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Corrective Advertising: Panacea Or Punishment

Although corrective advertising has been previously imposed by the Federal Trade Commission through consent orders,¹ the Commission's power to require corrective advertising as a remedy for allegedly deceptive advertising was first challenged in the courts only recently in *Warner-Lambert Co. v. FTC*.² In *Warner-Lambert*, the D.C. Circuit held that although the Commission could not require an advertiser, in the absence of bad faith, to include statements in future advertising which might serve to embarrass it,³ corrective advertising was a permissible tool to be used under the authority of the Federal Trade Commission Act⁴ where the disclosure's content would prevent future consumer deception.

This comment will explore the legality and use of corrective advertising as an FTC remedy for deceptive advertising. It is suggested that the Commission has transcended the bounds of its statutory power by ordering corrective advertising, and that imposition of corrective disclosure requirements violates an advertiser's constitutional rights.

1. Consent orders are a means by which an advertiser can limit or avoid costly litigation by accepting the findings of the Federal Trade Commission and agreeing to the remedy the Commission suggests. See notes 31-35 and accompanying text *infra*. See also *Amstar Corp.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,356 (manufacturer of certain brands of sugar consented to include in advertising for one year that its sugar was not a special source of energy or strength); *Ocean Spray Cranberries, Inc.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,981 (advertiser consented to run one advertisement in every four for one year with the disclosure that the "food energy" referred to in past advertising was supplied only by the product's caloric content).

2. 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575, 1576 (1978) (where it was shown that prior advertising of mouthwash was deceptive in that it stated erroneously that product was effective for preventing colds and sore throats and alleviating their symptoms, corrective advertising was a permissible remedy). Previously, corrective advertising had been mandated through consent orders. See notes 31-35 and accompanying text *infra*.

3. 562 F.2d at 763. The court stated that the FTC had ordered the following disclosure: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." *Id.* The D.C. Circuit affirmed the use of the disclosure minus the introductory phrase "Contrary to prior advertising," holding that if its purpose was to attract attention to the disclosure, it was made redundant by the other terms of the order. If its inclusion was to humiliate the advertiser, it was uncalled for in the absence of proof of deliberate deception. *Id.* See notes 46-47 and accompanying text *infra*.

4. 15 U.S.C. § 45 (1970). See notes 5-12 and accompanying text *infra*.

I. THE FEDERAL TRADE COMMISSION

The Federal Trade Commission, created by Congressional act in 1914,⁵ was first established to aid federal regulation of business,⁶ but was not given express power to regulate advertising at the time of its creation. Section 5 of the Federal Trade Commission Act⁷ declared unfair methods of competition in commerce unlawful, and the Supreme Court imposed a strict interpretation on this section: the only type of advertising certain to be subject to Commission sanctions was that which harmed free competition.⁸ The Court later expanded its position when it held that competitive methods which harmed consumers were themselves unfair.⁹ This stance was legislatively sanctioned in 1938 by the Wheeler-Lea amendment to the Federal Trade Commission Act, which extended the Commission's jurisdiction to include prohibition of acts in commerce deemed unfair or deceptive.¹⁰ False advertising was described as a deceptive practice.¹¹ Jurisdiction was expanded again in 1975 to encompass acts both in and affecting commerce.¹²

Authority to impose a cease and desist order is the only power

5. Ch. 311, § 5, 38 Stat. 717 (1914).

6. See Note, *The Limits of FTC Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496, 506 (1972) [hereinafter cited as *Limits of FTC Power*].

7. Ch. 311, § 5, 38 Stat. 717 (1914).

8. See *FTC v. Raladam Co.*, 283 U.S. 643 (1931) (no cease and desist order permitted under Section 5 where no unfair competition proven).

9. *FTC v. R.F. Keppel and Brother, Inc.*, 291 U.S. 304 (1934) (candy packaged so that price paid or amount received by purchaser was found to be uncompetitive and disadvantageous to the public, particularly since candy was inferior in size and quality).

10. Wheeler-Lea Act, Ch. 49, 52 Stat. 111 (1938). The Wheeler-Lea Amendment added a phrase so that Section 5 of the FTC Act read: "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." (emphasis supplied) *Id.*

11. Wheeler-Lea Act, Ch. 49, § 4, 52 Stat. 111, 114 (1938). The new section read:

5(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title.

15 U.S.C. § 52 (1970).

12. 15 U.S.C. § 45(a) (Supp. IV 1974) amending 15 U.S.C. § 45(a) (1970).

expressly granted to the Commission to remedy a Section 5 violation.¹³ The Commission found this authority to be ineffectual, since the time between the initial issuance of a complaint and the final imposition of the cease and desist order could take years if the advertiser decided to resist the order. This would allow the advertiser to continue his advertising campaign, including the alleged deception, until the litigation had ended, and then, once a cease and desist order was issued, he would merely be forced to discontinue the deception.¹⁴

Realizing the deficiency in its express authority, the FTC sought to find better methods for regulating deceptive advertising. One method was to require affirmative disclosure in certain advertisements run subsequent to issuance of cease and desist orders.¹⁵ This was at first resisted by the courts, which again strictly interpreted the Commission's power as other courts had when the FTC Act was first enacted.¹⁶ In *Alberly v. FTC*,¹⁷ for example, the D.C. Circuit held that the powers granted to the Commission by the FTC Act permitted it to act to prevent false representations by forbidding further publication of deceptive advertising,¹⁸ but that the FTC exceeded its authority when it attempted to impose affirmative dis-

13. 15 U.S.C. § 45(b) (1970). Once the FTC determines that a person or business is using an unfair or deceptive advertising or sales practice, it may seek an order "requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." *Id.*

14. See Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693, 697-98 (1976) [hereinafter cited as Cornfeld]; Comment, *The Federal Trade Commission and the Corrective Advertising Order*, 6 U.S.F.L. REV. 367, 379 (1972) [hereinafter cited as *Corrective Advertising Order*].

15. Where an advertisement appears deceptive because of a failure to state a material fact rather than because of the inclusion of falsehoods, the Federal Trade Commission has required the advertiser to include the omitted facts in future advertisements. This affirmative disclosure differs from corrective advertising in that an advertisement containing a corrective disclosure is not itself deceptive to the consumer if the correction is deleted, whereas the affirmative disclosure is necessary to prevent the advertisement from being misleading *per se*. See *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir. 1960) *cert. denied*, 364 U.S. 827 (1960) (affirmative disclosure ordered where advertisements for products to cure baldness failed to state that they had no effect on male pattern baldness which accounts for 90-95% of all baldness). A similar order was issued in *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960). See also Cornfeld, *supra* note 14, at 706.

16. See note 8 and accompanying text *supra*.

17. *Alberly v. FTC*, 182 F.2d 36 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950) (where drug advertised as an aid for relief of tiredness was only helpful for tiredness brought on by iron deficiency anemia, FTC was only permitted to issue cease and desist order against deception but not to order disclosure of omitted fact).

18. This would be accomplished by issuing a cease and desist order. See note 31 *infra*.

closure in future advertising,¹⁹ at least in those instances where it had not proven that failure to state a product's limitations would in itself be misleading.²⁰

In subsequent decisions, the courts granted broader scope to the Commission's power, but, rather than overruling *Alberty*, found in all cases in which they determined affirmative disclosure to be justified that without the disclosure the advertisements would be misleading.²¹ *Alberty* has even been interpreted as having given judicial approval to enforcement of affirmative disclosure, by expressing the standard that disclosure may be imposed where an advertisement would be misleading without the inclusion of additional information.²²

Thus, in order to halt current and prevent future deception, the Commission has adopted powers beyond the express authority granted to it by the Federal Trade Commission to issue cease and desist orders granted to it by the Federal Trade Commission Act.²³ The Commission faced the future problem, however, of what could be done in those instances where an advertiser had deceptively promoted its product for a long period of time, and where there appeared to be evidence that an advertisement's false representations

19. 182 F.2d at 39. An administrative agency has only those powers conferred upon it legislatively. *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974) (coast guard commandant had no power to suspend pilot's federal license). See also *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961) (CAB attempted to change certificate issued to airline but could not when directly opposed to Congressional mandate); *Peters v. Hobby*, 349 U.S. 331 (1955) (Civil Service Commission's act held abuse of discretion by unwarranted assumption of power).

20. 182 F.2d at 39.

21. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 490 (1964). See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (affirmative disclosure upheld where product Geritol was only effective in reducing tiredness if person suffered from iron deficiency anemia); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (affirmative disclosure upheld where product to stop bedwetting was not effective where cause was organic defect or disease).

22. *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18, 23 (5th Cir. 1960) (affirmative disclosure ordered where advertisements for products to cure baldness failed to state that they had no effect on male pattern baldness, which accounts for approximately 95% of all baldness).

23. As long as a remedy could be considered reasonably related to the problem, it would be upheld by a court. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (advertisements stopped where advertiser's use of plexiglass with sand coating to represent sandpaper in television ad found deceptive); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946) (name of material used in coat found deceptive because appeared to mean valuable fiber used which was not; name change required). See also *Corrective Advertising Order*, *supra* note 14, at 378-79.

were remembered by the consumer long after the deception had ceased.²⁴ Affirmative disclosure would only be effective where advertising was to continue in the future. The question remained: what, if anything, could be done to remedy past deception?

II. INTRODUCTION OF CORRECTIVE ADVERTISING

The idea of corrective advertising was first presented to the Federal Trade Commission by Students Opposing Unfair Practices, Inc. (SOUP), a group of law students concerned about consumer protection, who filed a petition to intervene in the Commission's action against the Campbell Soup Company.²⁵ The Commission did not permit SOUP to intervene nor did it require corrective advertising by Campbell Soup.²⁶ It did, however, assert in dicta its authority to impose corrective advertising in the future where the situation merited a stronger remedy than traditional cease and desist or affirmative disclosure orders.²⁷

Soon after, the Commission attempted to use the new remedy by issuing a number of complaints against manufacturers whose advertising campaigns had contained alleged deceptions.²⁸ Its first corrective advertising order was obtained by consent order in 1971 from

24. One goal of advertising is to create a favorable, lasting impression regarding a product in a consumer's mind so that he or she will react favorably and purchase the product even after the advertising has stopped. See Cornfeld, *supra* note 14, at 717. There is some dispute, however, as to how effectively this goal is achieved. See, e.g., 1 ROSDEN, *THE LAW OF ADVERTISING* § 9.03(4) at 9-29-31 [hereinafter cited as ROSDEN]. Cf. *Corrective Advertising Order*, *supra* note 14, at 379.

25. Campbell Soup Co., [1967-70 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 19,006. A complaint had been issued against Campbell Soup for allegedly advertising soup in a deceptive manner by placing marbles at the bottom of a bowl to make the soup appear richer. [1967-70 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 18,706.

26. The Commission held that the consent order, already provisionally accepted, was an adequate remedy. Campbell Soup Co., [1967-70 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 19,261.

27. *Id.* at 21,421. In a gratuitous comment, the FTC asserted: "We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably related to the deception found and are required in order to dissipate the effects of that deception." *Id.* No authority for this statement was given.

28. See, e.g., Standard Oil Co., [1970-73 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 19,352 (advertisements for gasoline indicating pollution was reduced were allegedly false); Coca Cola Co., [1970-73 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 19,351 (claims regarding fruit content of Hi-C drink were allegedly false); American Home Prods. Corp., [1970-73 Transfer Binder] *TRADE REG. REP. (CCH)* ¶ 19,673 (advertisements purporting to prove cleaning products' superiority over other brands were allegedly deceptive).

ITT Continental Baking Company²⁹ and required that at least 25% of the company's advertising for Profile Bread during the next year contain corrective advertising disclosures.³⁰

Other consent orders followed.³¹ In some, the respondents agreed to run corrective advertising for a specified period of time;³² in others, a percentage of their advertising for a certain time span was to include corrective disclosures.³³ Several advertisers consented to a brief corrective campaign of intensive media placement.³⁴ In other

29. ITT Continental Baking Co., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,681. The consent order required that the corrective advertising consist of FTC-approved advertisements explaining that the bread only had fewer calories per slice because it was sliced thinner than others and that bread in general is not a superior food to aid in weight reduction. *Id.* ITT Continental Baking was also the target of another proposed consent order containing corrective advertising for its Wonder Bread and Hostess Snack Cakes, but the complaint was dismissed as to the snack cakes since they did have a higher level of enrichment than other similar products, as advertised. [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,495. Although the advertisements for Wonder Bread were found to be deceptive, the corrective advertising order called for disclosure of broader deception than had been found, so no corrective disclosure was ordered. *Id.* at 20,386.

30. [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,681.

31. See 15 U.S.C. § 45(b) (1970) and 2 TRADE REG. REP. (CCH) ¶¶ 9,603-9,701 concerning the procedure followed by the FTC. When the Commission has reason to believe a product has been advertised deceptively, it first issues and serves a complaint. The complaint usually calls for a cease and desist order to force the advertiser to halt any alleged deception and to refrain from such deception in the future, and the Commission has wide discretion as to the order's nature and terms. The respondent has the opportunity to be heard before an administrative law judge (ALJ) who is the fact-finder for the Commission proceedings. The ALJ's findings become the decision of the FTC unless a petition for review is filed. The respondent or the Commission may appeal, in which case the Commission reviews the ALJ's decision. This decision is then subject to review upon appeal by a United States Court of Appeals, and then by the Supreme Court. Should a respondent prefer not to undergo full litigation proceedings, he may agree by consent order to a cease and desist order whose contents are usually proposed by the Commission, to which the Commission must give its final approval.

32. See, e.g., Amstar Corp., [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,356 (manufacturer of certain brands of sugar consented to include in advertisements for one year that its sugar was not a special source of energy or strength).

33. See, e.g., Ocean Spray Cranberries, Inc., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,981 (one in every four advertisements for one year was required to state that the "food energy" referred to in past advertising was supplied only by the product's caloric content).

34. See, e.g., Sugar Information, Inc., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,142 and Sugar Ass'n., Inc., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,085 (one-time full page advertisements in six nationally-circulated magazines ordered to correct previous advertisements indicating that use of sugar in the diet helps curb appetite and can aid in weight reduction); Lens Craft Research and Dev. Co., [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,509 (advertiser to run in same media as challenged advertisements had run, including newspaper at least once a week for four weeks and radio for one week, that its contact lenses should not be worn while sleeping or continuously for more than a period of time prescribed by a doctor).

instances, the orders consented to by the respondents required inclusion in the corrective advertising a declaration of the advertiser's admission of prior deception, a practice termed by commentators a "scarlet letter" disclosure.³⁵ During that time, the only orders issued by the Commission which were not consent orders were conventional cease and desist orders without corrective advertising requirements, even though the original complaints in some instances called for corrective disclosures.³⁶ In those instances, upon review, it was found that the residual effects of the allegedly false or misleading advertising were questionable.³⁷ It was not until *Warner-Lambert* that the Commission attempted to impose corrective advertising without a consent order.³⁸

III. THE *Warner-Lambert* DECISION

In 1971, the Federal Trade Commission issued a complaint against Warner-Lambert Company, a pharmaceuticals manufac-

35. Where an advertiser is required either to say that its corrective advertising is being run pursuant to an order by the FTC or that previous ads were deceptive or misleading, the disclosure has been labeled a "scarlet letter" disclosure in reference to *The Scarlet Letter* by Nathaniel Hawthorne, a fictional work in which an adultress was required to wear a large red letter "A" as a reminder of past indiscretions. The validity of the confessional effect of the "scarlet letter" disclosure as an exercise of FTC power has been questioned and its use criticized. See Putz, *Advertising and the Law: An Overview of Recent Trends*, II ADVERTISING LAW ANTHOLOGY xxi, xxxvii (1974); ROSDEN, *supra* note 24, at 9-32 and 9-43; *Limits of FTC Power*, *supra* note 6, at 519-21. See also *Boise Tire Co.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,347 (consent order to retract claim that tires sold were rated as number one; correction to include statement "This advertisement is published pursuant to order of the Federal Trade Commission"); *Wasem's, Inc.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,536 (local drug store to run ads that its vitamins previously were erroneously advertised, and that neither the Food and Drug Administration nor the FTC had recommended or approved them).

36. See, e.g., *Standard Oil Co.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,352; *Sun Oil Co.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,856; *Firestone Tire & Rubber Co.*, [1967-70 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,011.

37. *Standard Oil of Cal.* [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,789 (advertisements that gasoline had eliminated pollution from emissions found deceptive but no corrective advertising ordered because evidence concerning residual effect inconclusive); *Sun Oil Co.*, [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,704, ¶ 20,658 (advertising that gasoline maximized car's performance found deceptive but because belief disappeared from consumers' minds fast, no corrective advertising ordered); *Firestone Tire & Rubber Co.*, 481 F.2d 246 (6th Cir. 1973) (safety claims concerning tires were deceptive but insufficient residual effect of advertising was shown to order corrective advertising).

38. *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 1575, 1576 (1978) (corrective advertising imposed by order of FTC on manufacturer of mouthwash whose advertising had claimed it relieved colds and sore throats).

turer, alleging misrepresentation in the company's advertising of Listerine Mouthwash.³⁹ At the fact-finding hearing,⁴⁰ the administrative law judge (ALJ) found that the advertisements were deceptive and ordered that all advertisements for the mouthwash for the next two years contain the disclosure, "Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats."⁴¹

Upon review,⁴² the Commission upheld the cease and desist order containing the requirement for corrective disclosure,⁴³ but modified the time requirement. Instead of the original two-year period, in which the advertiser could forbear from advertising at all during the prescribed time span, the Commission called for the corrective advertising to be run until Warner-Lambert had expended an amount on the advertising of Listerine that equaled its average annual Listerine advertising budget for the ten year period from April 1962, to March 1972.⁴⁴

On appeal,⁴⁵ the United States Court of Appeals for the D.C. Circuit affirmed the decision of the Federal Trade Commission but modified the disclosure requirements by deleting the words "contrary to prior advertising"⁴⁶ since such a disclosure would have

39. Warner-Lambert Pharmaceutical Co., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,838. The FTC alleged that Warner-Lambert's advertising of the mouthwash was false since it fraudulently induced consumers to purchase the product to prevent and relieve colds and sore throats. *Id.*

40. *See* note 31 *supra*.

41. Warner-Lambert Co., [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20, 777 at ¶ 20,636. The D.C. Circuit Court of Appeals, without explanation, quoted a slightly different version of the order. *See* and *cf.* note 3 *supra*.

42. An advertiser's first recourse upon an adverse finding by an administrative law judge is an appeal to the Commission. *See* note 31 *supra*.

43. Warner-Lambert Co., [1973-76 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066. The Commission discussed in detail its support of the ALJ's factual determination that Listerine was not beneficial for relief of colds or sore throats, *id.* at 20,927-32, and asserted its authority to order corrective advertising. *Id.* at 20,934-35.

44. *Id.* at 20,937. The advertiser thus could complete the requirement in a year or less or could stretch it out indefinitely, but if the advertiser chose to continue advertising the product, the disclosure could not be avoided. This appears to be less arbitrary and more related to the problem than previous time or frequency requirements. *See* notes 31-34 and accompanying text *supra*. *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 700 (1977); Note, "Corrective Advertising" Orders of the Federal Trade Commission, 85 HARV. L. REV. 477, 503 (1971).

45. *See* discussion of FTC procedure at note 31 *supra*.

46. 562 F.2d 749, 752 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575, 1576 (1978).

the effect of either calling attention to the correction or humiliating the advertiser. Sufficient attention would be attracted without the phrase, the court reasoned, and humiliation of the advertiser might be necessary only in cases of deliberate deception.⁴⁷

The court also discussed whether Congress had granted sufficient power to the Commission to order corrective advertising and concluded that it had.⁴⁸ Although previous courts had interpreted Section 5 of the FTC Act narrowly, the court observed that the modern approach was to apply a liberal interpretation.⁴⁹ The court held erroneous the advertiser's reliance on the legislative history⁵⁰ and the express powers granted to the courts by the 1975 amendments to the Act⁵¹ to support its argument that the Commission had no power to impose corrective advertising. Further, the first amendment did not prevent the issuance of a corrective advertising order since false speech was afforded no protection.⁵² Finally, the court concluded that the fact that there were no judicial precedents specifically upholding corrective advertising was not determinative of the Commission's power to impose disclosure, and precedent permitting affirmative disclosure supported the Commission's position.⁵³

Judge Robb, dissenting in part, agreed that there was sufficient evidence for the Commission to have found previous advertising deceptive, but disagreed with the imposition of corrective advertising.⁵⁴ He reasoned that the Commission did not have the authority to punish advertisers, but could only issue cease and desist orders

47. *Id.* at 763. Although the "scarlet letter" was deleted here, the court left the door open for future imposition by holding: "The second purpose (humiliation), if it were intended, might be called for in an egregious case of deliberate deception, but this is not one." *Id.* See also note 35 *supra* and notes 92-96 and accompanying text *infra*.

48. 562 F.2d at 756-61.

49. *Id.* at 756. See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966) (Commission permitted to use remedies beyond those expressly granted by statute).

50. 562 F.2d at 757. Although Congress chose not to permit criminal penalties, treble damages or civil penalties for deceptive advertising, the question of corrective advertising was never addressed. *Id.*

51. *Id.* The fact that the 1975 amendments to the Act expressly authorized a court to impose public notification among other remedies did not establish that the Commission did not also have power to do so. *Id.*

52. *Id.* at 758. The Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976), had recently upheld freedom of commercial speech but first amendment protection was not extended to false speech. *Id.* See also notes 96-98 and accompanying text *infra*.

53. 562 F.2d at 759-61.

54. *Id.* at 764 (Robb, J., dissenting in part).

to prevent future illegal practices.⁵⁵ Discussing the position of the 1975 amendment to the Federal Trade Commission Act granting relief to redress injury to consumers or others,⁵⁶ Judge Robb concluded that public notification encompassed corrective advertising, and that such sanctions could be imposed by a court only after an advertiser had been found in violation of an FTC final cease and desist order.⁵⁷ Thus, bad faith would be required before any relief resembling punishment could be imposed, and then a court, but not the Commission, would have the authority to order it.⁵⁸ The judge noted that the Commission's authority to issue cease and desist orders would not alone grant it the power to impose corrective advertising.⁵⁹

Judge Robb disagreed with the majority's comparison of corrective advertising with affirmative disclosure in cases where a product

55. *Id.* Support for this position was found in *FTC, v. Ruberoid*, 343 U.S. 470 (1952) (roofing material manufacturer enjoined from selling products at lower prices than competition). The *Ruberoid* court held: "Orders of the FTC are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." 343 U.S. at 473.

56. The amendment reads, in pertinent part:

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

(b) The court in an action under subsection (a) of this subsection shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. § 57b(a)(2) and 57b(b) (Supp. V 1975).

57. The amendment specifically states that the Commission may commence a civil action if any person, partnership or corporation engages in any unfair or deceptive act or practice with respect to which the Commission has issued a final cease and desist order. See note 56 *supra*. Judge Robb's conclusion would therefore seem to be cogent, since a reasonable interpretation would be that no court action is possible absent bad faith. See notes 120-125 and accompanying text *infra*.

58. 562 F.2d at 765 (Robb, J., dissenting in part). See also note 57 *supra*.

59. 562 F.2d at 765.

had been altered without public notification.⁶⁰ He pointed out that in *Warner-Lambert* the corrective advertising related to past and not future acts and was therefore beyond the scope of permissible Commission remedies,⁶¹ even where it was asserted that the disclosure would be required to prevent future illegal practices.⁶² Although Warner-Lambert attempted two more avenues of appeal,⁶³ the holding of the D.C. Circuit remained unchanged.

IS CORRECTIVE DISCLOSURE A VIABLE REMEDY FOR DECEPTIVE ADVERTISING?

Corrective advertising is based on the proposition that advertising creates a residual effect in consumers' minds.⁶⁴ In fact, such a residual impact is one purpose of advertising, although its effectiveness has been the subject of some dispute.⁶⁵ If an advertisement is not remembered, the use of corrective advertising is unwarranted; if there is no residual effect, corrective disclosure becomes a tool to punish advertisers for false or misleading advertisements instead of a prospective remedy to prevent future deception, and, therefore, is beyond the scope of FTC power.⁶⁶

60. *Id.* at 767. The judge argued that a corrective advertising statement would not be prospective in nature but would relate solely to past advertising. *Id.*

61. *Id.* at 768. Since the advertiser would have to include the disclosure in all future advertising until the required budget had been expended, including advertisements in which Listerine was advertised as an effective mouthwash and breath freshener, the requirement was retrospective and not prospective since it would serve as a reminder of past discarded advertising. *Id.*

62. *Id.* See also *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) (Commission attempt to require refund to consumers from advertiser found engaged in deceptive practices held beyond FTC's power).

63. Rehearing was denied in *Warner-Lambert Co. v. FTC*, 562 F.2d 768 (D.C. Cir. 1977), and the Supreme Court refused certiorari at 98 S. Ct. 1575, 1576 (1978). See note 31 *supra*, outlining the FTC procedure.

64. See *ROSDEN*, *supra* note 24, at 9-4.3; *Cornfeld*, *supra* note 14, at 707.

65. See note 24 *supra*.

66. See note 81 and accompanying text *infra*. Various attempts have been made to prove advertising's residual effects and to measure their purported impact on consumer purchases, but none have been found conclusive. See *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374, 379 (1971). Advertisers themselves study the effects, and sometimes claim excellent results, so it has been suggested that the courts might allow the FTC a presumption of recall. *Id.* However, such studies may be the result of zealous advertising agencies attempting to prove the efficacy of their campaigns, and the fact that advertisers continuously attempt to measure advertising results does not indicate conclusively that all ads are remembered, nor that every ad has an effect on consumer response. See notes 67-70 and accompanying text *infra*.

Even if the existence of consumer recall of a past advertising claim can be proven, the effect of retention on attitude and motivation is uncertain. Advertisers have attempted to measure the effects of their advertisements in relation to consumer response in a variety of ways. Scientific methods of motivational research have evolved,⁶⁷ and many forms of testing have been formulated in order to attempt to measure the effectiveness of advertising in attracting consumer attention and in motivating consumer purchases.⁶⁸ Among the testing schemes are those which measure recall of advertising,⁶⁹ and those measuring attitude toward a product,⁷⁰ but it has not been determined conclusively that there is a correlation between these factors and purchases.⁷¹ Thus, even if an advertiser did promote his product through false or misleading advertising, and tests prove that consumers remember the deceptive portions, the advertiser might not have realized any gain from the deception. It would follow that corrective advertising theoretically would have no economic effect on the marketplace if substitution of the truth in a consumer's mind for an advertised falsehood did not alter his purchasing habits. Corrective advertising would thus be prospective in nature since its only result would be to correct a false impression and it would therefore be a remedy within the FTC's powers.⁷²

It appears, however, that there is a correlation between consumer purchase response and the product image created by advertising.⁷³ Image differs from an actual advertising claim in that whereas a claim is purportedly a fact about a product, the product's image is

67. See V. PACKARD, *THE HIDDEN PERSUADERS* 5 (Pocket Book Edition 1957) [hereinafter cited as PACKARD]; S. ULANOFF, *ADVERTISING IN AMERICA: AN INTRODUCTION TO PERSUASIVE COMMUNICATION* 48 (1977) [hereinafter cited as ULANOFF].

68. See, e.g., D. NYLEN, *ADVERTISING: PLANNING, IMPLEMENTATION AND CONTROL* 517 (1975) [hereinafter cited as NYLEN].

69. *Id.* at 526. Some methods of measuring recall include personal interviews regarding what advertisements a reader remembers having seen in an issue of a magazine he has read, telephone interviews to determine viewer recall of a test advertisement on television. *Id.* at 526-27.

70. *Id.* at 530. In attitude tests, an attempt is made to measure consumer opinions of a product, but an opinion or change of attitude is not only formed because of advertising. *Id.* at 536.

71. Leavitt, Waddell and Wells, *Improving Day After Recall Techniques*, 10 J. ADVERTISING RESEARCH 13 (June 1970). Recall testing of advertising may be irrelevant since people may remember ads for products they do not buy, and may be motivated to buy for other reasons. *Id.*

72. See note 81 *infra*.

73. PACKARD, *supra* note 67, at 38.

the mystique created by advertising and other promotional and design methods designed to motivate brand loyalty.⁷⁴ If a product's image changes negatively, the product is likely to be purchased less frequently.⁷⁵ Thus, if corrective advertising causes negative attitude changes, the remedy is by its nature punitive since its effect is to penalize deceptive advertisers by taking away customers.⁷⁶

Studies have been conducted to determine the actual effect of corrective advertising on consumer attitudes.⁷⁷ Researchers found that corrective disclosures altered consumers' attitudes, making them feel less favorably toward the product brand advertised.⁷⁸ The more explicit the disclosure, the less favorable the attitude became.⁷⁹ These studies support the argument that imposition of corrective advertising has a punitive effect, since the resultant consumer attitude change could economically harm the advertiser.⁸⁰

The Federal Trade Commission has no power to punish a wayward advertiser, but must move prospectively, preventing future deception.⁸¹ Various arguments have been offered to support the

74. *See id.* at 39.

75. Images created by advertising and other factors appear to create brand loyalty. If the image is altered, purchase responses also change. *Id.* at 41. A negative image change thus could lead to fewer consumer purchases.

76. The FTC has no power to punish deceptive advertisers. *See* note 79 and accompanying text *infra*. *Cf.* *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) (Commission attempt to require refund to consumers from advertiser found engaged in deceptive practice was held beyond FTC's power).

77. Hunt, *Effects of Corrective Advertising*, 13 J. ADVERTISING RESEARCH 15 (Oct. 1973) [hereinafter cited as Hunt]. The study was based on corrective advertising in the Standard Oil case. [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,352.

78. Hunt, *supra* note 77, at 19.

The whole corrective ad concept is based on the premise that the corrective ad will result in less favorable levels of attitude, thereby removing the favorable brand attitude gained by deceptive advertising and depriving the deceiver of his ill-gotten competitive advantage. The data indicates that corrective ads do generally result in less favorable levels of attitude.

Id.

79. *Id.* at 21. Likewise, general disclosures create less consumer disfavor than specific ones. *Id.*

80. *See* notes 73-75 and accompanying text *supra*. The FTC might also vary the degree of punishment by imposing disclosure requirements of greater or lesser specificity. *See* note 79 *supra*.

81. *See FTC v. Ruberoid*, 343 U.S. 470, 473 (1951) (roofing material manufacturer was enjoined from selling products at lower prices than competition); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948) (cease and desist order of FTC alleging unfair trade practices upheld); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960) (FTC findings that advertising was deceptive sustained); *Gimbel Bros. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941) (findings of FTC that respondent had misused the term "wool" in advertis-

theory that corrective advertising is prospective rather than retrospective, and most of these center around the purported residual effect.⁸² Others call for corrective advertising to strip the advertiser of his increased market share gained by his previous deception,⁸³ but, again, this is effectively punitive in nature.⁸⁴ So far, these are the sole theories advanced for granting the FTC the right to order corrective advertising. However, since under both theories the Commission exceeds its authority by punishing the advertiser,⁸⁵ there is no legal justification for ordering corrective advertising.

Even assuming, arguendo, that corrective advertising is a remedy within the FTC's scope, problems regarding its content and the procedure for its imposition remain. FTC procedure is comparable to that of other administrative agencies. The FTC initiates the procedure as complainant, presenting its case before the administrative law judge, who is employed by the Commission. The judge makes the original fact-finding determination as to whether the advertisement in question is false or misleading.⁸⁶ The Commission also acts as the lower appellate court since it hears the first review, if any, and thus, the FTC independently controls the initial stages of the procedure.⁸⁷

Various doctrines have emerged in the construction of administrative authority and power. Agencies are regulated procedurally by the Administrative Procedure Act,⁸⁸ which prescribes, among other things, record keeping methods,⁸⁹ public hearing requirements,⁹⁰ and procedures for judicial review.⁹¹ Where a party attempts to avoid administrative procedure and go first to the courts to be heard, the doctrine of primary jurisdiction, in which the courts must

ing upheld). See also Judge Robb's dissenting opinion in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 764 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 1575, 1576 (1978); *Corrective Advertising Order*, supra note 14, at 379; *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415, 424 (1972).

82. See Cornfeld, supra note 14, at 694; Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1, 22 (1973); *Limits of FTC Power*, supra note 6, at 516.

83. See *Corrective Advertising Order*, supra note 14, at 381.

84. ROSDEN, supra note 24, at 9-28.

85. See notes 76-80 and accompanying text supra.

86. See note 31 supra.

87. *Id.*

88. 5 U.S.C. § 501 (1970).

89. 5 U.S.C. § 552 (1970).

90. 5 U.S.C. § 552(b) (1970).

91. 5 U.S.C. § 701 (1970).

abstain where preliminary resort to an agency is called for, controls.⁹² A corollary is the doctrine of exhaustion of administrative remedies, under which a party is not entitled to judicial relief until all possible administrative remedies have been used.⁹³ Thus, recourse to the courts often takes years and is potentially quite expensive since other avenues must be exhausted first.⁹⁴

To avoid the additional costs of litigation, some advertisers have submitted to "scarlet letter" disclosures by consent order.⁹⁵ It is possible that if challenge had been offered, an order requiring that the advertiser admit prior wrongdoing or state that the correction was required by the Federal Trade Commission would not be upheld, since it was deleted from the order in *Warner-Lambert* as being too punitive, at least in this particular factual situation.⁹⁶ Perhaps the court's finding on this point will be sufficient to prevent the Commission from again attempting to impose such orders, but it appears that confessional disclosure was not abolished provided deliberate deception is established.⁹⁷ "Scarlet letter" disclosures are, however, punitive by their very nature, since they call attention

92. The doctrine was defined in *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 353 (1963). See, e.g., *Far East Conference v. United States*, 342 U.S. 570 (1952) (Federal Maritime Board had exclusive jurisdiction of alleged violation of Sherman Antitrust Act by a voluntary association of far eastern traders); *Great North. Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) (no preliminary resort to Interstate Commerce Commission necessary where no question of fact existed).

93. *McKart v. United States*, 395 U.S. 185, 193 (1969). See, e.g., *Myers v. Bethlehem Steel*, 303 U.S. 41 (1938) (National Labor Relations Board procedure must be exhausted before review by appellate court permitted).

94. Where appeal has been made to the judiciary, courts have eliminated corrective advertising requirements when the Federal Trade Commission was unable to present convincing evidence regarding consumer recall of allegedly deceptive advertising. See, e.g., *National Comm'n. on Egg Nutrition v. FTC*, 3 TRADE REG. REP. (CCH) ¶ 61,751 (7th Cir. 1977). Some advertisers may have accepted corrective advertising under consent orders where there was no convincing evidence of any residual effect, the primary justification for corrective advertising, to avoid additional litigation.

95. See note 35 and accompanying text *supra*.

96. 562 F.2d at 752.

97. See note 47 and accompanying text *supra*. Since the court did not forbid the use of "scarlet letter" phrases in cases where deliberate deception has been found, this decision may have an effect similar to *Alberty*, in which the court held that the FTC had no power to order affirmative disclosure, at least where there were no findings that without disclosure future advertisements would be misleading. Courts following *Alberty* found questioned advertisements deceptive where no affirmative disclosures were included. See notes 17-22 and accompanying text *supra*. The FTC may thus find deliberate deception in a majority of cases in the future and impose corrective advertising with the confessional disclosure. This would, however, be punitive and beyond the scope of Commission power. See notes 79 *supra* and 95 *infra* and accompanying text.

to alleged misdeeds of the advertiser.⁹⁸ This remedy might more justifiably have been forbidden altogether, since the Federal Trade Commission may now potentially impose confessional disclosures on advertisers simply by finding deliberate deception, which would inflict punishment on advertisers beyond the scope of FTC power and in opposition to advertisers' first amendment free speech rights.⁹⁹

Additionally, the use of corrective advertising by the Commission potentially encroaches in the first amendment area of prior restraint on speech. The doctrine of prior restraint has been used almost exclusively in the area of censorship of obscenity,¹⁰⁰ but courts have held that although there are some areas in which it might be permitted,¹⁰¹ there is a strong presumption against any advance restraint of expression.¹⁰²

Corrective advertising is within the realm of prior restraint of expression since an advertiser is forbidden prior to issuance of an advertisement from circulating it without including in it a corrective disclosure. It is, in effect, a form of censorship which, even prior to publication, is not per se illegal, provided that procedural safeguards are followed.¹⁰³ For example, the court in *Freedman v. Maryland*,¹⁰⁴ a landmark decision in the area of prior restraint, held

98. See *ROSDEN*, *supra* note 24, at 9-32 and 9-44.

99. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

Protected speech includes commercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech protected by the first amendment). First amendment rights also protect against prior restraint of speech. See notes 100-108 and accompanying text *infra*.

100. CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 943 (1973).

101. See, e.g., *Kingsley Books v. Brown*, 354 U.S. 436 (1957) (state statute having some prior restraint features upheld on other grounds).

102. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) (law permitting a state commission to notify book publishers that certain material was objectionable and requesting that publishers cooperate in preventing distribution to minors found unconstitutional as prior restraint where lists of books sent to local police departments). See also *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (injunction forbidding newspaper from printing article tying local officials to organized crime on penalty of contempt held impermissible on grounds of prior restraint).

103. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (Maryland's motion picture censorship statute overturned on constitutional grounds because procedural safeguards not followed regarding prior restraint). See also *Speiser v. Randall*, 357 U.S. 513, 521 (1958) (California property tax exemption requiring statement that person did not advocate violent overthrow of government discarded because considered prior restraint).

104. 380 U.S. 51 (1965).

that administrative censorship prior to adjudication may be permitted provided that the censor proves the speech concerned is not protected by the first amendment, that a judicial determination is sought, and that the hearing is held promptly.¹⁰⁵

By analogy, since corrective advertising is a form of censorship, the Federal Trade Commission should have the burden of establishing that the form of expression in question is not protected, *i.e.*, that the advertising is false speech and therefore beyond first amendment protection.¹⁰⁶ It may then issue a cease and desist order containing the corrective disclosure requirement should corrective advertising continue to be upheld as a valid FTC remedy despite other grounds to discard it,¹⁰⁷ but a judicial hearing would be necessary before the order could be considered final, and the hearing would necessarily be held promptly. Only in this manner could prior restraint via corrective advertising be imposed without infringing upon the advertiser's constitutional rights.¹⁰⁸

Nor does the FTC have authority to punish an advertiser after

105. *Id.* at 58. The court held:

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor . . . Second . . . [t]he teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring judicial determination suffices to impose a valid restraint. . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest period compatible with sound judicial resolution. . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Id. *Freedman* concerned a statute requiring issuance of a license prior to a theater being permitted to show a film. A board of censors thus had to preview the film and give approval by means of a license.

Procedural safeguards were extended to protection of other forms of speech in *Blount v. Rizzi*, 400 U.S. 410 (1971) (law permitting Postmaster General to stop delivery and return allegedly obscene material to sender after a hearing was struck down as unconstitutional).

106. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 751 (1976) (commercial speech protected by first amendment but false speech is not); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (media not protected under first amendment for untrue defamatory remarks against private citizen).

107. See, *e.g.*, notes 66-85 and 97-99 and accompanying text *supra*.

108. But see *ROSDEN*, *supra* note 24, at 9-16-17, where the commentator interpreted the *Warner-Lambert* court's view of prior restraint regarding corrective advertising as a "permissible regulation of an illegal economic activity, since it is aimed at eliminating its continuing effects." *Id.*

publication,¹⁰⁹ even if the advertisement is a direct violation of a final cease and desist order. Only the courts have the power to punish advertisers who have been issued final cease and desist orders and who deliberately disobey them.¹¹⁰ The majority in *Warner-Lambert* held that the express grant of this power to a court did not establish that the Commission, too, did not have the authority to grant relief it found necessary to redress injury to consumers, and indicated that the Commission could utilize the same remedies granted expressly to the courts, including public notification.¹¹¹ Judge Robb's dissenting opinion postulated a more reasonable interpretation of the statute, however.¹¹² The granting of the power to the courts, he reasoned, would not have been necessary if the Commission already had such authority.¹¹³ In addition, the fact that the courts were required to find bad faith was another indication that the Commission had no comparable power, particularly since it was not required to find bad faith.¹¹⁴ Thus, a better reasoned view compels the conclusion that a final judicial determination is required before punishment for allegedly deceptive speech is permitted, and the authority to impose this punishment is not granted to the Federal Trade Commission.

CONCLUSION

The Federal Trade Commission has been charged with the difficult task of protecting consumers from unfair trade practices.¹¹⁵ Its position is particularly onerous in that it must protect those who are least able to protect themselves—the most naive or gullible con-

109. See note 81 and accompanying text *supra*.

110. 15 U.S.C. §§ 57b(a)(2) and (b) (Supp. IV 1974). See also notes 55-58 *supra*. A civil penalty was recently imposed by the courts against STP Corporation for alleged violation of a cease and desist order. The penalty consisted of a \$500,000 civil penalty, the largest ever for allegedly deceptive advertising, and \$200,000 for widespread publication of a settlement notice which was to include a statement that STP was in violation of an FTC order regarding false or deceptive advertising. Many of the settlement advertisements were to be run at full-page size. STP Corp., 3 TRADE REG. REP. (CCH) ¶ 21,390 (1978).

111. 562 F.2d at 757-58.

112. *Id.* at 765 (Robb, J., dissenting in part).

113. *Id.*

114. *Id.*

115. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (trading stamp company not permitted to suppress stamp exchanges); *National Petroleum Refs. Ass'n. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) *cert. denied*, 415 U.S. 951 (1973) (rule-making power of the Federal Trade Commission questioned).

sumer.¹¹⁶ The Commission must not, however, achieve these goals at the expense of the rights of others and by exceeding its express and implied authority.

Corrective advertising has also been attempted by several other federal agencies.¹¹⁷ These agencies may have also exceeded their power, or it may be that their legislatively granted authority includes corrective disclosure as a legitimate remedy for violation of their regulations. The fact remains, however, that the Federal Trade Commission has not been granted the right to use corrective advertising to redress consumer harm, and it should no longer do so.

Portions of the advertising industry have begun the task of self-regulation,¹¹⁸ and have met with some success.¹¹⁹ Nevertheless, it would be unrealistic to believe that this is sufficient to prevent all false or deceptive advertising in the future. Perhaps another remedy is needed to protect the consumer from the deceptive advertiser, but the answer to the problem is not corrective advertising.

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116. The law (the Federal Trade Commission Act) is not made for experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.

Florence Mfg. Co. v. J.C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910) (cease and desist order upheld against toothbrush manufacturer who packaged his product to look like and have similar name to another brand). See *Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1944) (cease and desist order upheld against cosmetics manufacturer who had represented products as restoring youthful appearance to skin). See also Cornfeld, *supra* note 14, at 715.

117. The Civil Aeronautics Board, for example, looked into advertising of Trans World Airlines and required correction of allegedly false representations. See *ROSDEN*, *supra* note 24 at 9-4.3 and 47 *ADVERTISING AGE* 1, 88 (Jan. 29, 1976).

118. Some of the groups attempting self-regulation have developed their own standards of publication. These include the National Advertising Review Board of the Council of Better Business Bureaus; the Television Code and Radio Code of the National Association of Advertising Agencies. See *NYLEN*, *supra* note 68, at 577; *ULANOFF*, *supra* note 67, at 461.

119. The National Advertising Review Board of the Council of Better Business Bureaus recently questioned some advertising of the Wella Company and the Tetley Tea Company and both advertisers immediately changed their advertising campaigns. See 49 *ADVERTISING AGE* 28 (Jan. 16, 1978).

