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Toward a theory of marketing law transgressions

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ABSTRACT

An area that has seen relatively little attention in the marketing arena is marketing related law and in particular, research that addresses why firms transgress marketing law. Since the 1970s, a number of theories regarding the determinants of unethical and illegal firm behavior have been developed within marketing and other disciplines. However, empirical testing of these models provides results that are often contradictory and inconclusive. Significantly, previous empirical research fails to link previous transgressions with intent to engage in future transgressions, instead viewing transgressing the law as a static process. This research develops and tests a model of transgressing marketing law that links past transgression and intent to transgress in the future through the concept of control. The results show that while firm performance has little effect, it a lack of control (penalties, reward, risk perceptions and existence of compliance programs) that influences illegal behavior.

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1. Introduction

Corporate scandals, such as those by Citigroup, Enron and Worldcom, and more recently Bernie Madoff, and JP Morgan, have created considerable interest in the area of corporate misconduct (Bennett et al., 2013). Corporate misconduct creates major harm to firms and their stakeholders, through significant negative economic consequences resulting from regulatory enforcement, litigation, negative publicity, consumer skepticism, reduction in brand equity and reduced quality perceptions (Chen et al., 2009; Mishina et al., 2010; Skarmeas and Leonidou, 2013; Van Erp, 2013). Stakeholders can punish the firm for any misconduct by ceasing to purchase their products, through the withdrawal of supplies, capital and labor (Barnett, 2012), as well as through additional constructive and destructive punitive actions (Romani et al., 2013). Corporate misconduct is of particular relevance to marketing practitioners since, although marketing activities contribute much to society, some of their outcomes may be to the detriment of consumers and society in general (Day and Montgomery, 1999), or comprise questionable behavior (Singhapakdi et al., 1995; Langenderfer and Cook, 2004; O'Higgins and Kelleher, 2005; Bush et al., 2013).

When considering corporate misconduct, it is important to distinguish between strictly illegal acts and unethical acts. Unethical acts consist of a moral component whereby the individual (or group of individuals, such as an industry body) defines what is acceptable (Smith, 2001). While there is a considerable body of knowledge on Corporate Social Responsibility (Maignan and Ferrell, 2004), on business ethics in marketing (e.g. Payne and Pressley, 2013; Rawwas and Arjoon, 2013) and ethical issues in marketing (see Schlegelmilch and Öberseder, 2010 for a review), there is a paucity of literature on marketing behavior from a legal perspective. In addition, much of the work in marketing ethics considers ethical decision-making from the standpoint of individual marketing managers and even CEOs (Maignan and Ferrell, 2004; Marta et al., 2013; Zona et al., 2013), rather than from the perspective of the firm as a whole (Maignan and Ferrell, 2004). Therefore, this paper focuses on a legal perspective of marketing behavior, as opposed to ethical, focusing on the firm as a whole, rather than individual managers.

When taking a strictly legal perspective however, it is important to distinguish between illegal behavior dealt with by the court system and illegal behavior dealt with by other agencies such as regulatory bodies. Baucus and Dworkin (1991) refer to this issue as the difference between corporate crime, where actions are resolved through the court system, and illegal corporate behavior that are resolved through a variety of procedures including court judgements, settlements and decrees (Baucus and Dworkin, 1991). Similarly, Coleman (2008) refers to the distinction between deterrence and compliance theories. Deterrence is based on the notion that firms do not commit crimes due to the threat of negative consequences; such sanctions are implemented by the court system.

Compliance theory however, refers to the use of regulatory bodies, such as the FCC in the United States or the Australian Competition and Consumer Commission (ACCC) in Australia, rather than just criminal prosecutions through the courts in order to prevent crime. Regulatory agencies attempt to prevent illegal behavior before it is committed

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through education, encouraging compliance programs and negotiated settlements (Baucus and Dworkin, 1991). Coleman (2008) proposes that the role of regulators has been under researched and that a combination with court prosecutions needs to be considered when viewing illegal behavior. For these reasons, and because within the Australian context a large number of actions that occur for breaches of marketing law do not go through the court system but are imposed by regulatory agencies (such as the ACCC), this paper considers illegal marketing behavior to reflect both action taken through the court system and action taken by regulatory agencies. These cases still however differ from ethics as there is still action taken against the company for alleged breaches of the law. However, there is still much uncertainty as to the most effective forms of sanctions (Coleman, 2008).

Increasingly, technical and complex products mean consumers are more reliant on marketers' claims when making purchase decisions (O'Higgins and Kelleher, 2005; Lindsey-Mullikan and Petty, 2011; Chandon, 2013). Therefore, it is essential that marketing research, both theoretical and empirical, considers issues such as intrusive marketing practices, deceptive advertising and product harm (Day and Montgomery, 1999; Howells et al., 2009; Craig et al., 2012; Gao et al., 2013). Such behavior is regulated by legislation and regulations, such as the Federal Trade Commission Act in the United States or the Trade Practices Act in Australia (Flight et al., 2008).

Within the ethics domain, one approach is to consider the processes individuals undertake when engaging in unethical behavior (e.g. Hunt & Vitell, 1986; Treviño et al., 2014). Another approach is to consider situational or environmental variables; that is, characteristics of individuals and the firm that lead to unethical behavior. These include: interpersonal influences, cognitive and affective processes, organizational culture and industry factors (Ferrell and Gresham, 1985; Trevino, 1986; Hunt and Vitell, 1991; Treviño et al., 2014). In looking at the role of organizational identity, recent research in the area of marketing ethics and corporate social responsibility suggests that the organizational mechanisms by which firms respond to societal pressures is an area warranting further research (Martin et al., 2011).

Therefore, we apply a situational approach from the ethics literature to focus on illegal marketing behavior of organizations. Following this approach, one stream of research, prevalent within the illegal corporate behavior field, takes a retrospective perspective in identifying the factors believed to have led to historical transgressions (e.g. Baucus and Near, 1991; McKendall and Wagner, 1997; McKendall et al., 1999, 2002; Fuller and Scammon, 2000; Fontenot and Hyman, 2004; Dion, 2009). Another stream, central within the field of business ethics, assumes a prospective approach in considering intent to act unethically in the future (e.g. Hunt and Vitell, 1991; Sparks and Hunt, 1998; Weber and Gillespie, 1998).

Finney and Lesieur (1982) propose that models of illegal corporate behavior should not end with the commission of the transgression. This is because both previous transgressions and their detection play an important role in a firm's decision to transgress again in the future. Likewise, Ferrell and Gresham's (1985) contingency model recognizes outcomes of the illegal behavior to have an influence on subsequent behavior; noting that the absence of any sanctions provides opportunity for continued questionable behavior. More recently, Balch and Armstrong (2010) developed a conceptual model that proposes persistent, 'accepted-as-normal' illegal behavior, particularly by high-performing firms, is the result of a competitive environment in which aggressive leadership promotes, justifies and legitimates a culture where wrongdoing is commonplace. Such a culture can result in repeat transgressions as evidenced by statistics which show that similar to traditional crime such as theft, rates of recidivism for 'white collar' crime are often high (Weisburd et al., 2001).

Given the incidence of illegal corporate behavior, two questions emerge: 1) why do firms engage in illegal behavior, and 2) what are the most effective ways to prevent such behavior (Smith et al., 2007)? The primary objectives of this research are to explore why and how firms transgress marketing related laws, in particular, misleading advertising and deceptive advertising. Such research provides a means to shape policy to reduce the number of transgressions and minimize related harms to consumers and law-abiding competitors alike.

While illegal corporate behavior has received attention in other disciplines such as management (Mishina et al., 2010; Barnett, 2012), human relations (Fyke and Buzzanell) and sociology (Vaughn, 1999), to the best of the authors' knowledge, such research has not been conducted to any great extent within the marketing discipline. Our contribution is thus threefold:

1) The development of a framework to understand illegal behavior within the marketing discipline from the perspective of the firm.
2) Empirical testing of the framework and;
3) Consideration of the policy implications of such behavior by looking at tools that can be used to prevent such practices.

In the next section we develop the conceptual model, proposing a series of research questions, before discussing the methods used and reporting of the results. Finally the theoretical, practical and policy implications are discussed.

2. Conceptual development

McKendall and Wagner (1997), McKendall et al. (1999), and McKendall et al. (2002) summarize the existing research in the field of illegal behavior as pertaining to conditions of motive, opportunity and control; this framework forms the foundations of the model we develop and test in the current study (see Fig. 1). Based on an assessment of the extant literature, four research questions are developed in an attempt to identify factors that may influence marketing law transgressions. These address the four foundations of the developed model: 1) past transgressions, 2) consequences of past transgressions, 3) future transgressions and 4) the effect of past transgressions on future transgressions.

2.1. Motive, opportunity and past transgressions

Motive represents the reason for illegal behavior to occur (McKendall et al., 2002). Organizational theory states that "organizations strive to achieve their aspirations, and firms with performance below aspirations search for ways to improve reported performance to a satisfactory level" (Harris and Bromiley, 2007, p. 353). Profitability is the most commonly proposed motive for illegal behavior, with numerous studies showing a relationship between [reduced] profit and transgression (Staw and Szwajkowski, 1975; Clinard and Yeager, 1980; Cochran and Nigh, 1987; McKendall et al., 1999, 2002). Other motives, such as attempting to attain a greater market-share (Clinard and Yeager, 1980), also exist.

Opportunity for illegal conduct occurs when conditions allow a firm to transgress the law with relative ease. Opportunity commonly relates to learning theory, whereby organizational or industry norms stress the need for high levels of performance, but not to achieve these in an ethical or legal manner (Hill et al., 1992). Within the literature, firm size (amongst others) is identified as an important condition of opportunity (McKendall et al., 2002). Evidence from the accounting sector suggests that the majority of cases taken by the Securities and Exchange Commission are against smaller non-national firms, possibly due to poor training and procedures (Cohen and Pant, 1991). However, the preponderance of previous research demonstrates a relationship between firm size and illegal corporate behavior (Cochran and Nigh, 1987; Dalton and Kesner, 1988; Baucus and Near, 1991; McKendall et al., 1999). Larger firms have greater capacity to absorb the costs of legal fees and fines than smaller firms, are more visible to regulatory agencies and are more prone to breakdown due to their size and complexity. This creates opportunities for illegal behavior to occur (Baucus, 1994; Vaughn, 1999; McKendall et al., 2002). These findings suggest that profit, market share and firm size are all key contributors to illegal behavior. As a result, the following research question is developed:

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