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CONSUMER MISCOMPREHENSION AS A CHALLENGE TO FTC PROSECUTIONS OF DECEPTIVE ADVERTISING

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In 1972, the Federal Trade Commission prosecuted the Firestone Tire and Rubber Company for alleged deceptive advertising claims. Firestone sought exoneration by offering into evidence a survey showing that eighty-five percent of all persons interviewed did not understand the advertising to convey the claims alleged by the Commission.¹ In response, however, the Sixth Circuit upheld the finding of a violation observing that "we find it hard to overturn the deception findings of the Commission if the ad thus misled 15% (or 10%) of the buying public."² Thus Firestone joined the many advertisers subjected to an established interpretation that a violation exists when the advertising claim is presumed deceptive for a portion of the public which, even though a minority, is deemed significantly large in the Commission's judgment as to constitute a matter of public interest.³

A challenge to this interpretation, however, is arising in the 1980s in the form of an argument that low levels of "deceptiveness"⁴

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1. *Firestone Tire*, 81 F.T.C. 398, 415 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973). In its advertising, Firestone represented its tire as being "free of all defects" and "safe under all conditions of use." The survey data referred to consumers' tendencies to perceive the latter two claims.

2. *Firestone*, 481 F.2d at 249.

3. "An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive." *Policy Statement on Deception*, in form of Chairman Miller's letter of Oct. 14, 1983 to Congressman Dingell, at 7, n.20 (reprinted as appendix to *Cliffdale*, 103 F.T.C. 110, 174 (1984)). The new majority proposed the standard of a "significant minority of reasonable consumers" to replace an earlier standard for defining a significant number of consumers. See *infra* text accompanying notes 42-50.

4. The term "deceptiveness" is used here to reflect the statutory prohibition against "deceptive acts or practices." FTC Act, Section 5, 38 Stat. 719 (1914), as

should be definable as mere innocent and omnipresent "miscomprehension." All messages are miscomprehended to some degree, the argument goes.⁵ Presumably even the simplest, most familiar phrases, such as "Mary had a little lamb" or "two and two make four," will be misunderstood by some percentage of those persons asked to repeat what they saw or heard. Should it be concluded as a matter of law, then, that the minority who understood Mary to have a little plan, or two and two to make five, must be characterized as victims of the deceptive capacity of those messages and so be protected by government action?

Should it more properly be concluded, the argument continues, that government action is improper if the average level of miscomprehension across all kinds of messages is thirty percent, as it has been found to be, and the proportion of persons receiving a false message from a particular advertisement is, as in *Firestone*, less than thirty percent? Should not the false beliefs conveyed under such conditions be properly regarded not as prohibitable deceptive-ness, but rather as miscomprehension that should not be stopped by

amended, 52 Stat. 114 (1938). "[T]he Commission need not show that there has been actual deception." Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1040 (1967). This is a well established principle of advertising regulation. See, e.g., *Fiel v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Jacob Siegel Co. v. FTC*, 150 F.2d 751, 755 (3d Cir. 1944). The intent of the FTC regulatory power is preventative rather than punitive, as noted in the following:

In order best to implement the prophylactic purpose of the statute, it has been consistently held that advertising falls within its proscription not only when there is proof of actual deception but also when the representations made have a capacity or tendency to deceive, i.e., when there is a likelihood or fair probability that the reader will be misled.

FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963).

While section 5 applies generally, sections 12 and 15 of the FTC Act forbid, in the case of food, drugs, cosmetics, and medical devices, advertising that is "misleading in a material respect." "[T]he criteria for determining whether an advertisement is a 'deceptive practice' . . . seem similar to those used in ascertaining whether an advertisement is 'misleading in a material respect' . . . In both instances the test for FTC intervention may be formulated in terms of whether the advertisement has a 'tendency to deceive'" Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1025 (1956).

Cases and comments often refer to the "capacity" or "tendency" to deceive or mislead. See, e.g., Note, *Developments in the Law: Deceptive Advertising*, *id.*; Commissioners Bailey and Pertschuk, *Analysis of the Law of Deception*, enclosure in letter to Congressman John D. Dingell (Feb. 28, 1984), 46 ATTR 372 (1984). Since 1983, a new FTC majority under Chairman Miller has sought to establish an alternative concept called "likeliness to mislead." *Cliffdale*, *supra* note 3 at 146. The earlier standard is termed "circular and therefore inadequate." While the majority describes this as a new standard, at least one analysis says it is not entirely so. Scherb, *Trade Regulation—The FTC Policy Statement on Deception: A New Standard, or a Restatement of the Old?*, 10 J. CORP. LAW 805, 807-9 (1985). Although at least one aspect may be different, *supra* note 3, *Policy Statement on Deception*, it appears that the processes of measuring deceptiveness which are this article's concern would be no different.

5. J. JACOBY, W.D. HOYER, AND D.A. SHELUGA, *MISCOMPREHENSION OF TELEVISED COMMUNICATIONS* (1980) [hereinafter cited as *MISCOMPREHENSION*].

restraining the advertiser because the advertiser is not responsible for their production and therefore cannot stop them?

The advertising industry sponsors of the miscomprehension argument hold that the answer is yes.⁶ Although they have not yet taken any such action, it seems reasonable to suppose that they intend their evidence and arguments to be used by respondents in Federal Trade Commission (FTC) proceedings as a defense against deceptive advertising charges. The hope would be to have such charges dismissed where the proportion of consumers found susceptible to acquiring false beliefs is small.

The challenge thus posed to the FTC's established procedures regarding deceptive advertising is assessed, and a conclusion is drawn as to its likely impact.

Development of the Miscomprehension Concept

Dr. Jacob Jacoby and his associates conducted the study of miscomprehension.⁷ It began with the Educational Foundation of the American Association of Advertising Agencies (A.A.A.A.), offering research funds with this explanation of intent:

In the past few years various regulatory bodies have charged certain advertisers with having produced "misleading" advertising. Regulators have interpreted fairly modest levels of consumer misperception as evidence that a particular advertisement is "misleading." This may simply reflect the difficulty in distinguishing between deception and small levels of misperception which may be inherent in the process of mass communications.⁸

Subsequently, Jacoby's proposal was accepted and funded. Its immediate goal was "to provide objective evidence of the extent and nature of consumers' perceptions and misperceptions of various forms of communication, including advertising."⁹ The A.A.A.A. subsequently published the report of the research in book form.¹⁰

The principal finding was that a substantial amount of miscom-

6. As interpreted from *Specifications for Research on Consumer Perceptions and Misperceptions of Advertising*, American Association of Advertising Agencies Educational Foundation, cited in *MISCOMPREHENSION*, *supra* note 5, at 116.

7. *MISCOMPREHENSION*, *supra* note 5.

8. *Supra* note 6, at 116. This document constituted a notice inviting research proposals. No additional identification of, nor support for the claim of, "modest levels" was provided.

9. Bartos, *Foreword*, in *MISCOMPREHENSION*, *supra* note 5, at 14. "As the study developed 'misperception' was more properly defined as 'miscomprehension.'" *Id.* The project involved no study of advertising deceptiveness as such; the empirical work was done exclusively on miscomprehension, although suggestions as to the implications of miscomprehension for deceptiveness were made. *Infra* text accompanying notes 14-15.

10. *MISCOMPREHENSION*, *supra* note 5.

prehension of messages occurs in consumers' reports of the content of messages to which they have just been exposed. Individuals were recruited at twelve shopping malls, 225 at each for a total of 2,700, and were exposed to televised communications at testing sites in those malls. Each was exposed to two of sixty thirty-second test messages, excerpted from twenty-five commercial advertisements, thirteen noncommercial advertisements, and twenty-two program excerpts drawn from televised speeches, editorials, entertainment, and information programs.¹¹

Each respondent was then asked to indicate whether each of six written statements the experimenters contrived was "true" or "false" based upon what was stated or implied in each of the messages. Two of these statements described message content accurately, and four described them inaccurately. Half were accurate or inaccurate statements of objective facts explicitly stated in the communications, and half were accurate or inaccurate inferences that could be drawn from the messages.¹² The results assessed the level of miscomprehension, as measured by incorrect answers, at thirty percent.¹³

Suggested Implications of Miscomprehension

Upon assessing their empirical work the researchers offered the implication that:

[J]ust because there is a demonstrable degree of miscomprehension associated with a particular advertisement does not necessarily mean that the particular advertisement contains something out of the ordinary to provoke said miscomprehension . . . [because] . . . a certain proportion of miscomprehension may simply reflect a natural error rate associated with all types of televised communication.¹⁴

Further, "the authors . . . would find completely unreasonable any attempt to use 'zero-based miscomprehension' as the criterion for evaluating advertising."¹⁵

Although little more is stated explicitly, certain additional conclusions can reasonably be drawn as to what the researchers and their sponsors meant to communicate about the relationship of miscomprehension to deceptiveness. There appears to have been an underlying assumption that government regulators investigate advertising by measuring or assessing what amounts to consumer miscomprehension and then prosecute advertisers on the belief that

11. *Id.* at 29, 44-49.

12. *Id.* at 52, 53.

13. *Id.* at 64, 63-87.

14. *Id.* at 97.

15. *Id.* at 98.

such demonstrates deception. To the contrary, the researchers appear to urge that miscomprehension, because it occurs in response to all advertising and indeed to all televised (and probably all) communication, represents only the natural tendency of human beings to produce a certain proportion of errors in their processing of message content.¹⁶ Because it thus is attributable only to the consumer and not to the advertiser, presumably it should not be interpreted as evidence of deceptiveness.

The suggestion, therefore, is that only when the observed level of error exceeds the base level of miscomprehension should deceptiveness properly be assumed to exist. With people typically erring in an average of thirty percent of instances, deceptiveness should properly be attributed only to messages for which the observed miscomprehension figure is higher than thirty percent. If the figure in a given instance, for example, were forty percent, then only the last ten percent should be defined as deceptive. This would mean that a great many ads would have no deceptiveness at all, and that the forty percent ad would have attributed to it only ten percent deceptiveness rather than the full forty percent.

Were this argument to prevail in FTC proceedings, a significant number of respondents beset with evidence such as that in *Firestone* would find their cases dismissed. FTC action regarding deceptiveness would not be entirely eliminated, but it would be severely curtailed. Accordingly, the following sections offer various aspects of an assessment of the miscomprehension argument, and a conclusion as to its likely viability in litigation.

The Question of Small Amounts of Deceptiveness in FTC Cases

The first evaluation offered here concerns the assumption of the A.A.A.A. which presumably underlies its interest in examining miscomprehension. The assumption is that the FTC frequently prosecutes advertisers on the basis of small amounts of deceptiveness. In addition to its statement on this point cited earlier, the A.A.A.A. later said more specifically that the FTC has "hypothesized a figure of 5 to 10% misunderstanding as being deceptive."¹⁷

How Much is Enough?

Examination of the actual FTC case record shows little reason in recent years to accept a five percent or even a ten percent figure.

16. "Miscomprehension" is defined by these researchers as "the evocation of a meaning not contained in or logically derivable from the message." *Id.* at 22.

17. A.A.A.A., "Miscomprehension Study," *Washington Newsletter* (October, 1980).

The earlier record, however, demonstrates how a basis for such figures was created, although in some instances the support for it is more apparent than real.

In 1952 Rhodes Pharmacal fell victim to a survey showing that nine percent of interviewees saw in Rhodes' advertising a meaning that the FTC alleged to be false. The opinion stated that a better research method would have found even more, but it added explicitly that "[t]his number alone would constitute a sufficient showing of the deceptive nature of respondent's advertisements."¹⁸ Such a holding, if applicable in 1986, would support the A.A.A.A. contention.

Several years later, in 1964, Benrus Watch ticketed its products with prices, allegedly conveying the false representation that they were the usual retail prices.¹⁹ Fourteen percent of those surveyed thought watch prices in the marketplace generally were invariable, which, the opinion concludes, "indicates unequivocally that a substantial segment of the public would be deceived."²⁰

Two other early cases appear to support the A.A.A.A. position, but the extent of support is questionable. In *Elliot Knitwear*,²¹ when asked in an open-end question what they thought of a sweater labeled "Cashmora," twelve percent of interviewees volunteered that it contained cashmere. Fifteen percent did the same when asked whether they would be interested in buying the sweater. Twenty-two percent did so when asked from what kind of material it was

18. Rhodes Pharmacal, 49 F.T.C. 263, 283 (1952), *modified on other grounds*, Rhodes Pharmacal v. FTC, 208 F.2d 382 (7th Cir. 1953), *rev'd per curiam*, FTC v. Rhodes Pharmacal, 348 U.S. 940 (1955). This case concerned an aspirin-based product called "Imdrin," which was advertised as a treatment for arthritis, rheumatism, neuritis, and other conditions. The FTC challenged the company's advertising for its deceptive claims of performance. On affirming the finding of a capacity to deceive, the appellate court gave no explicit support for the nine percent level, but rejected by silence the respondent's urging that the results for 91 percent of those surveyed demonstrated a lack of deceptiveness. Its only explicit statement was that the Commission's findings overall were supported by substantial evidence. *Rhodes Pharmacal*, 208 F.2d at 387.

19. Benrus Watch, 64 F.T.C. 1018, 1029 (1964), *aff'd*, Benrus Watch v. FTC, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

20. *Id.* at 1032. The concept of a substantial segment "requires the protection of any group of buyers even though they may not be in the majority and even though they may be more susceptible . . . than a majority of buyers perhaps more experienced in seeking bargains." *Id.* "Moreover, even if the study does show 86 percent nondeceptive . . . this still leaves 14 percent of the prospective purchasers who may be deceived, and, of course, these are entitled to protection." *Id.* at 1045. "[W]e think that the Examiner and the Commission were justified in concluding that list prices still indicate actual regular retail prices to a substantial percentage of the watch buying public, a percentage that is entitled to protection from deceptive preticketing." *Benrus Watch*, 352 F.2d at 319.

21. 53 F.T.C. 1185 (1957), 54 F.T.C. 1398 (1958), *remanded*, Elliot Knitwear v. FTC, 266 F.2d 787 (2d Cir. 1959), Elliot Knitwear, 59 F.T.C. 893 (1961).

made.²²

Whether these figures should be considered small must be interpreted in light of the disclosure of "No cashmere" in smaller print below the lettering saying "Cashmora." The typically prosecuted advertising claim would contain no such disclaimer, and indeed this one was incorporated by the respondent only after issuance of the complaint.²³ It may be safe to guess that the reported percentages would have been far higher had the disclaimer been absent. In addition, the survey respondents examined not the label *per se*, but rather a sweater that contained the label. Because some may not have noticed the label, the situation was not equivalent to the more appropriate research that would require response to a message. The reported percentages likely would have been higher had attention been called specifically to the message. The case, therefore, provides no conclusive support for an assumption that the FTC would typically see deceptiveness in such percentages.

Doubt may also be applied to *A.A. Friedman*,²⁴ the case famous, or infamous, for the lowest percentage of deceptiveness obtained by surveying: five percent. Survey respondents did not see the ad; they responded only to a question of whether they would expect to pay more for a financed purchase than for a cash purchase. Ninety-five percent said yes. Logically the five percent who said no would likely be fooled by an ad that implied falsely that the answer was no, but it would be illogical to assume that the ninety-five percent who said yes could not possibly be fooled by the same ad. Accordingly, the opinion stated that "[t]his advertisement not only would deceive the 5 percent, but is capable of deceiving a much higher percentage of the public."²⁵ Thus there was no assertion that a finding of five percent would have produced the decision made.²⁶

The two valid cases discussed, *Rhodes Pharmacal* and *Benrus Watch*, along with *Firestone*, establish the figures of nine, fourteen, and fifteen percent as indicative of the low level of deceptiveness that could be used to support the finding of a violation.²⁷ Following

22. *Id.*, 59 F.T.C. at 902.

23. *Id.* at 899.

24. 74 F.T.C. 1056 (1968).

25. *Id.* at 1071.

26. Moreover, the survey was not of persons who had seen the advertisement, but only of persons who, based on reading the incomplete record, were apparently asked in some unspecified way whether, if they bought the product, they would expect a certain consequence to occur. Those saying "yes" totalled 95%, and if that were still the case after they saw the advertisement they would not be deceived. Thus the survey evidence pertains to the advertisement only by questionable inference.

27. Early cases also demonstrated percentages that would be too low. In *Firestone*, only 1.4% of those surveyed saw an alleged meaning; the allegation was rejected. *Firestone Tire*, 81 F.T.C. at 417. The same occurred when only one person out of 13,000 reported seeing a claim of the equivalence of Hi-C fruit drink and orange

these early cases, however, the percentages supporting findings of violations became typically higher.

In *Sun Oil* the figure was between sixty-two and sixty-five percent.²⁸ The opinion in the *Bristol-Myers* antiperspirant case stated that "a substantial number of consumers surveyed (somewhere between 14 percent and 33 percent) understood Dry Ban to be 'dry.'"²⁹ In *Block Drug*³⁰ a claim for denture adhesive, about allowing users to eat "difficult" or "problem" foods, was seen by forty-two, thirty-nine, thirty-nine, and seventy-five percent in two tests apiece of two different ads. An implication of being able to eat anything, based on a literal statement that you can eat almost anything, produced figures of twenty-four, thirty-four, fifty-one, and forty-six percent.³¹ In *Ford Motor Company* the figure was forty-two percent.³² *American Home Products*³³ reported seventeen to twenty-five percent perceived the claim that Anacin is good for tension. In *California Milk Producers Advisory Board*³⁴ there were several figures ranging from nineteen to seventy-six percent.³⁵

In the most recent case, *Thompson Medical*,³⁶ the percentages cited included thirty, twenty-one, thirty-five, twenty-three, twenty-two, seventeen, and thirty-eight percent.³⁷ Some of these figures, in-

juice. Coca-Cola Co., 83 F.T.C. 746, 816 (1973) (dismissed). And it happened when only 2-4% saw an alleged message about Dry Ban antiperspirant that "clear" and "clean" represented that it left no visible residue.

While a few verbatims indicate a definite perception that no visible residue would be left, that figure is on the order of 2-4%, a percentage which we find patently insubstantial in this context. In a word, we reject the finding that the commercials promised 'no residue.'

Bristol-Myers, 85 F.T.C. 688, 745 (1975) (dismissed).

28. 84 F.T.C. 247, 261 (1974). See text accompanying *infra* notes 76-80.

29. 85 F.T.C. 688, 744 (1975) (dismissed).

30. 90 F.T.C. 893 (1977).

31. *Id.* at 907.

32. 93 F.T.C. 873 (1979), following a partial order and Commission remand, 87 F.T.C. 756, 779 (1976). The initial decision in this case states only that "a great number of them" were deceived by claims of the fuel efficiency of Ford's automobiles, and "equated the mileage claims with what they ('YOU') might expect to obtain," but an affidavit of Ivan Preston, on which that conclusion was based in part, reported that number to be 42%. *Ford Motor Company*, 87 F.T.C. at 779.

33. 98 F.T.C. 136, 298 (1981), modified, *American Home Prods. v. FTC*, 695 F.2d 681 (3d Cir. 1982), modified, 101 F.T.C. 698 (1983), modified, 103 F.T.C. 57 (1984), modified, 103 F.T.C. 528 (1984). Anacin advertisements in this case were "generously sprinkled" with terms like "tension," "nerves," "stress," and "fatigue," and they depicted stressful situations.

34. 94 F.T.C. 429 (1979) (dismissed). The claim that "everybody needs milk" was disputed in this case, since milk is not absolutely necessary to the body's functioning, and, in fact, some people are allergic to it.

35. *Id.* at 460-63. The claim thus was found to have been made, however, it was not found to constitute a violation.

36. 104 F.T.C. 648 (1984), *aff'd*, *Thompson Medical v. F.T.C.*, slip op., Dkt. 85-1047 (D.C. Cir. May 27, 1986).

37. *Id.* at 796, 805, 807.

cluding the lowest at seventeen percent, were made in response to ads that, as in *Elliot Knitwear*,³⁸ contained contrary disclosures, characteristics not usually present in advertising, and which, analogous to *Elliot*, were "added because the networks required them."³⁹

These are cases in which percentages were reported. In some cases percentages were apparently available but alluded to only vaguely.⁴⁰ Of course, in numerous cases no such data is obtained; rather, the decisions about deceptiveness are made by indirect means, such as by the judges' and commissioners' examination of the advertisements.⁴¹

The Minority Approach

Our ability to identify the Commission's current position on the appropriate percentages is affected by the disagreement over the proper deceptiveness standard that has been waged between the new majority⁴² and the tradition-protecting minority.⁴³ Commissioners Pertschuk and Bailey, the minority, summarized thinking under the traditional standard, which has sought to prohibit claims that would be deceptive to a substantial number of consumers, thus:

The Commission has never identified a minimum percentage of consumers who must be misled in order to find deception; nor has it identified any percentage as "*per se*" substantial. Indeed, those decisions that have discussed extrinsic evidence as to the percentages of consumers who could be misled suggest that the number of consumers adequate to constitute a "substantial number" will vary depending on

38. 53 F.T.C. 1185 (1957), 54 F.T.C. 1398 (1958), *remanded*, *Elliot Knitwear v. FTC*, 266 F.2d 787 (2d Cir. 1959), *Elliot Knitwear*, 59 F.T.C. 893 (1961).

39. *Thompson Medical*, *supra* note 36, 104 F.T.C. at 690.

40. "Substantial percentages," were reported, but the actual figures were absent. *Warner-Lambert*, 86 F.T.C. 1398, 1416 (1975), *aff'd*, *Warner-Lambert v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 453 U.S. 950 (1978), *modified*, 92 F.T.C. 191 (1978). Because only a "small number of viewers" saw an alleged claim, an allegation was rejected in *Bristol-Myers*, 102 F.T.C. 21, 326 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 58 U.S.L.W. 3528 (1985).

41. In a study analyzing 3,337 FTC cases from 1916 to 1973, it was found that 87.2% of the cases indicated no submission of tangible evidence other than the advertisements themselves, thereby leaving the Commissioners to determine the ad's tendency to deceive solely on their own judgment of what the ad conveyed. Brandt and Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. MARKETING 54 (1977). Moreover, Ira Millstein states:

A review of the cases demonstrates that generally the Commission will find that an advertisement promises what the Commission itself believes it promises. . . . Furthermore, the courts seem quite willing in most instances to uphold the Commission's view of the promise. This has been true even when there was no evidence other than the advertisement itself. . . .

Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 470 (1964). See also, LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971).

42. *Policy Statement on Deception*, *supra* note 3.

43. *Analysis of the Law of Deception*, *supra* note 4.

the nature of the claim and the consequences of the deception. Generally, twenty or twenty-five percent may be considered a substantial number. However, a smaller percentage may be sufficient if physical injury or large monetary loss could result from consumers being misled.⁴⁴

This minority position reflects past majority approaches and is rooted in substantial FTC precedent declaring that the Commission was founded to subvert the common law concept of *caveat emptor*.⁴⁵ This approach reflects an attempt to insulate consumers, often inexperienced in the ways of the business world, from the unscrupulous and manipulative techniques that might be developed by the more sophisticated and practiced hand of the marketer. In the 1937 case *FTC v. Standard Education Society*,⁴⁶ the defendant's advertising deceptively represented that a free set of encyclopedias would be given to purchasers subscribing to an encyclopedia extension or updating service. The Supreme Court said, "[t]here is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious."⁴⁷

A frequently quoted decision in this regard came from the Seventh Circuit in 1942. *Aronberg v. FTC*⁴⁸ involved the promotion of several medicinal preparations, known as "Triple-X Compound," "Reliable Perio Compound," "Perio Pills," and "Perio Relief Compound," with advertisements claiming that the compounds were effective, harmless remedies for menstrual pain, while failing to reveal to consumers that the products contained dangerous drugs in quantities sufficient to endanger health. The FTC also complained that the advertisements gave the false impression that these were remedies, while they merely reduced pain. The court affirmed the FTC order which condemned these advertisements, and said:

The law is not made for experts but to protect the public,—that vast multitude which includes *the ignorant, the unthinking and the credulous*, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions . . . Advertise-

44. *Id.* at 50.

45. In *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963), the court declared:

The central purpose of the provisions of the Federal Trade Commission Act under discussion is in effect to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the word of commerce. That rule can no longer be relied upon as a means of rewarding fraud and deception. . . .

46. 302 U.S. 112 (1937).

47. *Id.* at 116. See also *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963), which states that "[t]he vice inherent in the representations is the inability of the 'gullible' price conscious consumer to control his urge to make what he erroneously may believe is a good buy. . . ."

48. 132 F.2d 165 (7th Cir. 1942).

ments are intended not "to be carefully dissected with a dictionary at hand, but rather to produce an impression upon" prospective purchasers.⁴⁹

This historically grounded minority view, then, promotes the prosecution of relatively low levels of deceptiveness, but there is a question as to its continuing acceptance at the Commission.

The New Majority

The new majority under Chairman Miller, which seeks to prohibit only those claims which would be deceptive to consumers acting *reasonably*, has made no mention of specific numbers, perhaps because all of the cases reporting such numbers were decided under the prior "substantial number" concept which does not involve the idea of reasonable behavior.⁵⁰ The closest the new majority has come to citing numbers has been in *Cliffdale*:

Virtually all representations, even those that are true, can be misunderstood by some consumers. The Commission has long recognized that the law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few. . . . In recent cases, this concept has been increasingly emphasized by the Commission.⁵¹

Thus, the majority, although mentioning no specific figures, certainly is opposed to small numbers, and appears as well to be opposed to the traditional numbers. This, in conjunction with the *Pertschuk-Bailey* mention of twenty to twenty-five percent, suggests that no one on the Commission in the 1980s wishes to endorse such earlier figures as nine, fourteen, and fifteen percent.

Is the A.A.A.A. Correct?

The A.A.A.A. is incorrect in asserting that the FTC has found deceptiveness in a percentage as low as five. The lowest valid figure is nine percent. Further, the number of cases involving the lowest percentages has been small, and they are the older cases; the trend is upward.

49. *Id.* at 167, quoting from *Newton Tea & Spice Co. v. United States*, 288 F. 475, 479 (6th Cir. 1923) (emphasis added). See also *Florence v. Dowd*, 178 F. 73, 75 (2d Cir. 1910). But see *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964), which finds that "[a]n advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feebleminded." In *Kirchner* the Commission considered a case involving an "invisible" flotation device for swimmers, worn under the clothing, and decided that it would be absurd to understand "invisible" to mean that it would be totally unnoticeable when inflated.

50. *Supra* note 3.

51. *Cliffdale*, 103 F.T.C. 110, 165 (1984).

Still, the lowest figures have never been explicitly rejected, and many of the recent figures cited are below the thirty percent miscomprehension figure. Consequently, it appears that the FTC might be forced eventually to come to grips with the notion of miscomprehension as an alternative interpretation for deceptiveness. How it might proceed is the topic of the next sections.

Comparing the Concepts of Miscomprehension and Deceptiveness

The comparison made by the miscomprehension researchers between miscomprehension and deceptiveness is affected by their holding that "the word 'deceive' implies a deliberate attempt . . . to generate an incorrect belief or impression."⁵² That is a mistake. Violations may be found in the absence of any evidence of intention to deceive.⁵³ Further, although FTC practice has been to use the terms as synonymous,⁵⁴ the researchers specified a difference between deceptiveness and misleadingness.⁵⁵

These researchers did not study deceptiveness empirically, and so did not offer an operational definition (i.e., a concrete measurement) of deceptiveness. The omission of such a step was legitimate in terms of their stated purposes,⁵⁶ but it meant that they did not undertake the type of analysis which makes clear that miscomprehension and deceptiveness are independent concepts.

These differences are illustrated with the aid of Figure 1. It indicates three objects which may be examined and assessed according to appropriate criteria: 1) the product (or service) advertised and offered for sale, 2) the message about the product as contained in the advertisement, and 3) the conveyed meaning of the message as perceived by the consumer upon exposure to that advertisement. Both miscomprehension and deceptiveness assess what the conveyed

52. *Miscomprehension*, *supra* note 5, at 40.

53. Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1043 n.25 (1967). The reference cites in particular *FTC v. Algoma*, 291 U.S. 67 (1934), in which respondents were told that they were "not relieved by innocence of motive . . . though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however, innocently made." 291 U.S. at 81.

54. Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1025 (1956).

55. They described deceptiveness as preferred by the FTC, and misleadingness as preferred by the FDA, apparently without knowing about Section 12, *supra* note 4, or about such instances of blending the terms as in *Cliffdale*, 103 F.T.C. at 165. See also, Jacoby and Small, *The FDA approach to defining misleading advertising*, 39 J. MARKETING 65 (1975); Preston, *A Comment on "Defining misleading advertising" and "Deception in Advertising,"* 40 J. MARKETING 54 (1976). Discussion of misleadingness as pursued by the FDA is not undertaken here, inasmuch as FDA coverage of advertising is minimal in comparison to that of the FTC.

56. *Supra* text accompanying note 9.

meaning has accomplished, but their criteria of assessment are different.

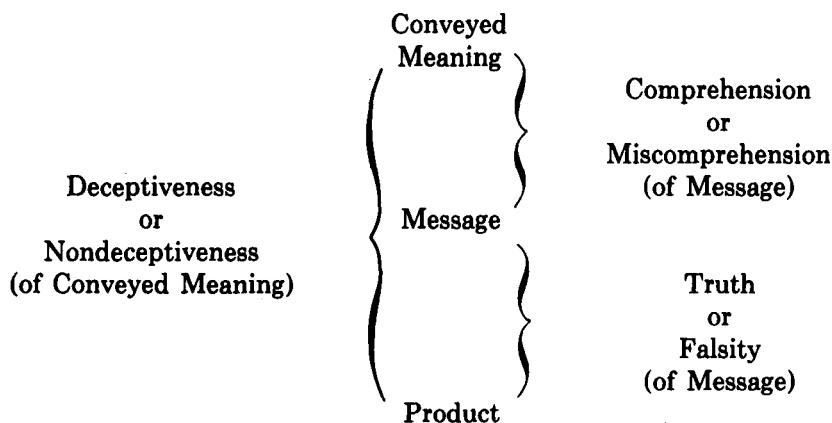


FIGURE 1

To assess *miscomprehension*, the conveyed meaning must be identified as being the same as, or different from, the literal content of the message. If the conveyed meaning is different from that stated in or logically implied by the message, miscomprehension exists. Miscomprehension thus assesses the conveyed meaning without concern for its relationship to the product. It is a concept devoted to the interaction of the consumer with the message (albeit with respect to the product).

To assess *deceptiveness*, the conveyed meaning is identified as being consistent with (true), or discrepant from (false), the product. If the conveyed meaning is discrepant, deceptiveness exists. Deceptiveness thus involves assessing the conveyed meaning without concern for its relationship to the literal message. It is a concept devoted to the interaction of the consumer with the product (albeit through the vehicle of the message).

To illustrate, if the message said the product was blue and the consumer thought the message said the product was green, there would be miscomprehension (whatever the product's actual color). If the product was blue and the consumer thought the message said it was green, there would be deceptiveness (whatever the message literally said).

Because deceptiveness is construed as a potential rather than a realization,⁵⁷ the Commission has often seen no need to obtain direct evidence of it and has merely assumed its presence by means of

57. *Supra* note 4.

examining the message.⁵⁸ That is particularly true for express claims, for which the assumption has been made that any message that is literally present must necessarily have the capacity to be conveyed to consumers.⁵⁹ It is also often true for implied claims.⁶⁰ These procedures would seem to belie the statement above that the conveyed meaning is assessed without concern for its relationship to the literal message.

Nonetheless, that statement is true in the sense that the determination of the conveyed meaning (i.e., what the consumer *believes* the message says) is a separate judgment, and that the key to its deceptiveness lies in its relationship to the product rather than to the message. This is supported by the FTC's indication that any question as to a conveyed meaning will be resolved by direct observation of it:

If our initial review of evidence from the advertisement itself does not allow us to conclude with confidence that it is reasonable to read an advertisement as containing a particular implied message, we will not find the ad to make the implied claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. . . . The extrinsic evidence we prefer to use and to which we give great weight is direct evidence of what consumers actually thought upon reading the advertisement in question. Such evidence will be in the form of consumer survey research for widely distributed ads [certain other types of less direct evidence are also described].⁶¹

The relationship between miscomprehension and deceptiveness may now be described as shown in Figure 2. Each column shows a combination of the two judgments made about the literal message and the conveyed message; each may be either true or false, independently, in what it claims about the product. The number of possible combinations is five rather than four because when both are false they may involve the same falsity (Column C) or different falsities (Column D). Miscomprehension is shown as present where the conveyed message is discrepant from this literal message, and deceptiveness is present where the conveyed message is false.

58. *Supra* note 4, *Cliffdale*, 103 F.T.C. 110, 166 (1984).

59. *Id.* See also *Thompson Medical*, *supra* note 36, 104 F.T.C. at 788.

60. *Id.* at 6-7. See also *Cliffdale*, 103 F.T.C. 110, 166 (1984).

61. *Thompson Medical*, *supra* note 36, 104 F.T.C. at 789.

	A	B	C	D	E
Literal Message	T	T	F ₁	F ₁	F
Conveyed Message	T	F	F ₁	F ₂	T
Miscomprehension	No	Yes	No	Yes	Yes
Deceptiveness	No	Yes	Yes	Yes	No

FIGURE 2

The analysis of deceptiveness at the FTC involves all of these possibilities, which in turn reflect two general ways of detecting the feature. Deceptiveness is present or absent in Columns A and B depending on whether the conveyed message reflects or is discrepant from the features of the product (which have been stated truthfully in the literal message). It is present in Columns C and D because the falsity of the literal message leads to the typically untested assumption that the conveyed meaning will be the same and therefore also false. In practice there is scant recognition of the differences among C, D, and E because of the lack of direct observation of the *conveyed* meaning. Column E reflects the theoretical possibility that the conveyed message could be true when the literal message is false, but FTC practice appears to assume that such outcome will not happen.

The miscomprehension research of the Jacoby group did not involve all of the possibilities listed in Figure 2. That seriously limits its validity as support for the suggested relationship to deceptiveness. The limitation occurred through the researchers' decision to "accept as given . . . that each of our ads provides a correct representation of Product X."⁶² This means that they examined only two of the five possible outcomes, those shown in Columns A and B.

The miscomprehension researchers' perception of a close relationship between miscomprehension and deceptiveness may stem in part from that limitation. In Column A and B the two concepts occur together or are absent together. Were these the only possibilities, they would suggest a dependency relationship. In the columns not included in the miscomprehension research, however, the relationship falls away. In Columns C and E the appearance of the one phenomenon accompanies the absence of the other. And in Column D, although the two appear together, the occurrence of deceptiveness is based on the falsity of the message and so would occur even though the miscomprehension did not.

The extent, then, to which miscomprehension and deceptiveness are related depends on the relative occurrence of the two

62. *Miscomprehension*, *supra* note 5, at 35.

groups, A-B and C-D-E, in actual deceptiveness cases. The following section reports data on such occurrences.

Two Ways of Identifying Deceptiveness in FTC Cases

The social science technique known as "content analysis" was implemented by the authors to investigate the occurrence of the two ways of identifying deceptiveness in FTC cases. Content analysis involves the creative work of identifying a set of categories to which items of content may be assigned, and then "coding" each item into its appropriate category in order to determine the percentage of occurrence of each type.⁶³

In the present instance, the contents analyzed were complaint allegations of false conveyed meanings based on literal statements in advertisements, as contained in decisions reported in the nine most recently published volumes of *FTC Decisions*.⁶⁴ There were 53 cases containing 416 such allegations.⁶⁵

The coding categories used involved whether the alleged conveyed meaning was the same as, or different from, the literal contents of the advertisement. FTC complaints typically first describe the respondent's advertising by quoting substantial portions of its wording, and often by pictorially reproducing entire print advertisements or radio/television scripts. The complaint then states the meanings that are charged with being represented to consumers through exposure to these messages. The coding task, then, was to determine for each alleged conveyed meaning whether it was the same as, or different from (i.e., allegedly implied by) the literal message.⁶⁶ Also, a subset of the "implied" category was coded to recognize those instances in which a reasonable basis for other conveyed claims was alleged to be conveyed.⁶⁷

63. Content analysis is a popular method of research used in communications research. See, e.g., K. E. ROSENGREN (ED.), *ADVANCES IN CONTENT ANALYSIS* (1981); K. KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (1980); R.W. BUDD, R.K. THORP, AND L. DONOHEW, *CONTENT ANALYSIS OF COMMUNICATIONS* (1967).

64. See *F.T.C. DECISIONS* volumes 95-103 (1980-84).

65. *Id.* These constitute all cases involving claims appearing in advertising.

66. Allegations involving failure to disclose a specified message, and therefore presumably a similar conveyed meaning, were not included in the content analysis, although it was noted that there were 48 of them. These allegations were that a specific meaning was not conveyed, and they may tend to suggest that a specific contrary meaning was conveyed and was false. Had these instances been coded on such basis, they would have fallen in the "implied" category. The complaints and decisions, however, did not specify that any particular meaning was conveyed and was false; they only charged that the failure to convey the nondisclosed meaning was deceptive.

67. While most charges involve a statement such as "Respondent in its advertising represented that its product is twice as effective as its competitor's product," the reasonable basis charge involves a statement such as "Respondent in its advertising represented that it had a reasonable basis for its representation that its product is

In addition to these two categories, a third coding category was created because a decision regarding the first two categories appeared in some instances to be impossible to make where the complaint supplied insufficient information. A fourth category was created to cover instances in which the authors had irreconcilable differences over the decision concerning the first two categories. Because these third and fourth categories indicate failure in conducting the content analysis, it is fortunate that they occurred in only 11.8% and 4.0%, respectively, of the instances studied.

The reasons for these problems, however, merit a brief discussion on behalf of any who may research similar material in the future. The principal reason is that the authors of the FTC's complaints, and of its initial decisions and final opinions in litigated cases, do not indicate whether the alleged misrepresentations are conveyed directly by explicit content or by implication. In fact, complaints routinely use the phrase "directly or by implication" in their allegations of how misrepresentations are conveyed.⁶⁸ Of course there is a reason for such procedure, which is that the complainants prefer to offer two ways rather than only one by which the finders of fact may confirm their charges. Still, for the purposes of understanding the processes of message transmission and response by which violations of the law occur, it is unfortunate that clarification, at least in litigated cases, is not routinely offered.⁶⁹

A reason why the decisions and opinions may "finesse" this problem is that the distinction between meanings stated explicitly or implied may at times be very thin. For example, in *Estee Corpo-*

twice as effective as its competitor's product."

The charge of "no reasonable basis" has become near boilerplate language in FTC cases in recent years, as an apparent consequence of the Commission's policy on advertising substantiation which was issued on June 9, 1971. 36 Fed. Reg. 12,058 (1971). See generally, *FTC Policy Statement Regarding Advertising Substantiation*, 48 Fed. Reg. 10471 (1983), appended to *Thompson Medical*, *supra* note 36; Note, *The FTC Ad Substantiation Program*, 61 *Geo. L.J.* 1427 (1973); Comment, *The Ad Substantiation Program: You Can Fool All of the People Some of the Time and Some of the People All of the Time, But Can You Fool the FTC?*, 30 *Am. U.L. Rev.* 429 (1981); Sethi, *The Case (For and Against) The Imposition of Proof of Accuracy or Substantiation Requirements on Advocacy—Or Issue-Oriented Corporate Image—Advertising*, 23 *Wayne L. Rev.* 1229 (1977). See also *Pfizer, Inc.*, 81 F.T.C. 23 (1972); Note, *Unfairness In Advertising: Pfizer, Inc.*, 59 *Va. L. Rev.* 324 (1973).

68. See, e.g., *Estee Corp.*, 102 F.T.C. 1804 (1983), which states:

Par. 6. Through the use of the statements set forth in Paragraph Five and others, in the context in which they appeared, respondent has represented, *directly or by implication*, that the Food and Drug Administration and the American Diabetes Association each has concluded that the sweeteners in Estee's special foods are useful without significant qualifications in the diabetic's diet.

Id. at 1805 (emphasis added).

69. There are definite exceptions. A good example where clarification is provided is in the initial decision of *Market Dev. Corp.*, 95 F.T.C. 100, 137 (1980).

ration⁷⁰ the complaint charged the misrepresentation that "Estee's Cookies . . . will not cause undesirable elevations of diabetics' blood sugar levels."⁷¹ The advertisement in this instance, however, stated ". . . *Instead, we use sorbitol and fructose, the slowly absorbed sweeteners that avoid the 'highs and lows' of ordinary table sugar.*"⁷² The present authors had trouble determining whether the claim was explicit or implied, since the "highs and lows" could have referred to an objective blood sugar variation, or a more subjective consumer reaction. Presumably the judge or commissioners would have had the same problem had the case been litigated.

The problems discussed illustrate why the use of more than one coder is standard practice in content analyses. The choices made will be subjective, and appeared in this instance to include the fact that the coders (i.e., the two authors) sometimes made their decisions on the basis of different portions of overall sets of extensive and complex advertising claims. Often, too, the coders simply had different meanings for the same word. These sorts of problems were attacked, after each coder did his coding separately, by a discussion in which the coders compared their bases and decided whether they should readjust their decisions accordingly. By this process most of the original differences became reconcilable.

The FTC, of course, cannot be held responsible for individual idiosyncracies. Still, it seems reasonable to suggest that it might identify alleged conveyed meanings by language that would create fewer questions about whether the meanings were explicit or implied. Presumably the Commission has a reasonable basis for its allegations, and such basis would include a theory as to the process by which the deceptive conveyance was accomplished. In practice, this could result in the alleged conveyed meanings being reported in two distinct ways, either with the exact or almost exact wording as is found in the advertising (to indicate direct, explicit claims)⁷³ or by wording that clearly was different from any wording actually found in the advertising (to indicate implied claims).⁷⁴

70. 102 F.T.C. 1804 (1983).

71. *Id.* at 1808.

72. *Id.* at 1806 (emphasis original).

73. See Monte Proulx, 102 F.T.C. 1722 (1983). The alleged false conveyed meaning about the Extra Margin Emergency Escape Mask is that it "permits normal breathing in the event of fire." *Id.* at 1724. The related wording in the ads was "breathe normally for 20 minutes." *Id.* at 1723.

74. See, e.g., Adria Laboratories, Inc., 103 F.T.C. 512 (1984). The alleged false conveyed meaning about a pain reliever was that "Efficin is not associated with most of the side effects and contraindications with which aspirin is associated." *Id.* at 513. The closest related wording in the ads was "Contains no aspirin." *Id.* The pain reliever was magnesium salicylate, which is chemically related to aspirin and has many of the same effects. An example of wording in which the Commission did not observe this simple advertising policy is found in *Estee*, 102 F.T.C. at 1805.

After the sixty-six instances in the third and fourth categories were removed, the remaining 350 conveyed meanings were categorized as 172 explicit and 178 implied.⁷⁵ To call the explicit meanings deceptive is to call the literal message false, which places these 172 instances under Columns C, D, and E of Figure 2. To call the implied meanings deceptive involves no such decision about the literal messages related to them. This does not mean they are found true, but rather that they are not challenged as false. On the assumption that any literal messages thought to be false would be so charged, we may assume that these are conceded to be true. These 178 instances therefore are assigned to the combination of Columns A and B.

The conclusion of the content analysis, therefore, is that the miscomprehension researchers failed to incorporate into their work a type of advertising message reflecting almost half of the volume (49.1%) of the last four and one-half years of actual FTC activity. Obviously their research has no capability of implying anything about the relationship of miscomprehension to deceptiveness in these conditions. Further, the 172 instances of tying deceptiveness to the falsity of the literal message involve charging a violation at a point in the communication process prior to that at which miscomprehension would be able, even theoretically, to play a role. Such criticism does not, in itself, amount to a refutation of the proposal that miscomprehension may in some cases (i.e., Column B) be related to deceptiveness. We turn in the following section to an assessment of that topic.

Miscomprehension as Deceptiveness

This section examines the apparent assumption by the sponsors of the miscomprehension research about the relationship between miscomprehension and deceptiveness when the literal message is true and the conveyed meaning occurs as a false implication drawn from that message (as in Column B, Figure 2). The relationship is that if the conveyed message amounts to miscomprehension then the identification of it as deceptiveness is a mistake. The two cannot exist together—miscomprehension precludes deceptiveness. The apparent reason for this is that miscomprehension is an act committed by the recipient of an advertising message and therefore cannot be

75. Of the 178 implied, 34 involved the implication of a reasonable basis. In all cases examined here, the conveyed meanings involving a reasonable basis occurred by implication rather than by explicit statement; their existence typically is determined not by surveying consumers but is simply assumed by the existence of the product claim they accompany. *Supra* note 67. Such conveyed meanings therefore represent a certain amount of duplication which results in the number of implied conveyed meanings being greater than it might otherwise be.

interpreted as something for which the advertiser can be blamed.

While the proponents of this argument offer no acceptable rationale for it, a considerable argument may be developed on behalf of an opposing notion, which is that miscomprehension, rather than having been ignored by the FTC, has in fact been recognized in Commission proceedings and has been used precisely as an indication of the existence of deceptiveness.

This may be seen in any FTC case in which the conveyed meaning is called deceptive after being found by empirical observation to be different from, and not logically derivable from, the literal message. Such a result would constitute miscomprehension and deceptiveness simultaneously. Although such observations in most FTC cases have not been conducted by the exact method used by the miscomprehension researchers, the methods used appear to fit the conceptual definition of miscomprehension and thus to be valid indicators of it. In addition, there has been one instance of an FTC case in which the empirical method was almost precisely the same.⁷⁶

The similarity occurred because both methods were based on a measurement used in a prior study of false implications. Preston and Scharbach⁷⁷ asked college students in an experimental setting to look at full-page advertisements from *Life* and then respond to a number of prepared statements about the advertisements' content. The subjects' task was to mark whether each statement was an "accurate" or "inaccurate" restatement or paraphrase of what the ad stated or implied.

For each advertisement there were five such statements. One reflected the explicit content of the ad and so would be called "accurate" by those subjects whose response was accurate. One was an explicit refutation of the advertisement's explicit content ("inaccurate"). A third was related by logical derivation to the ad's content ("accurate") while a fourth constituted an illogical derivation from the advertisement's content, reflecting one or another common logical fallacy ("inaccurate"). The fifth, called the "independent" statement, was constructed so as to neither reflect nor refute the explicit content, nor be logically nor illogically related to that content ("inaccurate").

The study focused on the logically invalid statements, with the hypothesis being that consumers would tend to see such meanings being conveyed, and thereby describe them as "accurate," even though the objectively proper answer was "inaccurate." The reasons

76. Sun Oil, 84 F.T.C. 247 (1974).

77. Preston and Scharbach, *Advertising: More Than Meets the Eye?*, 11 J. ADVERTISING RESEARCH 19 (1971). The research was based on that of Preston, *Logic and Illogic in the Advertising Process*, 44 JOURNALISM Q. 231 (1967).

given for this expectation were that these statements constituted logical fallacies and they made positive claims about the product, and that consumers tend to commit such fallacies and to perceive advertisements as desiring to convey such positive statements. It was further hypothesized that such effect would occur less often with other communication forms because consumers did not expect positive statements in such forms. The results confirmed this, with the illogical statements called "accurate" in sixty-three percent of instances while the figures for news stories, business memos, and personal letters carrying the same messages were forty-nine, fifty-one, and fifty-four percent.

The miscomprehension researchers' method of measurement was reported to be "patterned after Preston and Scharbach."⁷⁸ Despite small differences, the method was essentially the same as that of Preston and Scharbach, which suggests that the results of the latter might also be identified as miscomprehension, in retrospect.⁷⁹

In *Sun Oil*,⁸⁰ Preston appeared as an expert witness and introduced a survey of respondent's advertising that used the Preston and Scharbach method.⁸¹ There were eleven statements, of which three reflected the explicit content of Sun Oil advertising, two refuted the explicit content, and five were illogically derived from it. The latter five were statements that the complaint alleged to be conveyed by the advertising. These conveyed statements were found on the record to be false with respect to the product, and not stated explicitly in the advertising. However, the tendency of the survey respondents to interpret them wrongly was used to confirm the finding that they were conveyed to the public by implication and therefore had a capacity to deceive. Accordingly, in *Sun Oil* a demonstration of what the miscomprehension researchers call miscomprehension, employing a method on which the miscomprehension method was based, and insignificantly different from the miscomprehension method, was used by the FTC as evidence of

78. MISCOMPREHENSION, *supra* note 5, at 53.

79. The principal difference was that subjects were asked to designate the constructed statements as "true" or "false" based upon what they felt was either stated or implied in the message. Given that basis, "true" and "false" probably were handled by subjects in a way parallel to the handling of "accurate" and "inaccurate" in the Preston and Scharbach research. Another difference was that the miscomprehension researchers used one each of the types of statements that reflected the content explicitly or were logically derivable from it, and two each of the types that refuted the content explicitly or were illogically derivable from it. They did not use the "independent" form of statement. Subjects' specifications of "true" or "false" were compared to the researchers' objective determinations based on examining the message content, and those subjects' answers not agreeing with the objective determinations were identified as indicating miscomprehension.

80. 84 F.T.C. 247 (1974).

81. *Id.* at 259-61, 270-71. For a more detailed description, see I. PRESTON, *THE GREAT AMERICAN BLOW-UP*, 147-58 (1975).

deceptiveness.

The facts just reviewed would appear to create difficulties for the intended argument of the proponents of miscomprehension. Their apparent intent is to introduce miscomprehension into a deceptiveness proceeding, to urge a finding of fact that it exists as a behavioral concept, and then to urge a finding of law that its existence must preclude a finding of deceptiveness. Had we concluded here that the existence of miscomprehension could reasonably preclude the existence of deceptiveness as a matter of behavioral fact, we next would have applied a legal analysis to inquire whether the existence of miscomprehension could prevent the finding of a violation of FTC law based on deceptiveness. On our determination, however, that miscomprehension has actually indicated rather than precluded deceptiveness in prior FTC cases, we see no need for such a legal analysis. The appropriate analysis seems already to have been made, and the miscomprehension research offers nothing that appears likely to overturn it.

The Possibility of Informal Impact on FTC Proceedings

There remains the possibility that the miscomprehension research might informally influence the FTC by means of the argument that miscomprehension is attributable to the consumer and therefore not the fault of the advertiser. Although evidence of intent is not required to prove deceptiveness, and thus evidence of presence or absence of intent is seldom obtained, such evidence has been used in determining the scope of FTC orders⁸² and might also be used to determine whether to prosecute or even investigate instances of suspected advertising violations.⁸³

If, for instance, the Commission were straddling the fence on the question of the degree of public interest involved in a case, a realization that the advertiser was believed not to have intended any deception (along with a clean record on such matters in the past) might turn the tide in favor of less or no action. In this way the development of the miscomprehension concept might yet achieve the intended goal of lessening the impact of the FTC on advertisers.

82. "A party's intent or culpability may be considered in designing an appropriate remedial order, however. *Litton Indus. v. FTC*, 676 F.2d 364, 372 (9th Cir. 1982); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980)." *Analysis of the Law of Deception*, *supra* note 4, 46 ATTR 372 at n. 37.

83. This possibility is suggested by the analogous comment that "competing demands on the Commission's resources" will sometimes mean that it will "decline to initiate a law enforcement proceeding." *FTC Policy Statement Regarding Advertising Substantiation*, 48 Fed. Reg. 10471 (1983), reprinted as appendix in *Thompson Medical*, *supra* note 36, 104 F.T.C. at 839.

That possibility should not be taken seriously, however, without first taking into account an additional concept that is here labeled "induced miscomprehension." This is miscomprehension that can be predicted by examining the content of a message, and so is encouraged by the message sender to occur because it is favorable to that sender.

Induced miscomprehension represents a reaction to the notion expressed, at least implicitly, by the proponents of miscomprehension, that miscomprehension is always bad and that all parties desire uniformly to see it eliminated. There is common sense, of course, in the idea that something constituting an "error" is something that presumably should be corrected. And yet the definition of induced miscomprehension points to the possibility that errors made by message receivers are not always unwelcome in the minds of the senders.

Even the Supreme Court has recognized this potentiality. In *Donaldson v. Read Magazine*,⁸⁴ the respondent publisher nationally promoted a project known as the Facts Magazine Hall of Fame Puzzle Contest. The Postmaster General issued a fraud order against the publishing company, charging that the ads for the contest were false and fraudulent, and that contestants were "deliberately misled concerning all these facts by artfully composed advertisements."⁸⁵ The ads promoted the contest in large, plain, language, but the possibility of a letter-essay contest to break ties was relegated to small type under the heading "Official Rules of the Contest."

The lower court held the Postmaster General's findings were unsupported by the evidence.⁸⁶ The court stated in its findings:

Indeed, the advertisement is by no means a model of clarity and lucidity. It is diffuse and prolix, and at times somewhat obscure. Many of its salient provisions are printed in rather small type. . . . Nevertheless, a close analysis of this material discloses the complete plan. Nothing is omitted, concealed or misrepresented. There is no deception.⁸⁷

The Supreme Court, in an opinion by Justice Black, disagreed with this conclusion:

Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead . . . The Postmaster General found that respondents' advertisements had been deliberately contrived to divert readers' attention from ma-

84. 333 U.S. 178 (1948).

85. *Id.* at 180.

86. *Hannegan v. Read Magazine*, 63 F. Supp. 318, 323 (D.D.C. 1945).

87. *Id.* at 322.

terial but adroitly obscured facts. That finding has substantial support in the evidence.⁸⁸

This finding clearly acknowledges the capability of advertising to be intentionally constructed to induce miscomprehension in lieu of a literally false message.

Where *Donaldson* involved the presentation of the truth, albeit obscurely, other advertisers might omit both true and false forms of a desired message. Imagine an advertiser who knows he would benefit from the conveyance of a certain message, but knows the message is not true and so declines to include it in his advertising. But imagine as well that this advertiser knows a great deal about the way people typically respond to messages—not only that they miscomprehend, but exactly what sorts of miscomprehensions they make. In fact, this advertiser knows that if he sends a certain alternative message, a true one, the public will interpret that message so as to perceive the ad to be conveying the exact message that he was not willing to transmit in explicit form.⁸⁹

That hypothetical advertiser has found a way to convey an advertising claim without having to express it. Should such advertisers really exist, they would certainly be people who *favor* rather than disfavor the creating and maintaining of miscomprehensions in response to advertising.

Do such advertisers exist? Of course we are unlikely to obtain many admissions of such intent. But evidence exists for the likelihood of success of those who pursue such a process. The research cited earlier of Preston and Scharbach and of Preston⁹⁰ showed precisely that miscomprehensions favoring the advertiser were likely to occur because the advertising contained messages that would produce such miscomprehensions when people committed logical fallacies.

Further, the data showed that the tendency to miscomprehend varied as a function of whether the conveyed messages would be favorable or unfavorable to the advertiser if believed by the consumer. All of the logically invalid statements in the Preston and Scharbach and the Preston studies would have been favorable to the

88. 333 U.S. at 188-89.

89. An argument was made by Richards and Zakia that this unregulated approach to conveying otherwise prohibited claims is indeed a probable explanation of the predominant use of pictorial advertising very nearly devoid of verbal claims about the advertised product. Richards and Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 GA. L. REV. 77 (1981). See generally Reed and Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733 (1977); Isaacs, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097.

90. See *supra* note 77.

advertiser if miscomprehension caused them to be conveyed. For example, a statement used in both studies said that doctors recommend for colds and flu that people should 1) rest in bed, 2) drink fluids, and 3) take Bayer aspirin.⁹¹ To see this statement conveyed by the Bayer ad would have been to miscomprehend, for the ad claim actually omitted the word "Bayer" while remaining the same otherwise. Bayer, of course, would have benefitted from the error.

Meanwhile, some of the other types of statements used would have been unfavorable to the advertiser if miscomprehended. Those that were explicitly true, explicitly false, and logically derived would have been so. The independent statements, representing utter invention and having no logical relationship to the advertising content, would in some cases have been unfavorable if miscomprehended but typically would have been neutral.

The overall rate of miscomprehension for all these kinds of statements in the Preston study was 29.2 percent, remarkably similar to that of the miscomprehension researchers. By previously unreported analysis, however, we have measured the miscomprehension rate separately for those statements that would have been favorable to the advertiser and those that would have been unfavorable. The analysis, which omitted the independent statements, shows that where miscomprehension would have been unfavorable to the advertiser the rate of miscomprehension was only 20 percent, below the average. But where the miscomprehension would have been favorable to the advertiser, the rate was far above the average at 65 percent (87 percent for the Bayer example cited above).

A similar additional unreported analysis was made of the data entered in *Sun Oil*.⁹² Of eleven statements, eight would have been favorable to the advertiser if conveyed to consumers as a result of miscomprehension, and for those, the miscomprehension rate was sixty-seven percent. The other three statements would have been favorable to the advertiser only if comprehended accurately, and for those statements the miscomprehension rate was only twelve percent.

The outcome in both sets of data suggests that miscomprehension works in advertisers' favor because people are more likely to miscomprehend when doing so would favor the advertiser than when it would disfavor him. The logic behind this is that people expect ads to say favorable things about products, and even more to the point, expect ads not to say unfavorable things. Accordingly, although consumers have a natural tendency to miscomprehend all messages, they are likely to enhance the tendency when doing so

91. *Id.* at 237.

92. 84 F.T.C. 247 (1974).

would fit their preconception about the nature of advertising, and to repress it when doing so would clash with that preconception.⁹³

Assuming that all of this means that advertisers can benefit from the careful manipulation of consumer miscomprehension, it does not, of course, amount to proof that significant numbers of advertisers are consciously doing so. But the possibility of such "induced miscomprehension" is likely to function as a counterweight to the interpretation of miscomprehension as a phenomenon over which advertisers exercise absolutely no control. This is especially true when the additional concepts of eradicable and ineradicable miscomprehension are considered.

Ineradicable Miscomprehension as a

Standard for Evaluating Miscomprehension

Suggesting that miscomprehensions may be induced implies that they may be avoided. That, in turn, implies that advertising claims may be written in alternative ways that produce higher or lower rates of miscomprehension. The alternatives that produce the higher rates may be said to have produced eradicable miscomprehension, which is miscomprehension that can be eliminated or reduced by editing. Ineradicable miscomprehension, by contrast, is the type that cannot be so reduced because it already uses the simplest form that produces the lowest possible rate of miscomprehension.

An example exists in the statements "I don't have no bananas" and "I have no bananas." In a grammatical, technical sense the first of these, by employing a double negative, has a meaning different from the second, and thus presumably some people will see such different meaning conveyed. Other people, however, knowing contemporary tendencies toward slang constructions, will take the meaning of the first statement to be the same as that of the second. The first statement, therefore, is ambiguous and presumably will produce considerable miscomprehension. But the miscomprehension it produces is eradicable, because the statement can easily be rewritten as "I have no bananas" or "I have bananas," either of which appears

93. Several studies have concluded that viewers of advertising tend to "expand" the meaning of an advertisement to read into that ad more than it actually says. Shimp, *Do incomplete comparisons mislead?*, 18 *J. ADVERTISING RESEARCH* 21 (1978); Rotfeld and Rotzoll, *Is Advertising Puffery Believed?*, 10 *J. ADVERTISING* 16 (1980); Harris, *Comprehension of Pragmatic Implications in Advertising*, 62 *J. OF APPLIED PSYCH.* 603 (1977); Shimp and Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 *J. MARKETING* 22 (1981). See also discussion of such research in Rotfeld and Preston, *The Potential Impact of Research on Advertising Law*, 21 *J. ADVERTISING RESEARCH* 9 (1981).

incapable of producing the same ambiguity. The latter statements appear to be capable of producing only ineradicable miscomprehension, at least to those who find no way to rewrite *them* into simpler forms.

When miscomprehension occurs by drawing invalid implications, the solution is equally simple. Should X falsely imply Y, the editor need only eliminate X or else include in conjunction with X an additional statement that Y is not true. The tendency to see Y conveyed would plummet.⁹⁴

Eradicable miscomprehension typically is predictable. Language structures that are reducible to simpler structures, such as the double negative, obviously can be seen and recognized by experienced writers. The same is true for invalid implications based on common logical fallacies. The very concept of a common fallacy implies that it is well known.

The significance of the possibilities just discussed is that analysis of advertising claims alleged by the FTC to be deceptive shows that such claims tend often to be written in such a way as to produce eradicable miscomprehension. In *American Home Products*,⁹⁵ for example, the active ingredient was "obscured with phrases like 'the pain reliever doctors recommend most'" when it might more readily have been identified as "aspirin." In *Thompson Medical*,⁹⁶ the name of the product, Aspercreme, was held to be miscomprehended by the public as implying falsely that the product contained aspirin.⁹⁷ It might readily have been given a name that had no capacity to do that. In *Sun Oil*,⁹⁸ following the true claim that Sunoco 260 had the highest octane available anywhere, the claim was made that other Sunoco gasolines made by blending 260 with a lower octane gasoline had "260 Action." This was held to convey to consumers that the blended gasolines would have the merits of 260 and thus would give benefits not available elsewhere, which was false because the blending reduced the octane level below that of 260.⁹⁹ The miscomprehension may be attributed to the phrase "260 Action," which could convey truthfully that the other gasolines contained 260 in part, but could also convey falsely that the characteris-

94. When Beneficial Corporation appealed the prohibition of the phrase "Instant tax refund," arguing that it would thus be unable to convey a true and useful message, the situation was found to be correctable by allowing the phrase to be continued if accompanied by the word "loan" along with disclosure that such loan had no relationship to the borrower's tax refund. *Beneficial*, 86 F.T.C. 119 (1975), *remanded in part*, *Beneficial v. FTC*, 542 F.2d 611 (1976), *modified*, 94 F.T.C. 425 (1979).

95. *Supra* note 33, 98 F.T.C. at 366.

96. *supra* note 36.

97. *Id.* at 793, 796-7, 799, 803.

98. 84 F.T.C. 247 (1974).

99. *Id.* at 257, 270.

tics of 260 would remain after blending. Without question the accuracies of the Sunoco claims could have been conveyed to the public by a rewriting, which would have eliminated the conveyance of the inaccuracies.

When Preston testified in *Sun Oil*, the respondent's counsel, during cross examination, asked him whether an advertisement consisting of nothing more than the name of a company, such as "RCA," could convey additional meanings by implication. The answer given was "Yes," because such possibility can never be ruled out.¹⁰⁰ The intent of the attorney was to express the point that the Sunoco advertising was being attacked for doing nothing more than what any other message would do (precisely the point of the miscomprehension researchers, found several years prior). Such an argument, however, may be questioned by analyzing messages for their relative eradicability. Any miscomprehension produced by "RCA" would presumably be ineradicable; there is no simpler way to say that. Meanwhile, the advertising references to "260 Action" were easily subject to rewriting that could have eradicated most of their potential for producing miscomprehension.

The conclusion toward which this discussion has been progressing is that any sympathy that the FTC may show toward excusing advertisers for miscomprehension is likely to be limited to that miscomprehension which appears to be ineradicable. Because it is predictable, eradicable miscomprehension, when favorable to the advertiser, is likely to be interpreted as indicating the possibility of induced miscomprehension, and to suspect the advertiser of such inducement is to eliminate any possible sympathy based on the idea that the advertiser played no role in the process.

Logic does not demand, of course, that everyone who produces eradicable miscomprehension must have been attempting to induce it. The result could have been achieved innocently. Still, it is likely to be sensed that professional communicators usually know, and certainly ought to know, what kind of impact they are producing. Consider the observation made on this point by an FTC commissioner:

Whatever the shortcomings of advertising agencies of the size and experience of this one . . . negligence, carelessness, and lack of judgment in the choice of words have not been widely suspected. If there is any group anywhere that is thought to have a special expertise in using words that will convey precisely the message intended, it is the men who write advertisements for the country's major producers of highly promoted consumer products.¹⁰¹

While addressed to the largest advertising organizations, this remark

100. *Id.* at 259 (Preston transcript).

101. *Bristol-Myers*, 85 F.T.C. 688, 751 (1975) (dismissed).

offers no comfort to units of any size which, by asserting their claims of special expertise, make themselves vulnerable to the imposition of responsibility for what that expertise produces.

It does not seem onerous, then, to conclude that advertising experts ought to be held to producing only that miscomprehension which is ineradicable. The miscomprehension researchers argued that "zero-based miscomprehension" is intolerable, and they apparently would substitute their empirically-obtained figure of thirty percent as an acceptable alternative benchmark. However, although such a level may very well be a norm for mass communications content as it is typically written,¹⁰² there seems little question that such a level contains considerable miscomprehension of the eradicable sort.

The proper benchmark, then, it is proposed here, is that of ineradicable miscomprehension. We are seeking, accordingly, not to reject the idea that miscomprehension should exceed some benchmark level in order to be properly defined as violative deceptiveness, but to accept that the appropriate benchmark should be the amount of ineradicable miscomprehension rather than the amount of both eradicable and ineradicable miscomprehension.

The advertising industry should want to join the Commission in supporting such a criterion, since it would scarcely wish to associate itself with the goal of maintaining the sort of miscomprehension that competent writers could easily eliminate. Opposing unnecessary obscurity would represent, after all, the very essence of professionalism. Given such industry motivation, a program of consumer education by the FTC on the nature of eradicable miscomprehension probably would not be necessary.

Determining the Level of Ineradicable Miscomprehension

The work of the miscomprehension researchers cannot be used, at least not by other persons, to determine the level of ineradicable miscomprehension. By arrangement with their A.A.A.A. sponsors, the researchers kept confidential the identities of the commercial advertisements used in their work, along with the constructed statements used for obtaining responses to them. Although this arrangement may be entirely sensible within the orbit of the two groups of

102. Several technical objections have been raised which question whether the true figure might be something other than thirty percent: Ford and Yalch, *Viewer Miscomprehension of Televised Communication—A Comment*, 46 J. MARKETING 27 (1982); Mizerski, *Viewer Miscomprehension Findings Are Measurement Bound*, 46 J. MARKETING 32 (1982); Schmittlein and Morrison, *Measuring Miscomprehension for Televised Communications Using True-False Questions*, 10 J. CONSUMER RESEARCH 147 (1983).

persons involved, publication addressed to a wider audience violates the general understanding of social scientists that information will be provided to the extent of enabling research to be replicated by others.¹⁰³

The type of reanalysis done by the present authors upon the data of Preston and Scharbach, of Preston, and of the Sun Oil survey thus cannot be performed on the data of the miscomprehension researchers. The consolation exists, of course, that should their research be introduced into an FTC case the full information would have to be made public.

To implement, then, the present proposal that the benchmark be ineradicable miscomprehension, research must be done to determine the amount of such miscomprehension in the average commercial advertisement. Until such information is supplied, the conclusion tentatively suggested is that the figure is far below thirty percent and is probably below the percentage figures used by the FTC in recent times in its findings of deceptiveness.

The Remaining Problem of Blame

Should the tentative conclusion prove correct, there remains the problem that advertisers may suffer too much of the blame when their interactions with consumers result in the conveyance of deceptiveness. The interaction requires two parties, after all, and the concept of ineradicable miscomprehension, as a phenomenon attributable to the consumer, suggests that to receive all of the blame is to receive too much. We are not suggesting that actions against advertisements should ever be excused on these grounds; rather, the issue seems to be more a matter of the interpretation that is placed on the event, both by the FTC and by the mass media.

Because it is the message toward which action is taken,¹⁰⁴ and the advertiser produced the message, publicity about the affair seems automatically to be weighted toward the conclusion that the advertiser was entirely to blame. No doubt this happens because the complaint allegations, findings, and orders, along with the an-

103. If this were truly proprietary data, collected for their own purposes, then they certainly would have the right to withhold it, but when the results of an experiment are presented to the public the data should be made available to other scientists so that they can re-test and assess the credibility of those results. This is a long-held ethical canon of behavioral researchers. For a discussion of the public nature of scientific research, see J. NUNNALLY, *PSYCHOMETRIC THEORY* 8 (1978). Discussions of the nature and practice of "replication" can be found at C. SELTZ, L.S. WRIGHTSMAN, AND S.W. COOK, *RESEARCH METHODS IN SOCIAL RELATIONS* 45 (1976); K.D. BAILEY, *METHODS OF SOCIAL RESEARCH* 10 (2d ed. 1982).

104. The Third Circuit Court of Appeals, in *Regina Corp. v. FTC*, noted, "The purpose of the Federal Trade Commission Act is to protect the public, not to punish the wrongdoer. . . ." 322 F.2d 765, 768 (3d Cir. 1963).

nouncements by the FTC's information office, mention no one but the advertiser.

There could be no way, of course, for the actual prohibition to be placed on anyone but the advertiser. No comparable way exists by which consumers could be ordered by threat of law to change their thought processing. Moreover, with millions of message receivers scattered about the nation, their identities and locations representing an insurmountable problem, the efficiency obviously lies in acting at the point of the single sender.

Perhaps the answer lies in persuading the FTC to reinterpret its actions to the public. Except in the infrequent instances when evidence of intent has been established, the Commission might accompany announcements of its orders with comments explaining that consumer miscomprehension contributes to the conveyance of false messages, and that the consumer's understanding may be attributable to either the advertiser or consumer or both. There might also be efforts at consumer education, aimed at encouraging consumers to recognize the role they play in the advertising process, and to respond in a more sophisticated manner in their own best interests. None of this is proposed to take the place of law enforcement, but only to augment it and to foster fair treatment.

Will the advertising industry, as represented by the A.A.A.A., be mollified by a proposal that purports not to eliminate deceptive actions but only to better interpret them? The answer cannot be forthcoming here. We hope that the A.A.A.A. and other components of the advertising industry will insist on their rights and make the necessary effort to obtain them.

An industry that so capably interprets to the American public the views of its thousands of clients probably should be able to achieve the same results successfully on its own behalf. We feel that the need is appropriately perceived, and that the miscomprehension concept is part of the solution. It is only the reliance on the miscomprehension argument in its present form that appears inappropriate.

