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Edward L. Graf

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Disparaging the Product— Are the Remedies Reliable?

*Edward L. Graf**

I. BACKGROUND AND HISTORY

"Disparagement" is defined by the Restatement of the Law of Torts as "matter which is intended by its publisher to be understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible things, or upon their quality . . ."¹ The act has been similarly designated as "Injurious Falsehood"² and "Trade Libel." Simply stated, it is "knocking the competitor," an act as old as competitive business and one which takes on new significance in this age of effective and far-reaching communications.

It is estimated that a single prime-time network television show, with its accompanying commercials, will reach two hundred stations with some twenty million viewing families. Many magazines attain circulation of over ten million. With these media available as a forum, and with the effectiveness of modern advertising it is clear that it is necessary to protect the consumer from a misleading disparagement that may affect his buying decision, as well as to protect the responsible businessman from attack.

This problem has been recognized by many trade and professional organizations,³ as well as organizations of broadcasters who have proscribed this type of competitive conduct. The latter organizations, through their member networks and stations have established clear-

* B.A., University of Pittsburgh, J.D., Duquesne University School of Law.

1. RESTATEMENT OF TORTS § 629 (1938).

2. W. PROSSER, TORTS § 122, at 938 (3rd ed. 1964).

3. THE STANDARDS OF PRACTICE OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES provides that "It is unsound and unprofessional for the advertising agency to prepare or handle any advertising of an untruthful or indecent character (including) statements which tend to undermine an industry by attributing to its products, generally, faults and weaknesses true only of a few, and false statements or misleading exaggerations."

ance procedures which enforce their codes.⁴ However, none of these organizations provide the machinery for a determination of the rights of the parties, nor does the condemnation of any one of them preclude the determined disparager from using another medium.

Historically the courts have been willing to recognize that there should be liability for certain false and injurious statements affecting individuals. The law of defamation has grown, based on the recognition of the value of the individual's reputation, and has provided for pecuniary damages to reimburse the plaintiff for his loss. The courts have generally compared a business' injury resulting from false statements to defamation, and this reasoning has severely limited the responsiveness of the law. As stated by Prosser, discussing disparagement, "a supposed analogy to defamation has hung over the tort like a fog."⁵ This unfortunate line of reasoning has severely restricted injunctive relief because of the reluctance of courts of equity to suppress a libel. The similarity to the treatment of defamation cases has also resulted in the requirement of proof of actual damages in all but certain "per se" defamation cases, thereby limiting the remedy.

The businessman whose product or company is being disparaged usually opts for an early cessation of the activity. Monetary damages are usually a concern secondary to stopping the disparagement and useful as a deterrent to the offending conduct. When first recognized by the English courts, the injury to business was held to constitute an *injury to property* rather than to the persons reputation. The remedy of the injunction was established to prevent a continuing injury. This injunctive relief was later authorized by a statute permitting the Courts of Chancery to try libels, and is the law of England today.⁶ But the development of the law in the United States has resisted the use of the equitable remedy of injunction, and as will be noted later, this remedy is still limited.⁷ The legal remedy of compensatory damages has also been limited, mainly through the difficulty of obtaining proof of special damages.⁸

Most of the cases in the United States, by following the defamation

4. National Association of Broadcasters, *THE TELEVISION CODE* (1969). The Code provides that advertising should offer a product or service on its positive merits and refrain by identification or other means from discrediting, disparaging or unfairly attacking competitors, competing products, other industries, professions or institutions.

5. W. PROSSER, *TORTS*, § 122 at 939 (3rd ed. 1964).

6. 3 *CALLMAN, UNFAIR COMPETITION* § 39 (2d ed. 1950).

7. See generally, *Developments in the Law—Competitive Torts*, 77 *HARV. L. REV.* 888 (1964).

8. See generally, Note, 17 *HASTINGS L.J.* 394 (1965).

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analysis, have labeled the actions as libel or slander. In actions for damages they have required the proof of special damages unless there is a showing that the disparagement is "libel per se" or unless there is a showing that the libel has been of an individual as well as of the product. The courts have generally strained to avoid the imputation of the libel to an individual. Using a defamation analysis, injunctive relief has often been denied in the interest of free speech and, because of the general rule, the equity will not enjoin the commission of a crime. Recent developments in the recognition of the law of "Unfair Competition" have provided encouragement for the injured party by reasoning that it is not the libel itself, but rather the competitor's conduct which is enjoined.⁹

Statutory restraints on disparagement include the Federal Trade Commission Act¹⁰ and the Uniform Deceptive Trade Practices Act. The FTC polices business practices including false disparagement as an "unfair or deceptive practice" under the Act. However, its jurisdiction is limited to interstate commerce and it has no duty to act upon the urging of a businessman alleging wrongdoing. The Uniform Deceptive Trade Practices Act proposes to deal with the problems faced by the plaintiff in seeking relief by injunction, while it leaves the law as to damages untouched. Both of the statutory restrictions against disparagement will be analyzed in this article.

II. WHAT CONSTITUTES DISPARAGEMENT?

Disparagement, while usually connected with publications by competitors, is in no way limited to that situation. It may be committed by a customer of the plaintiff who is upset with the quality of the goods purchased,¹¹ by a writer or film company who disparages a non-profit organization,¹² by a union in its description of management¹³ or by a third party who has no business relationship with the plaintiff.¹⁴

9. 3 CALLMAN, UNFAIR COMPETITION § 39 (2d ed. 1950).

10. 38 STAT. 717 (as amended by 52 STAT. 111 and 64 STAT. 1265); 15 U.S.C. 41.

11. *West Willow Realty Corp. v. Taylor*, 198 N.Y.2d 196 (1969). Here the action was against the owner of a private residence who was picketing the office of the vender-realty company.

12. *New York Society for the Suppression of Vice v. MacFadden Publications, Inc.*, 260 N.Y. 167, 183 N.E. 284 (1932).

13. *Montgomery Ward v. United Retail Employees*, 400 Ill. 38, 79 N.E.2d 46 (1948). Note that this is an unusual case, generally the unions "right to free speech" is given great latitude.

14. *Penn-Ohio Steel Corp. v. Allis Chalmers Manufacturing Company*, 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1959).

A. *Subject Matter*

The subject matter of the disparagement, as stated in the Restatement of Torts,¹⁵ is the "existence or extent of another's property in (goods etc.);" and "their quality." The courts in dealing with interests capable of disparagement have entertained a broad variety of cases. Clearly a statement concerning the title to property can be disparaging,¹⁶ as can statements concerning the quality,¹⁷ composition,¹⁸ effectiveness¹⁹ or price²⁰ of the goods. Statements concerning the ethics,²¹ existence,²² practices²³ or conduct²⁴ of the competitor have been held to be disparaging. Practically anything that would interest a customer or is capable of influencing his decision may be the subject of the disparagement.²⁵

Statements of Opinion

It is a long established maxim in the law of misrepresentation that a certain amount of "seller talk" or "puffing" is permissible. It is assumed by the courts that the public discounts the seller's expressions of broad generality that do not state a fact or facts. Callman, in discussing misrepresentation states that:

if it is apparent to the average purchaser that the advertiser has indulged in excessive hyperbole upon which one may not reasonably rely then the advertisement cannot be labeled false or misleading.²⁶

The Restatement of Torts, in dealing with deceit, requires that the recipient of a misrepresentation of opinion may rely upon representations of opinion based upon facts not disclosed, but requires that the reliance be reasonable. The habit of vendors to exaggerate is noted and it is stated that the "purchaser is justified in assuming that even

15. RESTATEMENT OF TORTS, § 629 (1938).

16. Landstrom v. Thorpe, 189 F.2d 46 (8th Cir. 1951).

17. Mowry v. Raabe, 89 Cal. 606, 27 P.157 (1891).

18. Geary v. Bennett, 53 Wis. 444, 10 N.W. 602 (1881).

19. Dust Sprayer Mfg. Co. v. Western Fruit Grower, 126 Mo. App. 139, 103 S.W. 566 (1907).

20. Samson United Corp. v. Dover Mfg. Co., 233 App. Div. 15S, 251 N.Y.S. 466 (1931).

21. Pfeiffer v. Henry, 269 Pa. 533, 112 A. 768 (1921).

22. Dudley v. Briggs, 141 Mass. 582, 6 N.E. 717 (1886).

23. Great South-Western Collection Corp. v. Rosoff, 40 Misc. 2d 121, 242 N.Y.S.2d 678 (1963).

24. Puget Sound Navigation Co. v. Carter, 233 F. 832 (W.D. Wash. 1916).

25. 3 CALLMAN, UNFAIR COMPETITION § 43.2(b) (2d ed. 1950).

26. 2 CALLMAN, UNFAIR COMPETITION § 19.2(b)(2) (2d ed. 1950).

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his vendor's opinion has some basis of fact and therefore in believing that the vendor knows of nothing which makes his opinion fantastic."²⁷ This reasoning has been applied to disparagement and protected those whose statements, though derogatory, were of opinion only. As in the famous case of *White v. Mellin*,²⁸ Lord Herschel's reluctance to permit the court to become a mechanism for judicial determination of the better product is still alive.²⁹ However, the courts are willing to closely review the statements and look for assertions of fact.³⁰ The "unfavorable comparison" rule laid down by *White v. Mellin*³¹ is not absolute and does not preclude disparagement in all comparisons.³² Therefore, it appears that statements of "opinion" that may be proven by test or surveys and statements of objective facts will not be permitted an exemption from a disparagement action on the basis that they are "puffing."

Statements of Fact

Throughout the analysis of whether certain conduct constitutes disparagement, the paramount problem is one of characterizing that disparagement as the type which will enable the grant of relief. Under the present state of the law it has been noted that the requirement of many courts of establishing libel per se or proving special damages presents the injured party with some very practical problems in obtaining relief.

The determination of whether the alleged disparagement is a statement of fact, rather than opinion, is often difficult. When the defendant quotes a performance figure such as "only 40% as effective"³³ or makes a positive statement such as "(plaintiff) is out of business,"³⁴ there is no doubt that he is stating ascertainable facts. But as the defendant's

27. RESTATEMENT OF TORTS § 539 (1938).

28. *White v. Mellin* (1895) A.C. 154.

29. *Testing Systems Inc. v. Magnaflex Corp.*, 251 F. Supp. 286 (1966).

30. *George v. Blow*, 20 N.S.W. 395 (1899); *Jarrahdale Timber Co. v. Temperly & Company*, 1894, 11 T.L.R. 119.

31. *Supra* note 28.

32. *Testing Systems Inc. v. Magnaflex Corporation*, 251 F. Supp. 286 (1966). In this case plaintiff and defendant competed in the manufacture of equipment, systems and chemical products and defendants conduct included such substantive claims as "(plaintiff's product) only 40% as effective as (defendant's)" and "the government is throwing them out." Clearly these were factual claims and defendants defense of "unfavorable comparison" was promptly dismissed.

33. *Id.*

34. *Dudley v. Briggs*, 141 Mass. 582, 6 N.E. 717 (1886); *Davis v. New England R. Pub. Co.*, 203 Mass. 470, 89 N.E. 565 (1909).

statements move into the area where they appear to be opinion, but also intimate their backing with facts, the court is faced with a difficult analysis.³⁵

There is no remedy for a true but disparaging statement of fact. As Callman succinctly puts it: "As the law stands today, truth is a complete defense."³⁶ This is so even though the derogatory statement may concern past acts of the plaintiff such as crimes committed as a youth,³⁷ so long as those crimes have some bearing upon the current dealings. This rule may be subject to exception when the actions fall within the category of "unfair competition." The true statement of a competitor's misconduct which is not connected with the bargain at hand could be characterized as competition not "according to the rules of the game." In the interest of aiding the prospective customer to deal on the merits of the product, this would be appropriate. Similarly, there are some recent indications that if the true statement is motivated solely on the intentional infliction of harm, there should be a remedy.³⁸ The basis of this claim is the "prima facie tort," a so-called "new tort" recognizing a wrong not covered by "traditional torts." In order to be actionable in this instance, the harm must result from an unmixed motive to inflict injury, and the act must be without justification.³⁹ Where there is a legitimate purpose there is no liability, and acts done in furtherance of business have been held to be for a "legitimate purpose,"⁴⁰ limiting the use of the doctrine in competitive situations.⁴¹

35. See generally, Note, *Misrepresentation of Opinion: Statement of Fact Distinguished from Statement of Opinion*, 28 B.U.L. REV. 352 (1948).

36. 3 CALLMAN, UNFAIR COMPETITION § 43.1(a) (2d ed. 1950).

37. McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir. 1939), cert. denied, 309 U.S. 684 (1940).

38. Penn-Ohio Steel Corp. v. Allis Chalmers Manufacturing Co., 8 App. Div. 2d 808, 187 N.Y.S.2d 476 (1959). The court reviewed the alleged utterance of false information which had been given to the Internal Revenue Service by the defendant. The information led to plaintiff's indictment for tax evasion. While finding that the information was not given maliciously and with intention to harm plaintiff, they stated that "usually, the utterance of a truth does not provide a basis for redress and imports no wrongdoing and consequently is not actionable, unless, as in prima facie tort, the sole motivation is the intentional infliction of harm resulting in damage." The court here cited the RESTATEMENT OF TORTS § 873 (1938), which provides that "A person who, with knowledge of its falsity, makes an untrue statement concerning another which he realizes will harm the other is liable to the other for such resulting harm as he should have realized might be caused by his statement."

39. Miller v. Kormella Corporation, 229 N.Y.S. 2d 675 (1962); Ruza v. Ruza, 146 N.Y.S. 2d 808 (1955).

40. *Id.*, Glenn v. Advertising Publications Inc., 251 F. Supp. 889 (S.D.N.Y. 1966). Defendant publisher of AD AGE magazine published an allegedly false survey of media buying influences. The statements, found true, were said to be for "mixed motives," negating "prima facie tort."

41. *But see*, Morrison v. NBC, 24 App. Div. 2d 284, 266 N.Y.S.2d 466 (1965). This case was not competitive conduct, but again recognized a remedy for the wrongful conduct of

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Falling within the category of truthful, non-actionable disparagement are a long line of cases involving notification of, or threatened action on defendant's patent, copyright or trademark. The courts recognize the right of the patentee to give such notice, absent bad faith.⁴² To avoid the element of bad faith, all that is required is that a patent actually exists and that the allegedly infringing acts have either occurred or are threatened.⁴³ For this purpose, a duly issued patent is considered presumptively valid.⁴⁴

As stated before, actionable disparagement consists of the publication of false statements of fact which tend to demean another's title in goods; the quality of the goods; the conduct of the competitor's business; or the competitor himself. A great many cases have interpreted specific acts as disparagement and certain types of conduct may be cited as representative.⁴⁵

Product Characterized as Unsafe, Unhealthy or Illegal—Examples include the statement that the use of a competitive fly-spray was "subject to government seizure" and "could be fined for selling";⁴⁶

Use of a competitive product was a violation of trademark rights and illegal.⁴⁷

Conduct or Integrity of the Business or Its Principles—Examples include printed article that bank had misposted certain checks and apparently committed a larceny;⁴⁸

Competitor's computing scale which falsely weighed meat was publicized;⁴⁹

"Barnum's statement of fifty years ago can be applied even at the present time" when applied to competitor's sale of ineffective medicine;⁵⁰

prima facie tort, stating again the requirement that the activity be without economic or social justification. The action of the network in inducing the plaintiff to perform on a rigged TV quiz show and to thus suffer damage to his academic reputation was said to be "unjustified." This notwithstanding the business advantage gained by the network—analogue to business advantage of disparaging the competitor.

42. *Glott v. Notion Accessories Inc.*, 129 F. Supp. 297 (S.D.N.Y. 1954); *Kaplan v. Helenhard Novelty Corp.*, 182 F.2d 311 (2d Cir. 1950); *Royal Die Cutting & Heat Sealing Corp. v. Duro Pen Co., Inc.*, 223 F. Supp. 384 (S.D.N.Y. 1963).

43. *Q-Tips Inc. v. Johnson & Johnson*, 108 F. Supp. 845 (D.C.N.J. 1952), *aff'd* 206 F.2d 144 (3rd Cir. 1953).

44. *Bruen v. Huff*, 100 F. Supp. 713 (W.D. Pa. 1950).

45. See generally, the exhaustive list of specific conduct, 3 CALLMAN, UNFAIR COMPETITION § 43.1(b) (2d ed. 1950).

46. *Allen Manufacturing Co. v. Smith*, 224 App. Div. 187, 229 N.Y.S. 692 (1928).

47. *Landstrom v. Thorpe*, 189 F.2d 46 (8th Cir. 1951).

48. *First National Bank of Waverly v. Winters*, 223 N.Y. 47, 121 N.E. 459 (1918).

49. *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 F. 919 (6th Cir. 1906).

50. *Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255 (8th Cir. 1926).

Movie depicting plaintiff's factory as a "white slave" waystation;⁵¹

Improper conduct in obtaining criminal actions by a non-profit organization.⁵²

Financial Difficulty or Discontinuance of Business—Examples include corporation in serious financial difficulty, lacked credit;⁵³

Plaintiff could not continue in business, lost all of its competent men;⁵⁴

Lack of Effectiveness or Poor Quality of Product—Examples include "rifle jams, wears out prematurely";⁵⁵

"I bought a home from this builder—before you buy see mine" implying that it was of poor quality;⁵⁶

Statements that newspaper was not a general newspaper and its publication was not suitable for legal notices;⁵⁷

Advertisements referring to competitor's film development—"Hurry and ruin snapshots," "Use inferior chemicals."⁵⁸

Title of Product or Other Property—Examples include assertion of lien against land.⁵⁹

Comparative advertising has provided considerable controversy. The forcefulness of a side by side, "see for yourself" type advertisement is considerable and in recent years many advertisers have been inclined to make use of this type of ad, notwithstanding the free publicity given to the competitor.⁶⁰ Because of the power of this type of advertising, a strict standard of truthfulness and use of meaningful comparisons should be required. To some extent the courts have recognized this,

51. *Merle v. Sociological Film Corp.*, 152 N.Y.S. 829 (1915).

52. *New York Society for the Suppression of Vice v. MacFadden Publication Inc.*, 260 N.Y. 167, 183 N.E. 284 (1932).

53. *Wayne Works v. Hicks Body Co.*, 115 Ind. App. 10, 55 N.E. 2d 382 (1944).

54. *Shevers Ice Cream Co. v. Polar Products Co.*, 194 N.Y.S. 44 (1924). *See also*, *Dovis v. New England RY Pub. Co.*, 203 Mass. 470, 89 N.E. 565 (1909); omission of a valid supplier from a list purporting to list all reputable suppliers.

55. *Marlin Firearms C. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902).

56. *West Willow Realty Corp. v. Taylor*, 198 N.Y.S.2d 196 (1969).

57. *La Massena v. Storm*, 62 App. Div. 150, 70 N.Y.S. 882 (1901).

58. *Cosgrove Studio and Camera Shop Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962).

59. *Cronkhite v. Chaplin*, 282 F. 579 (10th Cir. 1922).

60. *Four A's Warns of Increase in Disparaging Ads*, ADVERTISING AGE, March 24, 1969. Noting this increase, the American Association of Advertising Agencies Committee On Improving Advertising issued a policy statement condemning the practice, stating that the committee "believes advertising should present positive information in persuasive ways, using positive appeals. We are not against any and all comparisons, but it is easy for positive 'comparison' to slip over into negative 'disparagement'. The line is not always precise."

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but a certain amount of latitude is still permitted within "unfavorable comparison" of matters of opinion.

Comparative statements take many forms, but in all cases, the use of the plaintiff's name, product or description is for the purpose of either intimating that defendant's product is as good as plaintiff's or that plaintiff's is inferior. Without this there would be no purpose in drawing the comparison. Accordingly, falsely representing that your product is equivalent to the plaintiff's has been recognized as disparaging,⁶¹ and advertisements that a product was "identically the same product," when false, were held to be actionable.⁶² Merely listing the products of the plaintiff beside the defendant's was not held to imply that they were identical when the purpose was to provide size comparisons in a price list.⁶³

Side by side visual comparisons, when false, are particularly damaging, and a false store window display of both the defendant's and plaintiff's gym shorts, along with critical remarks were held to be disparaging.⁶⁴ In *O.A. Business Publications v. Davidson Publishing Co.*,⁶⁵ however, a brochure presented a photographic reproduction of pages 2 and 3 of both plaintiff's and defendant's periodical publications, with a list of questions pointing out the superiority of defendant's publication. The presentations were clearly factual, both being photocopies, but they were only two pages of multipage (40) publications and the plaintiff argued that they were not representative of his product. The court, finding no falsity, held that the advertisement was not actionable. This type of case points up the inherent limitations in the libel analysis of disparagement cases. There is no doubt that a manufacturer will be injured if samples of his product that are not representative of the whole are displayed in a derogatory comparison. A clever competitor can always find weak areas of the product which alone do not make a legitimate comparison. Yet in the search for libel, the courts have difficulty with such a truthful statement of fact.⁶⁶

61. See also, RESTATEMENT OF TORTS § 761 (1938), which recognizes the liability of one who diverts trade from a competitor by making false representations of the qualities of his goods, which are, in fact, possessed by his competitors goods.

62. *Carolina Aniline and Extract Co. v. Ray Chemical Company*, 221 N.C. 269, 20 S.E.2d 59 (1942). The court here spoke in terms of "unfair competition", rather than "disparagement".

63. *National Welding and Engineering Co. v. Hammon Precision Engineering Co.*, 165 F. Supp. 788 (N.D. Cal. 1958).

64. *Rosenberg v. J. C. Penney Co.*, 30 Cal. A.2d 609, 86 P.2d 696 (1939).

65. *O. A. Business Publications v. Davidson Publishing Co.*, 334 F.2d 432 (7th Cir. 1964).

66. Similarly, claims which are untrue, but not libelous have been held not to be actionable—e.g. "most listened to station" was held to be non-libelous and untruthfulness

Statements of comparison falsely listing the defects of plaintiff's product and the merits of defendant's have been held disparagement,⁶⁷ while comparisons of competing systems rather than specific competitors have been permitted more latitude.⁶⁸

D. Means of Disparagement

The means of the disparagement may be written or spoken, by picture or display.⁶⁹ It need not directly refer to the plaintiff or his product so long as it is reasonably understood to refer to him.⁷⁰ The various methods used have involved oral statements, signs, movies, print and broadcast ads, handbills—virtually every media.

III. REMEDIES

Injunction

Businessmen, injured by disparagement, will opt first for an early cessation of the injurious conduct on the assumption that they will do best in battling their competitors in the market place rather than the legal area. They instinctively realize that the asset known as "goodwill" is composed of years of performance for customers and of good work in the community and that it requires considerably less to destroy than to build. Accordingly, the remedy sought is frequently injunction.

American Courts have traditionally been reluctant to place prior restraints upon free speech, even when the speech was defamatory. In *Vulcan Detinning Co.*,⁷¹ the court explained that "injunction is an extraordinary remedy and where human liberty is involved the writ should be used with great caution." Similar caution was urged in *Montgomery Ward v. United Retail Employees*⁷² when constitutional

could not make it so—see *Hornell Broadcasting Corp. v. Nielson Co.*, 8 App. Div. 2d 60, 185 N.Y.S. 2d 945 (1959). This case involved two competing radio stations and the defendant had based its claim on a survey taken by the co-defendant. The statements were said not to hold plaintiff up to ridicule, scorn or contempt or impugn reputation, management or credit. Note the dicta concerning possible unfair competition and negating prima facie tort.

67. *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962).

68. *Nordlund v. Consolidated Electric Co-op.*, 289 S.W. 2d 93 (1956).

69. 3 CALLMAN, *UNFAIR COMPETITION* § 43.3 (2d ed. 1950).

70. *Id.* at § 43.2(e).

71. *Vulcan Detinning Co. v. St. Clair*, 315 Ill. 40, 145 N.E. 657 at 658.

72. 46 Ill. 38, 79 N.E.2d 46 (1948).

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rights were involved. The court cited the constitutional guaranty of free speech and right of trial by jury, and stated that the acts were of defamation, not disparagement. Thus there could be no injunctive relief since such relief would be a prior restraint upon free speech.

This reluctance to apply injunctive relief has been followed by the New York courts and in *Mauger v. Dick*⁷³ it was succinctly stated that equity does not extend to libel or slander. A similar result was reached in *Kidd v. Horry*⁷⁴ where the court quoted from Malins, V.C. in *Thornley's Castle-Food Co. v. Masson*⁷⁵:

I think these cases at law establish this doctrine: that where one man publishes that which is injurious to another in his trade or business, that publication is actionable, and, being actionable, will be stayed by injunction, because it is a wrong which ought not be repeated.

They announced that no well-considered judgement of this country had introduced this new branch of equity and refused to do so.

This same result was reached by other jurisdictions.⁷⁶ The often cited case of *Marlin Firearms Co. v. Shields*⁷⁷ was decided in 1902 to further reinforce the rule. In this case the plaintiff was a manufacturer of a repeating rifle who had for some time advertised its rifle in defendant's magazine. When defendant raised his rates, plaintiff withdrew its advertising. Thereupon defendant began to publish spurious letters purporting to have been volunteered by readers. The letters were derogatory of the rifle, charging that it would fire prematurely and was inferior to other rifles of similar price. The lower court in reviewing the case decided in favor of the plaintiff, granting an injunction on the grounds that although equity may not restrain a libel where the attack is purely personal, like an attack on character or reputation, it could restrain a publication to protect the rights of property when such publication would inflict irreparable harm and when an action at law was inadequate. On reversal the court refused equity jurisdiction when the party had an adequate remedy at law, even though the remedy might be worthless because of the special damage requirements—citing the constitutional guaranty of free-speech and the need to have libel decided by a jury.

73. 55 How. Pr. 132 (1878).

74. 28 F. 773 (1886).

75. 14 Ch. Div. 763.

76. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. R. 310 (1873); *Marx & Haas-Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S.W. 391 (1901).

77. 171 N.Y. 384, 64 N.E. 163 (1902).

This strict approach was not followed in *Davis v. New England RY Pub. Co.*⁷⁸ It was a case involving competitors and the court characterized the competitive conduct as a "false and misleading publication interfering with business, not technically a libel," recognizing the embryo "unfair competition" action.

The New York court in *Shevers Ice Cream Co. v. Polar Products*⁷⁹ followed a similar analysis granting injunction and accounting for profits. The defendant was in a competitive capacity and had made statements that plaintiff "couldn't continue in business" and "wasn't honest in dealing with customers." Then in 1928 the New York court heard *Allen Mfg. Co. v. Smith*⁸⁰, another competitive case with the defendant making false statements and writings regarding plaintiff's product. Citing Dean Pound's famous quotation,⁸¹ they distinguished *Marlin* as libel, rather than unfair competition, and the injunction was granted. Here the court analyzed the case as "unfair competition" rather than simply a libel as in *Marlin*. The case reinforced the growing willingness of equity to provide a remedy, provided there was competition and damage to property.

In *Black & Yates, Inc. v. Mahogany Assn. Inc.*⁸² the circuit court recognized the authority of the federal courts to grant the remedy of injunction when an unfair competition is perpetrated. In its review, the court compared the relevant domestic law to relevant foreign law. Again the case was a competitive case with the disparaging statements having been made continuously and systematically. The Court distinguished the "pure trade libel" from the trade libel which was accompanied by the usual acts of unfair competition such as "passing-off" and trademark infringement. Constrained by the Delaware law which did not permit injunctive relief for "pure trade libel," the case was decided on the broader unfair competition issue.

78. 203 Mass. 470, 89 N.E. 565 (1909) case involving the omission of plaintiff express company from a list of "reputable" local expresses published by defendant.

79. *Shevers Ice Cream Co. v. Polar Products Co.*, 194 N.Y.S. 44 (1921).

80. 224 App. Div., 187 N.Y. (1928). Competitive products were "So-Bos-So" cattle fly spray manufactured by the plaintiff and "E-Z-Bos" by the defendant. Defendants' statements included "they could be fined by selling" and "subject to government seizure." See also *Old Investors v. Jenkins*, 232 N.Y.S. 245 (1928), *aff'd* 225 App. Div. 860, 233 N.Y.S. 845 (1929).

81. "In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion." 29 HARV. L.R. 640, 668.

82. 129 F.2d 226 (3d Cir. 1941). In this case the defendants were a trade group of mahogany dealers and had called the plaintiffs (dealers in Philippine Mahogany) unethical and deceptive.

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A 1946 New York case involving a radio show which omitted the plaintiff's song from its list of the top ten, resulted in no injunction. *Marlin* was cited as the rule, albeit criticized.⁸³ Later cases appear to follow the distinction between competitive and non-competitive cases, granting the remedy of injunction in the former only when there are compelling circumstances.⁸⁴ A general reluctance has been exhibited to invoke the remedy absent some other ground such as breach of trust, coercion or conspiracy.⁸⁵ Pennsylvania follows the doctrine of *Kidd v. Horry*⁸⁶ with some indication that if the libel is so clear as to be conceded, or already established by the verdict of a jury, equity may invoke the remedy of injunction.⁸⁷ The courts still have a great deal of movement to reach the point where injunction is an adequate remedy.⁸⁸ The analysis as "unfair competition," comparing disparagement to "passing-off" seems logical, but has been slow in developing. There is little difference *in effect* between the unfair and disparaging comparison, and the act of selling goods as those of another since each causes an economic injury. Both acts should be termed "unfair competition".

B. Damages

The plaintiff seeking monetary damages resulting from a disparagement will immediately confront the problem of proving the damages. The established rule is that in disparagement cases, absent libel per se, the plaintiff must prove "special damages." This rule has its basis in the analogy between trade libel and defamation and requires that actual pecuniary loss be proven and shown to be the direct and natural consequence of the defamatory communication. The proof required is

83. *Advance Music Corp. v. Am. Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946), *rev'd*, 268 App. Div. 707, 53 N.Y.S.2d 337 following a "prima facie tort" reasoning, the court stated that the intentional inflection of harm required a justification.

84. *Shutzman & Shutzman v. News Syndicate Co., Inc.*, 60 Misc. 2d 827 (1969), where law partners sought to enjoin the publication of a book purporting to tell how to protect your legal rights and implying that lawyers were not trustworthy—no injunction. The court said that "the drastic remedy of injunction should not be granted . . . in the absence of compelling circumstances." *Compare West Willow Realty Corp. v. Taylor*, 198 N.Y.S.2d 196, where injunction was granted against a home owner picketing the construction firm which had sold him a home, when he had a suit pending in the matter.

85. *Robert E. Hicks Corp. v. National Salesman's Training Association*, 19 F.2d 963 (7th Cir. 1927).

86. 28 F. 773 (1886). *See also, W. R. Oyer Inc. v. Waynesboro Industrial Development Corp.*, 6 Adams L.J. 127 (Pa. Com. Pl 1964).

87. *Baltimore Life Insurance Co. v. Gleisner*, 202 Pa. 386, 51 A. 1024 (1902). Statements of plaintiff insurance company's competitor that plaintiff was "going out of the sick benefits business" not clearly libelous. *But see, Kershes v. Verbieues*, 36 D&E 499 (1939), where a neighbor's continuous loud and rancorous slander was enjoined.

88. A fuller discussion of the Uniform Deceptive Table Practices Act is noted later.

specification of both the particular customers and the property involved in the prospective sales lost as a result of the defendant's statements.⁸⁹ The result of this requirement is that the more sophisticated the business, the more difficult it is to satisfy the damage proof requirements.⁹⁰ As the business increases in size and complexity, and if the plaintiff is a national or regional seller, it becomes more and more difficult for him to compile a list of lost customers. In contrast to the small storekeeper, he often does not note the loss of customers immediately, nor recall their name or their reasons for terminating their business with him.

An exception to this harsh rule has been for disparagement which amounts to "libel per se." Again using the analogy to defamation, the courts have reasoned that certain statements, like libel or slander per se are clearly financially injurious and require no proof of damages—damages may be inferred. This concept has been applied where the words "directly impeach the integrity, knowledge, skill, diligence or credit" of the plaintiff.⁹¹ Similarly, a plaintiff who can show that the defamation affected him personally may establish libel per se.

The characterization of an act as libel per se has been a difficult question for the courts and many conflicting holdings have resulted from similar factual situations.⁹² There is general agreement that mere disparagement of the manufacturer's goods will not constitute libel per se.⁹³ But, if the statement touches the plaintiff in his "office, profession or trade" a different result is reached.⁹⁴

The basis of this rule is that if the criticism is not only of the product but also such that the manufacturer is accused of misrepresenting the product or using fraud or deceit in its marketing, it is an attack upon his personality. A corporation, as well as an individual, is said to be vested with a "personality" which may be libeled,⁹⁵ as can a non-profit corporation.⁹⁶

It is difficult to reconcile the cases or provide more than the most

89. *Hunt Oil Co. v. Berry*, 227 Misc. 234, 86 So.2d 7 (1956).

90. See generally, Note, *Trade Libel and Its Special Damage Requirement* 17 *HAST. L.J.* 394 (1965).

91. *Marlin Firearms Co. v. Shield*, 171 N.Y. 384, 64 N.E. 163 (1902).

92. See generally, 3 *CALLMAN UNFAIR COMPETITION* § 43.1 (2d ed. 1950).

93. *Le Massena v. Storm*, 62 App. Div. 150, 70 N.Y.S. 882 (1901), holding that statements that the *Wall Street Journal* was not a "general newspaper" and that advertisements in it were not acceptable to the courts was critical of the product only—not libel per se. Neither would statements such as "the dinner," "was wretched" and "served in a manner that hungry barbarians might object" be libel per se.

94. *Id.*

95. *Cosgrove Studio and Camera Shop Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962).

96. *New York Society for the Suppression of Vice v. MacFadden Publications Inc.*, 260 N.Y. 167, 183 N.E. 284 (1932).

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general guidelines, but an examination of some of the cases provides some guidance. In the leading case of *Marlin Firearms*⁹⁷ the derogatory statements charging that plaintiff's rifle was defective and of low quality were considered disparagement of the product only. The court stated that the disparagements did not charge plaintiff with deceit in vending or want of skill in manufacturing—they did not “directly impeach the integrity, knowledge, skill, diligence or credit of the plaintiff, the words are not actionable unless special damages are proved.” The reader may find difficulty in reaching the conclusion that one accused of selling a dangerous instrumentality such as a defective rifle is not suffering an attack against his integrity. Similarly in *Erlich v. Etner*,⁹⁸ the charge that a dealer in kosher meats dealt in non-kosher products was not held to be libel per se. Contrast this with a case involving a side by side comparison of gym shorts with a claim that the plaintiff's shorts lost 25% in weight after laundering, thereby depicting them as wrinkled and shoddy.⁹⁹ The court found that the actions went further than to criticize the goods and imputed fraud and deception to the plaintiff-seller. They were held to be libel per se.

Statements referring to the plaintiff's method of doing business when they are libelous and adversely affect him in such trade or business have been considered libel per se. For example, calling the company president “a cheap chiseler and crook” whose company had “short weighted customers”¹⁰⁰ was libel per se, as was the charging of improper activities by a non-profit corporation.¹⁰¹ A different result was reached when the mentioning of the name of plaintiff's corporation in an article entitled “Don't Fall for Mail Frauds.”¹⁰² Nor was the article referring to plaintiff's drug as “merely sugar and bran” and stating that “P.T. Barnum's statement of 50 years ago can be applied even at the present time.” The courts have generally recognized that the imputation of dealing in goods which could cause physical injury due to their defects, is libel per se and there are numerous examples of cases where the libel has been that the shopkeeper dealt in poisonous foods.¹⁰³

97. *Marlin Firearms Co. v. Shield*, 171 N.Y. 384, 64 N.E. 163 (1902).

98. 224 Cal. App. 2d 69, 36 Cal. Rptr. 256 (1964).

99. *Rosenberg v. J. C. Penney Co.*, 30 Cal. App. 2d 609, 86 P.2d 602 (1939).

100. *Texas Plastics v. Roto-Lith, Ltd.*, 250 F.2d 844 (5th Cir. 1958).

101. *New York Society for the Suppression of Vice v. MacFadden Publications Inc.*, 260 N.Y. 167, 183 N.E. 284 (1932).

102. *Drug Research Corp. v. Curtis Publishing Co.*, 166 N.E.2d 319 (1960). The fact situation involved an article on reducing drugs which listed the plaintiff's company as an example of the fraud.

103. *Mowry v. Raabe*, 89 Cal. 606, 27 P. 157 (1891); *Brooks v. Harrison*, 91 N.Y. 83 (1883); *Panster v. Wasserman*, 190 App. Div. 827, 180 N.Y.S. 718 (1920).

The Pennsylvania court, in the case of *Cosgrove Studio and Camera Shop Inc. v. Pane*,¹⁰⁴ considered the competitive advertising of the defendant who replied to the plaintiff-competitor's offer to provide a new roll of film free for each brought in for development. An accompanying ad implied that plaintiff used inferior chemicals, blurred prints and ruined snapshots.¹⁰⁵ The court found the statements to be libel per se because of their imputation of want of integrity but continued the recognition of the special damage requirement in cases other than libel per se. In the District Court case of *Testings Systems Inc. v. Magnaflux*¹⁰⁶ the court could not find libel per se in competitive claims that plaintiff's product was only 40% as effective and the "government is throwing them out," finding that the disparagement dealt only with the product. In considering the strict special damage rule the court noted its harshness, but was compelled by *Cosgrove* to continue its application.

The hardships worked by the special damage requirement have led the advocates for the injured plaintiffs to try approaches alternative to libel. One approach has been the so-called "prima facie tort" discussed previously. In *Morrison v. NBC*,¹⁰⁷ general damages were held to be sufficient, but this was a non-competitive case and involved an act (rigging a T.V. show) without social or business justification. A later district court case in the same jurisdiction involving a case of competitive disparagement did not get to the damage issue, but noted that New York law was unclear as to whether proof of special damages would be required.¹⁰⁸ The difficulties in applying the "prima facie tort" to competitive cases (because of the purpose of furtherance of business rather than pure malice) probably serve to limit the use of the doctrine in disparagement cases.

In summary, it must be observed that the oft-criticized special damage rule is still generally the law in this country. Although there have been limited incursions into it,¹⁰⁹ the rule has lost none of its vitality and it appears doubtful that continued assault on the basis of libel will change this.

104. 408 Pa. 314, 182 A.2d 751 (1962).

105. *Id.*

106. 251 F. Supp. 286 (E.D. Pa. 1966).

107. 24 App. Div. 284, 266 N.Y.S. 2d 466 (1965); a non-competitive case—damages to reputation from appearing on a rigged TV show.

108. *Glenn v. Advertising Publications Inc.*, 251 F. Supp. 889 (S.D.N.Y. 1966).

109. *Pendleton v. Time, Inc.*, 339 Ill. App. 188, 89 N.E.2d 435 (1949). Plaintiff had painted the first portrait of Harry S. Truman, and defendant credited it to someone else.

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IV. STATUTORY REGULATION

An act of disparagement may come within the regulatory activities of the Federal Trade Commission and is covered by the Uniform Deceptive Trade Practices Act where adopted.¹¹⁰ Other acts, such as the "Printers Ink" statutes based on criminal sanctions have had very little use.

A. Federal Trade Commission

The FTC, as one of the federal bodies dealing with business practices, has the duty of enforcing the Federal Trade Commission Act. The Act provides the basic governmental regulation of advertising and other trade practices. Section 5(a)(1) of the act prohibits "unfair and deceptive acts or practices in commerce"¹¹¹ and these acts and practices have been broadly defined to include advertising, labeling and other communications, among the broad range of business practices. The commission, in its reviewing of practices has closely reviewed comparisons and disparagement for deception. Under the act it has investigatory powers and through its "complaint" and "cease and desist" order proceedings may obtain an order with injunctive powers. There is a right of appeal to a United States Court of Appeals. Upon the violation of a final order, penalties of up to \$5,000 may be imposed for each violation and each day of continuing violation may be deemed a separate offense.¹¹²

False or deceptive comparisons of a product with that of another have been held unfair under the act, as have disparagements. In interpreting the act, the commission strives for truth as the consumer would view it.¹¹³ Unhampered by the libel analogy followed by common-law, the test has been whether the statements have a tendency to mislead and deceive a substantial number of persons and induce them to buy goods upon that basis.¹¹⁴

The FTC has found disparagement to be an unfair practice in most of the same types of conduct as are similarly treated under the common

110. See, *infra* note 127.

111. 15 USC 41, "unfair methods of competition, in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

112. CCH TRADE REG. REP. ¶ 7500.

113. Baum, *Truthful Disparagement under the Federal Trade Commission Act*, 51 Trademark Rptr. 1081 (1961).

114. *Perma-Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941).

law. False statements that a competitor had gone out of business and was in the hands of a finance company were unfair.¹¹⁵ Statements made to prospective customers by salesmen and distributors, falsely stating that a competitive product would "crack and stick" and that it would not be "passed by the engineers" were the subject of a cease and desist order.¹¹⁶ In several cases false statements made by stainless steel manufacturers that an aluminum type of utensil would cause various physical ailments were held unfair.¹¹⁷ These types of statements, utilizing fear in the sale of products have been considered particularly closely.¹¹⁸ The statement need not be continuous or extend over a long period of time to support an unfair competition charge—a single act is enough.¹¹⁹ Statements made by salesmen, as well as by officers, are covered by the Act and the company is responsible for them.¹²⁰

Comparisons to other products, even if not named, are unfair practices if false and deceptive. The deception may be by innuendo, such as making a true statement of fact which leads the reader to believe that another fact is necessarily true when it may not be true. In the case of *National Bakers Services Inc. v. FTC*¹²¹ the producer of Hollywood Bread had advertised that its bread was low calorie food; lower in calories than ordinary breads and had "up to 42% more protein." In fact, a slice of Hollywood Bread had the same amount of protein as a slice of "ordinary" bread, the greater amount of protein occurred only if an equal quantity of bread was compared. In upholding the FTC, the court stated that the meaning of an ad is a question of fact and an important criterion in determining its meaning is the "net impression that it is likely to make on the general populace."

The growth of popularity of television and the ingenuity of advertising agencies in its use led to a whole line of comparison/disparagement cases in this new medium. The FTC recognizes that the visual

115. *Majestic China et al.*, 38 F.T.C. 786 (1939).

116. *Philip Carey Mfg. Co. v. F.T.C.*, 29 F.2d 49 (6th Cir. 1928).

117. *Steelco Stainless Steel Inc. v. F.T.C.*, 187 F.2d 693 (7th Cir. 1951).

118. *Id.*; In the Matter of Eversharp, 57 F.T.C., 841 (1960), consent decree against a TV commercial implying that old style razors were dangerous, by a demonstration of cutting a boxing glove. *But see*, *International Parts Corporation v. FTC*, 133 F.2d 883 (7th Cir. 1943), where the advertisement was "protect yourself against leaking carbon monoxide gas, be sure your muffler is made with continuous electric-welded seams through-out—not locked, crimped or spot welded"—upheld, despite the lack of evidence that the electric welded muffler has less danger of leakage. This case stands out for its permissive allowance of "scare" copy writing.

119. *Philip Carey Mfg. Co. v. FTC*, 29 F.2d 49 (6th Cir. 1928); *Fox Film Corp. v. FTC*, 296 F. 353 (2nd Cir. 1924)—distinguishes the Sherman Act requirements of general practice.

120. *Perma Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941); *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3rd Cir. 1941).

121. 329 F.2d 365 (7th Cir. 1964).

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comparison has great power. In a television advertisement for razors and blades a comparison was used very effectively.¹²² The advertisement showed a boxer (a heavyweight champion) holding two razors in his gloved hands—a well known sportscaster looked on. The boxer performed a demonstration by pulling the razors, each in turn, across the gloves, severely cutting the one glove with the “old style razor, while the Shick caused no damage.” The FTC asserted that the demonstration was disparaging of the competitive razor because it portrayed a danger that was not actual since the staged condition was not actual. The ad had the capacity to unduly alarm and frighten prospective purchasers of competitive razors. A consent order was accepted in the case and the FTC’s intent to require relevant demonstrations was made clear.

Another consent order required the cessation of a demonstration in which a skindiver with a heavy beard dove into the water and demonstrated the ability of the advertiser’s shaving cream to maintain its lather while others dissipated under water. The FTC asserted that by cupping his hands only while using the advertiser’s product, the skindiver presented an unfair demonstration.¹²³

Next the FTC took on the *bete noir* of television advertising—the “mock-up.” The photographic deficiencies of television technology posed some problems for the advertiser in displaying his product as it really should appear. Very often the televised product looked quite different from the actual product, i.e. the product was not one which would retain its characteristics under filming or televising conditions. The solution was the “mock-up,” a simulation of the product designed to show the actual attributes of the product on the TV screen. The Commission was adamant in its opposition to these displays which they felt to be inherently deceptive. One of the Commission’s early attacks was directed at a television demonstration of pressurized shaving creams. The competitive shaving cream was actually a mocked-up “special formula.” The cream promptly dried upon release. In fact, there were several other shaving creams which would perform as well as the advertiser’s product, and the use of the mock-up was the cause of the poor performance of the competitive creams. While upholding mock-ups as proper when the only untruth is the mock-up itself, the court

122. In the Matter of Eversharp, 57 FTC 841 (1960). It should be noted that a consent order is not an admission of guilt, but rather a procedure for settling the complaint.

123. In the Matter of the Mennen Co., 58 FTC 675 (1960). See also, In the Matter of Standard Brands Inc., 56 FTC 1488 (1960) moisture drops (“flavor gems”)—actually drops of non-volatile liquid applied for the demonstration—were applied to the advertiser’s margarine, but not to the competitive brand.

held the particular demonstration to be misleading. Circuit Judge Wisdom stated that¹²⁴

Everyone knows that on TV all that glitters is not gold. On a black and white screen, white looks grey and blue looks white: the lily must be painted. Coffee looks like mud. Real ice cream melts much more quickly than that firm but fake sundae. The plain fact is, except by props and mock-ups some objects cannot be shown on television as the viewer, in his mind's eye, knows the essence of the objects.

At the time the *Carter* case was decided, the FTC was petitioning the Supreme Court in another "mock-up" case—*FTC v. Colgate Palmolive Co.*¹²⁵ This case was not a comparison, but rather the demonstration of a shaving cream which softened "sandpaper" so that it could be shaved within the space of the few minutes depicted in the ad. In fact, the "sandpaper" was a plexi-glass mock-up, and while the shaving cream could soften actual sandpaper so as to permit it to be shaved, it required soaking for 80 minutes. Sandpaper could not be used on TV, because it transmitted as the likeness of plain colored paper. The demonstration was held to be misleading because of the undisclosed use of the plexi-glass mock-up used in a manner so as to "prove" the product claim. But in discussing mock-ups the Court stated that they were not illegal per se, but only when presented as objective proof of the product claim made. The example given was the use of mashed potatoes to depict ice cream. There was no deception if shown only to indicate the product. But if shown to demonstrate the rich texture of ice cream, it is misleading. This case stands as the law today on the use of mock-ups in advertising.

The FTC in dealing with disparagement has generally exhibited a well reasoned approach which works to the benefit of the scrupulous advertiser and the public. It is deemed to have expertise in dealing with advertising matters,¹²⁶ and its findings are not reversed unless they are based upon an improper construction of the law or are unsupported by the evidence.

An FTC review of an alleged disparagement will provide an effective remedy for the injured businessman. There is no method, however, for the businessman to assure such a review. The FTC may act upon consumer or business complaints of unfair practices. There is no assur-

124. *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963).

125. 380 U.S. 374 (1964).

126. *FTC v. Keppel*, 291 U.S. 304 (1934).

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ance that the complaints will be acted upon, particularly if the act does not have wide effect on the public. Also, the acts, in order to be subject to FTC jurisdiction, must involve interstate commerce.

B. *Uniform Deceptive Trade Practices Act*

The Uniform Act was adopted for the purpose of providing statutory recognition to the developing law of "unfair competition." The act deals principally with "passing-off" (deception of the consumer as to source of product) and commercial disparagement. Slowly gaining in acceptance, the act, or a revised version of it, has been adopted in twelve states.¹²⁷

Provisions of the original act relating to disparagement provide that it is a deceptive practice to "[disparage] the goods, services or business of another by false or misleading representation of fact."¹²⁸ The revised act as adopted in some states omits "misleading representation." It provides that a person likely to be damaged by the deceptive trade practice may be granted an injunction, without the proof of loss of profits or monetary damages, and also provides that costs and/or attorney's fees may be assessed.

In providing that injunctive relief may be granted, the act clarifies the existing law in some of the states which have adapted it and also makes clear that "special damages" need not be proven in order to obtain the injunction. Presumably equity's requirement of proving irreparable harm by general proof remains in force. The act does not provide for relief from disparaging statements of opinion.¹²⁹ Nor does the amended version cover "misleading" statements of fact.

C. *Other Proposals*

The American Advertising Federation has drafted a Model State Deceptive Practices Act.¹³⁰ The proposed statute follows the language of the Federal Trade Commission Act, by declaring that "False, mis-

127. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS at 193 (1968). The act as approved in 1964 has been adopted in Connecticut, Delaware, Illinois, Oklahoma; revised 1966, adopted in Colorado, Florida, Georgia, Hawaii, Idaho, Nebraska, New Mexico and Ohio.

128. See, Ill. Smith-Hurd Annotated Statutes, § 121½ Sales § 11.

129. See generally, Note, *Disparagement Under the Uniform Deceptive Practices Act*, 51 Iowa L. Rev. 1066 (1966), and 56 Trademark Rptr. 911 (1966).

130. ADVERTISING AGE, November 25, 1968 at 26; see also, *AAF False Ad Statute Praised at FTC Probe*, November 18, 1968 at 2.

leading or deceptive acts or practices in the conduct of any trade or commerce are unlawful." It further authorizes the state attorney general to enforce the act by granting investigatory powers, and procedures for the issuance of an injunction or acceptance of voluntary compliance. The substantive law in the interpretation of "false, misleading or deceptive" would be tied to the interpretations of the FTC and the Federal courts in interpreting Section 5(a)(1) of the FTC act¹³¹ as amended.

This type of act has been recommended by the FTC since 1966. The essentials of the FTC proposal include enforcement by the State Attorney General and guidance on the interpretation of the act provided by the FTC and Federal Court decisions. A similar act was enacted in New Jersey in 1960.¹³² The enforcement of the act by the Attorney General places a victim of disparagement in the position of being able to register a complaint to the public official, but unable to invoke the statute himself as he can under the Uniform Deceptive Trade Practices Act. Proposed changes to the draft suggested by the Council of State Governments would amend this.¹³³ Individuals who were injured by the unlawful acts could institute suits for the recovery of their own damages and class actions for losses by others. While primarily intended to give a remedy to aggrieved consumers, the language is broad enough to permit a suit by a competitor injured by false and misleading disparagement.

V. CONCLUSION

Practical remedies for the businessmen who have suffered a disparagement are still not generally available. Common law actions for injunction are hampered by the reluctance of the courts to restrain free speech and by the lingering association with common law defamation. Actions for damages are limited by the special damage requirement. The FTC has taken an effective and pragmatic approach when it has dealt with disparagement, but its jurisdiction is limited and it is not necessarily responsive to individual wrongs. The Uniform Deceptive Trade Practices Act, while providing for injunctive relief based on actions which may be instituted by the individual, have not been widely adopted nor do they have a prohibition in the amended version against misleading statements that are disparaging. Also the interpretation of

131. 15 U.S.C. 45(a)(1).

132. 56 N.J. Stat. Ann. 8-2.

133. Suggested State Legislation for 1970.

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what constitutes "disparagement" may develop upon quite disparate lines in different jurisdictions.

A combination of the practical approach of the FTC in the determination of actionable disparagement, and the Uniform Act's provisions for institution of individual actions and injunctive relief is needed. The model act as proposed by the A.A.F. and FTC includes provisions for having the state courts guided by FTC and Federal Court decisions on what constitutes actionable disparagement. This would provide uniformity, and would substitute the FTC's expertise for present state court analogies to defamation. Proposed provisions for private suits should be written to include the right of the business which has been disparaged to bring an action under the act. It is hoped that this type of model act will achieve the wide acceptance needed to fill this void in the law.