share many interests and behaviors with those just below the legal drinking age. Some spillover appeal is inevitable. Ads aimed at minorities are also legitimate. Market segmentation and the targeted advertising that makes it work are standard in many industries. When toy companies make black or Latina dolls, social critics applaud, but when alcohol companies make products that appeal to minority communities, critics argue that these consumers are too gullible to withstand manipulation. The implication is that Hispanic or black consumers are not as astute as white consumers. The real problem is that the product is alcohol, not that the ads have ethnic or racial appeal. Finally, there is no evidence that targeting raises consumption. Despite concerns over targeting young women, a large national study found that the percentage of female 12th graders having a drink in the past 30 days declined from 47 percent in 1998 to 41 percent in 2008 and the number of young women aged 19 to 28 who drank a flavored alcohol beverage in the past 30 days declined from 30 percent in 2004 to 27 percent in 2008.<sup>37</sup>

## RESTRICTING ALCOHOL ADVERTISING

Alcohol advertising is highly regulated. Companies must navigate a labyrinth of restrictions. Approximately half the states restrict ad placements. Arizona prohibits it on school buses. Ohio bans it near churches, schools, and playgrounds. Many cities also

restrict it. San Diego bans billboard ads within 500 feet of playgrounds, child care centers, schools, and libraries. San Jose bans beer and wine ads on fueling islands at gas stations. San Francisco prohibits alcohol ads on public transit.<sup>38</sup>

Three federal agencies have the power to regulate marketing claims. The Food and Drug Administration approves ingredients in alcoholic beverages for safety. The Federal Trade Commission has the authority to stop advertising that is false, deceptive, misleading, or unfair. The Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau enforces labeling requirements and monitors advertising for compliance with certain requirements under a 1935 law. For example, if the words "Scotch whisky" are used, the product must be manufactured in Scotland. Labels cannot resemble a postage stamp. Depictions of the American flag cannot appear on labels or in ads. Advertisers cannot use subliminal means, defined as "any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness."<sup>39</sup>

Originally, the law prohibited statements of alcohol content on labels so that companies could not start strength wars. However, in 1995 the Supreme Court held that censoring this information violated bottlers' speech rights, so alcohol content can now be printed on labels and is required on distilled spirits labels.<sup>40</sup>

Altogether, the body of government regulation covering alcohol advertising imposes significant restraints. But critics want stronger, more uniform measures. In the 1990s several bills were introduced in Congress to limit alcohol ads, for example, by banning them near schools and playgrounds, in publications with large youth readerships, on college campuses, and during prime-time television hours.<sup>41</sup> The prospect for such measures faded after

<sup>36</sup> Center on Alcohol Marketing and Youth, *Drowned Out: Alcohol Industry 'Responsibility' Advertising on Television, 2001–2005* (Washington, DC: CAMY, 2005), p. 1.

<sup>37</sup> Lloyd D. Johnson, et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2008*, vol. I, table D-70 and vol. II, table 5-3.

<sup>38</sup> Marin Institute, *Out of Home Advertising: A 21st Century Guide to Effective Regulation* (San Rafael, CA: Marin Institute, March 2009), pp. 9–11.

<sup>39</sup> 27 CFR §5.65(h), 2010.

<sup>40</sup> *Rubin v. Coors Brewing Company*, 514 U.S. 618 (1995).

<sup>41</sup> See, for example, the "Voluntary Alcohol Advertising Standards for Children Act," H. R. 1292, 105th Congress, 1st Sess. (1997), introduced by Rep. Joseph P. Kennedy II (D-Massachusetts).

a Supreme Court decision that struck down a federal ban on broadcast ads by casinos.<sup>42</sup>

The court also chipped away at other restrictions. Until 1996 Rhode Island banned price advertising for alcoholic beverages, claiming it was justified in doing so to promote temperance. However, the justices struck the ban down, saying price advertising is protected by the First Amendment's free speech guarantee.<sup>43</sup>

Other initiatives by antialcohol forces have failed. A series of lawsuits sought to regulate the alcohol industry using product liability law. Parents of underage drinkers accused more than 100 companies of defrauding them by attracting their sons and daughters to spend family money illegally on alcohol. The parents alleged injury from a complicated scheme including marketing "alcopops" with themes that appeal to youth, distributing promotional items, using cartoons, sponsoring spring break events, and setting up sham regulatory codes. They sought to recover the money their underage children spent and to stop the ongoing seduction of youth. However, courts dismissed these lawsuits for insufficient evidence that company actions caused underage alcohol abuse.<sup>44</sup>

Some countries go further than the United States in national restrictions. India and Thailand ban all alcohol advertising. Ireland prohibits distilled spirits ads on television and radio and prohibits beer and wine ads before sports events. France bans alcohol ads on television and restricts ad content in other media. Norway, Sweden, Denmark, and Finland prohibit advertising beverages with more than a certain alcohol content ranging from 2.2 to 3.5 percent, less than regular beer or wine. Italy, Spain, and Portugal restrict televised alcohol ads before 8:00, 9:00, and 10:00 p.m., respectively. Greece limits the number of broadcast ads per brand per day. Russia prohibits the appearance of people and animals in television ads. When alcohol companies skirted these rules with off-screen voices and animated bottles, it banned that too. Such restrictions might not work in the United States due to constitutional protections for free speech.

<sup>42</sup> *Greater New Orleans Broadcasting Association, Inc. v. U.S.*, 527 U.S. 173 (1999).

<sup>43</sup> *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

<sup>44</sup> See, for example, *Hakki v. Zima Company*, 03-0009183 (Sup. Ct. Dist. Col., November 14, 2003); and *Eisenberg v. Anheuser-Busch, Inc.*, 1:04 CV 1081 (N.D. Ohio, February 1, 2006).

## ARE RESTRICTIONS ON ALCOHOL ADS CONSTITUTIONAL?

Images and statements in advertising are speech. Therefore, proposals for muzzling liquor, beer, and wine companies raise constitutional issues. The First Amendment protects all speech from government curbs, but courts have distinguished noncommercial speech from commercial speech. The former is speech in the broad marketplace of ideas, encompassing political, scientific, and artistic expression. Such speech is broadly protected. The latter is speech intended to stimulate business transactions, including advertising. This kind of speech receives less protection.

The right of free speech is assumed to be a fundamental barrier against tyranny and is not restricted lightly. Courts will not permit censorship of noncommercial speech unless it poses an imminent threat to public welfare, as it would, for example, if a speaker incited violence or a writer tried to publish military secrets.

With respect to commercial speech, however, various restrictions are allowed. For example, ads for securities offerings can appear only in the austere format of a legal notice and tobacco ads are barred on radio and TV. Would courts approve additional restrictions on alcoholic beverage advertising?

The most important legal guidelines for weighing restraints on commercial speech are those set forth by the Supreme Court in 1980 in the *Central Hudson* case.<sup>45</sup> Here the Court struck down a New York regulation banning advertising by public utilities, a regulation intended to help conserve energy. Justice Lewis Powell, writing for the majority, set forth a four-part test to decide when commercial speech could be restricted.

- The ad in question should promote a lawful product and must be accurate. If an ad is misleading or suggests illegal activity, it does not merit protection.
- The government interest in restricting the particular commercial speech must be substantial, not trivial or unimportant.

<sup>45</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557.

- The advertising restriction must directly further the interest of the government. In other words, it should demonstrably help the government reach its public policy goal.
- The suppression of commercial speech must not be more extensive than is necessary to achieve the government's purpose.

All government actions to ban or restrict alcohol ads could be challenged by industry and would have to pass the four-part *Central Hudson* test to survive.

## ALCOHOL ADVERTISING IN PERSPECTIVE

The mainstream antialcohol campaign today is to restrict advertising more. The Prohibition Party argument that alcohol is immoral, sinful, and unhealthy has few advocates now. But those who still believe it have seized on underage drinking as a weapon to attack the alcohol industry. Since underage drinking is a genuine social problem, antialcohol activists find many allies.

Alcohol advertising is creative, witty, and clever. Evidence is strong that children and teenagers are attracted to alcohol ads and increasing exposure is associated with more future drinking. Some of this drinking leads to tragedy for families. Such serious concerns are to be weighed against other factors.

Some studies show the influence of ads is very modest. Most Americans drink alcoholic beverages. Advertising limits would reduce information about products. And the constitution, while permitting restrictions, protects advertisers from needless and sweeping government actions. What dangers of alcohol ads justify what restrictions?

### Questions

1. Were Spykes and Wide Eye bad products? Do you think they were marketed in objectionable or misleading ways? Do you think companies should be allowed to market other caffeinated alcoholic beverages?
2. Do alcoholic beverage companies fulfill their ethical duty to be informative and truthful in advertising? Do they generally uphold their ethical duty to minimize potential harm to society from underage drinking?
3. Are some beer, wine, or spirits ads misleading? What examples can you give? What is misleading in them? Do some ads contain images and themes that go too far in appealing to an audience under the legal drinking age? Can you give examples?
4. Do you believe there is a need for more restrictions on alcohol advertising? If so, what limits are needed? Explain how a ban or any restrictions could meet the *Central Hudson* guidelines.