Boston College Law Review

Volume 5 | Issue 3 Article 17

4-1-1964

Federal Regulation of False Advertising

Judith L. Olans

John F. Dobbyn

FEDERAL REGULATION OF FALSE ADVERTISING

"O what a tangled web we weave
When first we practice to deceive."

SIR WALTER SCOTT, *Marmion*

THE DECLINE AND FALL OF CAVEAT EMPTOR

The American economy is centered around the market place. Thus, it is dependent upon the adequacy with which the market performs its essential function—providing the stage for the dialogue of buyers and sellers, the response to which will determine future economic schedules of production, consumption, savings and investment. Logically, it is only with full information regarding the qualities, amounts, and prices of the available products that such dialogue may be conducted intelligently. In a primitive barter system type of economy, where there is a face-to-face confrontation between buyer and seller, the buyer can question the seller about the qualities of the merchandise before deciding whether to buy it. But, as the economy has expanded, the seller has become an invisible partner to the "dialogue."

The buyer is at a distinct disadvantage, for he is forced to rely on the distant seller's advertising claims in formulating his decision to purchase without an opportunity either to question the merits of the goods or the validity of the claims. Thus, with the complexities of our contemporary economic system, the danger of misleading information in advertising is greater than ever before, for false advertising can and will undercut the buyer's capability to judge his purchase. If today's "dialogue" is predicated upon false or inadequate disclosure, the resultant waste of economic resources will pervert the function of the market.[1] Perfect performance of our economic system thus depends on the opportunity for all buyers and sellers to have equal access to the market with complete knowledge regarding its offers and requirements.[2]

With the parallel development of national markets and modern communications technology, advertising has indeed become the major method of feeding the necessary information to the buyer in the market place. Advertising may be said to include all representations made by sellers or their agents to induce the purchase of a product or service—from disclosures in the popular mass communications media to the presentation of the product itself by way of trademarks and labelling.[3] As such, advertising is a major

[1] Barnes, "False Advertising," 23 Ohio St. L.J. 597, 598-99 (1962).

[2] This analogy is, of course, vastly oversimplified. Although we speak of a national market, this is in reality a series of market-places accommodating the various localities and products which make up the American economy. Again, the word "dialogue" is used here to connote more than the face-to-face bargaining confrontation of buyer and seller in a store; we must also include the numerous situations where the buyer is confronted by an invisible seller who bargains on the basis of advertising such as television testimonials, packaging, and trade names. Obviously, complete knowledge is even more important here, where a dialogue in the literal sense of the word is not possible. If these expansions are noted, however, the model of a dialogue in a market-place is useful to illustrate the basic role of advertising in our economy.

[3] Barnes, supra note 1, at 597.

creative force in business.[4] Statistics reveal 11.5-12 billion dollars is spent yearly on radio and television advertising; that direct mail advertising has an annual cost of 1.5 billion dollars; that 1700 newspapers distribute a total of 57.5 million copies daily; and that 270 farm and general magazines reach 183.5 million people.[5]

If used to provide full disclosure of all relevant information, advertising can act as a catalyst in the development of ideal competition (in the sense of greatest economic efficiency). But if abused—by outright lies, half-truths, non-disclosure, false innuendo—the basic function of the market will be perverted and the resulting economic response will no longer supply the essential needs of society. This perversion may be thought of as occurring at three levels.[6] First, the consumer will be deceived and will not get the desired return. Second, with a premium on the advertising of one's wares rather than on their efficient production, the ethical producer may be forced to compete unethically in order to survive. Last, the operation of the market, and, in turn, of the economy itself, will be undercut when false advertising diverts demand to less utilitarian goods.

With the growth of advertising, there has been an increasing governmental concern with these consequences of deceptive advertising practices and a concomitant assumption of the responsibility of protecting not only the individual consumer and the businessman but also of ensuring the maintenance of free competition. Although recognizing both the businessman's desire to make a profit[7] and the fact that by definition advertising involves the lauding of the product in question, the law has imposed legal obligations on the advertiser and has developed means to enforce violations of these duties.

When confronted by the sheer magnitude of his choice and without some assurance that this choice will not be influenced by false information, the individual buyer would no longer be the most competent judge of what to buy.[8] Contemporary market facts have thus resulted in the replacement of the ancient doctrine of caveat emptor[9] and its legal presumption of the buyer's ability to look out for himself, with a governmental cognizance of the necessity for regulation.[10]

This comment will consider the need, history, and status of current statutory regulation of advertising; the manifestations of the various forms

[4] Note, "The Regulation of Advertising," 56 Colum. L. Rev. 1018, 1019 (1956).

[5] Moore, "Regulation of Deceptive Practices by the FTC," 16 Food Drug Cosm. L.J. 102, 111 (1961).

[6] Most commentators mention only two levels—see generally 56 Colum. L. Rev. 1018, supra note 4. But for the addition of the third, and perhaps the most basic dimension of the problem, see Barnes, supra note 1.

[7] Experience has shown the necessity of restraining the stimulus of the profit motive so that men will act "ethically" in the market-place. Moore, supra note 5, at 103.

[8] Barnes, supra note 1, at 602.

[9] For a comprehensive analysis of the history of the doctrine see Hamilton, "The Ancient Maxim Caveat Emptor," 40 Yale L.J. 1133 (1931).

[10] As early as 1848, John Stuart Mill, the well-known exponent of the philosophy of individualism, noted the need for state intervention when the consumer was no longer a "competent judge of the commodity." Mill, Principles of Political Economy, Bk. V, Ch. XI, § 8 (1848).

of false advertising and accompanying evolution of regulatory standards; and the roles and procedures of the agencies which have assumed responsibility in the area. Its scope will be confined to commercial, as opposed to political and official advertising. Likewise, given the nation-wide scope of the market, federal regulation will be emphasized to the exclusion of control on the state level.

Pre-1914 Sanctions

Before the first federal regulatory statute was enacted in 1914, the remedies available to the victim of deceptive advertising practices were clearly inadequate; their efficacy was impaired not only by the plethora of elements required before the courts were satisfied that a cause of action had been stated but also by the difficulties inherent in proving them. The injured purchaser could theoretically sue either in deceit or for breach of warranty; the aggrieved producer could seek an injunction against his competitor. A brief discussion will serve to point out the deficiencies of each remedy.

The consumer plaintiff had to allege and prove five elements to state a cause of action in deceit:[11] a false representation of a fact by defendant; defendant's knowledge or belief that the representation was false ("scienter"); defendant's intent to induce plaintiff to act or refrain from action in reliance on the misrepresentation; plaintiff's reasonable reliance; and the damages to plaintiff resulting from that reliance. General difficulties in proving these elements are illustrated by a Massachusetts case,[12] where plaintiff purchased a loaf of bread in which part of a nail was embedded. The bread had been advertised as "100 per cent pure, made under the most modern, scientific process." The court held that plaintiff had not proven the falsity of the representation since it could be construed as advertising the absence of unwholesome ingredients, rather than warranting against the presence of a foreign substance. In addition, plaintiff had not shown scienter, defendant's knowledge of the nail.

Another general problem in an action for deceit arose in proof of the injury sustained. This is so because damages are measured by the rule of proximate causation—*i.e.*, they are limited to those which might reasonably be expected to follow from a plaintiff's reliance. The general rule is that nominal damages are not awarded in deceit.[13]

The difficulties in a suit against the manufacturer for breach of warranty were even more vexatious. First, plaintiff had to prove the existence of the

[11] See generally Restatement, Torts, §§ 525-552 (1938); Prosser, Torts § 86 (1955 ed.).

[12] Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922). While it is true that this case involves the negligence of the manufacturer in the production process and, as such, would today be treated as a products liability problem, it is nevertheless indicative of the practical hurdles facing the consumer who has relied upon advertising that was, albeit unintentional, untrue.

[13] Tsang v. Kan., 78 Cal. App. 2d 275, 177 P.2d 630 (1947); Brackett v. Perry, 201 Mass. 502, 87 N.E. 903 (1909). Cases allowing recovery in deceit are collected in 17 A.L.R. 672, 706. Accord: Prosser, supra note 11.

warranty. Under the Uniform Sales Act,[14] any affirmation of fact or any promise relating to the goods which is contained in the advertisement which induced the purchase will have the effect of an express warranty. If the purchase was made under a written contract of sale, however, the parol evidence rule might make proof of an oral warranty impossible.[15]

Two additional requirements to the showing of the warranty—those of privity and reliance—further limited the use of this remedy. Traditionally, the courts have held that the warranty runs only to the immediate buyer and not to the ultimate consumer.[16] Thus, there was no recovery against the manufacturer without a showing of privity.[17] If the dealer had not repeated the representations of the advertiser, there was no cause of action against him.[18] And a mere showing of the advertising copy to the buyer was not considered a warranty of the truth of the statements in it.[19] The buyer had also to prove his reliance on the misrepresentations.[20] Lastly, as in deceit, damages were again limited, here to the loss directly resulting from the breach of warranty.[21] Such loss is often apt to be less than the court costs of its recovery.

The problems involved in a suit by a competitor to enjoin a deceptive advertising practice are illustrated by a leading federal case[22] which was predicated upon a defendant's deception of the public through the sale of misbranded goods. The case denied recovery on the grounds that equity's jurisdiction in a private suit for an injunction against unfair competition was limited to the protection of the complainant's property rights. The court held that a cause of action had not been stated, for complainant would have no right of action unless defendant's deception of the public took the form of an injury to complainant's property rights, *i.e.*, the representation of complainant's goods as defendant's own products. The court referred to the

> thoroughly established principle that the private right of action is not . . . based on fraud or imposition of the public but is maintained solely for the protection of the property rights of complainant,[23]

[14] Uniform Sales Act § 12 (1906).

[15] Miami Cycle & Mfg. Co. v. Nat. Carbon Co., 268 Fed. 46 (6th Cir. 1920); Demos Const. Co., Inc. v. Service Supply Corp., 153 Pa. Super. 623, 34 A.2d 828 (1943). See Note, "The Parol Evidence Rule and Breach of Warranty Resulting from Misstatements in Advertising," 29 Colum. L. Rev. 805 (1928) and cases collected therein.

[16] Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928).

[17] Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938); Prosser, supra note 11, § 84.

[18] Handler, "False and Misleading Advertising," 29 Yale L.J. 22, 26 (1929).

[19] Cool v. Fighter, 239 Mich. 42, 214 N.W. 162 (1927).

[20] Euzent v. Barrash, 180 Md. 451, 25 A.2d 462 (1942); Beckett v. F. W. Woolworth Co., 376 Ill. 470, 34 N.E.2d 427 (1941); Harrington v. Smith, 138 Mass. 92 (1884).

[21] Uniform Sales Act § 69(6) (1906). It is interesting to point out that even if the facts would seem to warrant a suit for breach of contract, the general rule is that advertising is not an offer; it is merely an invitation for an offer, an "offer to offer" as it were. Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893). Thus, the advertiser may use enticing terminology to attract the buyer and yet be free to negotiate with him on an entirely different basis. 1 Williston, Contracts § 27 (3d ed. 1957).

[22] American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900).

[23] The court went on to note:

and concluded, "It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods but this does not give rise to a private right of action."[24] While deploring the ethics of the situation, the court, Cassandra-like, concluded that any change of remedy must be initiated by the legislature.

In addition to the specific difficulties of each remedy, there were certain further deficiencies common to all three. As we have seen, the individual plaintiff had to allege and prove an injury resulting from the deceptive practice, greater than nominal money damages or the infringement of his property rights. Judicial inflexibility in delineating the elements of each cause of action and the difficulty in proving these prerequisites, in addition to the time and cost of litigation, barred from the courts many individuals with valid claims.

History of Federal Statutory Regulation

The first federal regulatory statute, the Federal Trade Commission Act of 1914,[25] seemed designed to alleviate these and other ills.[26] Under the Act, which made illegal "unfair methods of competition in commerce," the Commission was empowered to commence an action for violation of the statute[27] if it had reason to believe that an unfair method of competition was being or had been used, and if the Commission further felt that a proceeding brought by it would be in the public interest. Thus, the Act eliminated both the problems of cumbersome causes of action and of proving sufficient injury which had been so damaging to pre-1914 suits. By entrusting control of false advertising to an administrative agency, the Congress also demonstrated its cognizance of the unique characteristics of such an institution which made it more qualified than either a court or an individual litigant to respond to the problems in the area. Most notably, the agency had the

> There is a widespread suspicion that many articles sold as being manufactured of wool are not entirely made of that material. Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of the persons whose goods may deceive the public? We find no such authority in the books.

Id. at 286.

[24] Accord, Weener v. Brayton, 152 Mass. 101, 103, 25 N.E. 46, 47 (1890), where the court said:

> The jurisdiction of equity to restrain the wrongful use of such trademarks by persons not entitled thereto is founded not upon the imposition on the public thus practised but on the wrongful invasion of the right of property in such trademarks.

[25] 38 Stat. 717 (1914), 15 U.S.C. §§ 41-58 (1958).

[26] There is much textual authority to the effect that a second, if not controlling, purpose of the Act was to answer the public discontent with the present status of anti-trust law—the sentiments aroused by the presidential campaigns of William Jennings Bryan and the "trust-busting" of Theodore Roosevelt. In addition, the inadequacies of the Sherman Act of 1890 became clear in 1911 after the Supreme Court's announcement of the "rule of reason," *i.e.*, that the statute did not prevent all combinations in restraint of trade, merely those which were unreasonable. United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911). See Cushman, The Independent Regulatory Commissions, 177-78 (1941).

[27] 38 Stat. 719 (1914), 15 U.S.C. § 45(b) (1958).

following powers: to initiate proceedings without awaiting a moving party; to constantly administer a continuing problem with the required expertise; to relieve the over-burdened and under-specialized courts and Congress from responsibility in the area; and to assume the expense of representing the general public against the alleged violator.[28]

In general, federal regulation of advertising has not developed as a uniform scheme; rather, it reflects a piecemeal approach, a step-by-step application of curbs to specific evils arising under the common law and under the early statutes. Under its power to regulate commerce,[29] Congress has passed two general laws and four special enactments (the so-called truth-in-products statutes) conferring jurisdiction upon the Federal Trade Commission. Even after considering the various grants of jurisdiction in the area to other agencies, to be discussed below,[30] one may conclude that the FTC has the major federal responsibility in the advertising field.[31]

The Federal Trade Commission Act of 1914[32] made no specific reference to false advertising but, in section 5, limited the Commission's jurisdiction to "unfair methods of competition in commerce."[33] By this phrase, Congress intended to include false advertising;[34] indeed the first two cases decided under the statute dealt with false advertising.[35]

For the purposes of this paper, three relevant problems arose in the construction of the seemingly straightforward phrase, "unfair methods of competition in commerce." One of these was solved by judicial interpretation; one required further legislative enactment; and one necessitated a resort to both methods of institutional settlement.

The first problem concerned the assessment of institutional responsibility for determining the existence of "unfair competition." Although the Act specifically provided that the FTC's findings of fact were to be binding on the courts and that the scope of judicial review was to be limited to questions of law,[36] the early cases clouded this distinction and held that the court, not the FTC, was the proper agency to define the term.[37] Later cases, how-

[28] There is a plethora of authority substantiating the advantages of regulation by administrative agency. See Final Report of the Attorney General's Committee of Administrative Procedure, 77th Cong., 1st Sess., 7-20 (Comm. Print 1941); Davis, Administrative Law 10, 11 (1951); Gellhorn and Byse, Administrative Law 3 (4th ed. 1960); Woll, Administrative Law: the Informal Process 5-7 (1963).

[29] U.S. Const. art. I § 8.

[30] See text at notes 152-77, infra.

[31] As early as 1932, over 90% of all proceedings before the FTC involved advertising abuses. Watkins, "An Appraisal of the Work of the Federal Trade Commission," 32 Colum. L. Rev. 272, 277 (1932). Note that this was before the scope of the Commission's jurisdiction was enlarged by the Wheeler-Lea Amendments of 1938, infra note 42.

[32] 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1958).

[33] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

[34] Barnes, supra note 1, at 605. There is some authority that Congress also intended to regulate monopolistic practices under § 5; for this point of view see note 26 supra.

[35] FTC v. Abbott & Co., 1 F.T.C. 16 (1916); FTC v. Circle Cilk Co., 1 F.T.C. 13 (1916). Textile products containing no silk were advertised as "silk" and "cilk" respectively.

[36] 38 Stat. 720 (1914), 15 U.S.C. § 45(c) (1958).

[37] FTC v. Gratz, 253 U.S. 421, 427 (1920). But see Mr. Justice Brandeis, dis-

ever, reversed this trend and recognized the Commission's exclusive power to determine the unfairness of a specific practice.[38]

The second problem arose when the first *Raladam* case, *FTC v. Raladam Co.*,[39] held that it was not enough to show that a practice was unfair without proving the existence of a competition which was injured. In other words, without a showing that substantial competition—as opposed to the public generally—was injured or threatened to be injured by the unfair methods complained of, the FTC had no jurisdiction.[40] Thus, the Commission would not be able to restrain the unfair practice of a monopoly or an industry where all the competitors joined in the practice. The case was much criticized on the grounds that Congressional intent had been not only to ensure competition but also to protect the consumer.[41]

To counteract the *Raladam* holding, Congress enacted the Wheeler-Lea Amendments of 1938.[42] The Amendments added four new sections to the original Act and amended section 5[43] so that it now read, "unfair methods of competition in commerce *and unfair or deceptive acts or practices in commerce* are declared unlawful."[44] (Emphasis supplied.) By omitting the word "competition" from the additional language, the emphasis was shifted from practices unfair to competitors to those injuring the general public; and by removing the proof requirement of injury to competition, the FTC was able to protect the consumer directly.[45]

The solution of the third problem under the original enactment is attributable to both an evolution in judicial interpretation and an additional manifestation of legislative intent. This problem concerned the meaning of the words "*in* commerce." (Emphasis supplied.) It was held that this jurisdictional grant was less broad than that of "affecting commerce," as appeared in such statutes as the Interstate Commerce Commission Act. Since, as the Supreme Court held, the history and operation of the Federal Trade Commission and the Interstate Commerce Commission were different, there was a different rationale for the scope of their jurisdiction.[46] Thus, in *FTC v.*

---

senting in *Gratz*, at 437, to the effect that whether or not the practice was unfair was to be determined by the Commission, subject to judicial reversal only on the grounds of unreasonableness.

[38] See FTC v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934).

[39] FTC v. Raladam Co., 283 U.S. 643 (1931).

[40] Id. at 646.

[41] 56 Colum. L. Rev. supra note 4, at 1022; Note, "The Consumer and Federal Regulation of Advertising," 53 Harv. L. Rev. 828 (1940). *Raladam* was contra to an early judicial suggestion that the function of the FTC was to protect the consumer. FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

[42] 52 Stat. 114 (1938), 15 U.S.C. §§ 52-58 (1958).

[43] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958).

[44] Ibid.

[45] Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942); Scientific Mfg. Co., Inc. v. FTC, 124 F.2d 640 (3d Cir. 1941); Pep Boys—Manny, Moe and Jack, Inc., v. FTC, 122 F.2d 158 (3d Cir. 1941). It was said that before these Amendments, the FTC spent "more time and money . . . in proving competition and injury to competitors than . . . [it] expended in the proof of the offense itself." Hearings Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 5 (1937).

[46] FTC v. Bunte Bros., Inc., 312 U.S. 349, 353 (1941).

Bunte Bros., Inc.,[47] it was held that FTC authority did not extend to practices in intrastate commerce albeit their substantial effect on interstate commerce. The dissent in that case emphasized the discrepancy between such an interpretation and the principle handed down in *The Shreveport Case*.[48]

Although later judicial interpretations gradually expanded this restrictive definition of commerce,[49] successive legislation supplied a further impetus to the trend. The Wheeler-Lea Amendments[50] conferred jurisdiction over the "dissemination" in commerce of any advertisement of food, drugs, cosmetics, and devices;[51] and the four truth-in-products statutes enacted between 1939 and 1960[52] further broadened the grant of commerce clause jurisdiction.[53] Current cases[54] have given a more liberal construction to

[47] Early cases were in accord—see Canfield Oil Co. v. FTC, 274 Fed. 571 (6th Cir. 1921), requiring an actual involvement in interstate commerce, *i.e.*, more than a mere close relationship between intrastate and interstate commerce. An exception was allowed where the intrastate and interstate activities were so intermingled as to be inseparable. General Motors v. FTC, 114 F.2d 33 (2d Cir. 1940); FTC v. Hoboken Whitehead and Color Works, Inc., 67 F.2d 551 (2d Cir. 1933).

[48] Houston and Texas Ry. v. United States, 234 U.S. 342 (1913).

[49] After United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944) held that an insurance contract was interstate commerce, it was held by analogy that a purchase of advertising space in a publication published in another state and of national circulation is interstate commerce. See, citing *Southeastern Underwriters*, Sunbeam Corp. v. Wentling, 185 F.2d 903 (3d Cir. 1950).

[50] The Wheeler-Lea Amendments accomplished several other results besides those cited in the text, although the general purpose was the same, namely, to enlarge the jurisdiction of the FTC. These included a statutory definition of false advertising in regard to certain types of products (food, drugs, cosmetics, and devices) and an expansion of the administrative enforcement procedures.

[51] 52 Stat. 114 (1938), 15 U.S.C. § 52 (1958).

[52] In order of their passage, these statutes are: Wool Products Labelling Act of 1939, 54 Stat. 1128 (1940), 15 U.S.C. §§ 68-68j (1958); Fur Products Labelling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1958); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (1959); Textile Fiber Products Identification Act, 72 Stat. 1717 (1960) as amended, 15 U.S.C. §§ 70-70k (1963).

The rationale of these statutes is protection through requiring informative labelling of certain categories of products. Certain practices in regard to these products, especially their misbranding, both on the label and in the accompanying advertising material, were made "unfair" within the meaning of § 5. The products were chosen because of consumer inability to evaluate its qualities (fur and flammable fabrics) or consumer confusion resulting from technological advances (synthetic textiles). The statutes are similar to the previous regulatory scheme in that jurisdiction is still based on interstate commerce, but they are much broader in scope than the earlier enactments in that they specifically regulate the products in question at all levels of production and distribution. In addition, the FTC was authorized to promulgate rules and regulations detailing the requirements for the labelling, invoicing, and advertising of each product. Regulatory standards are thus easier to administer than under the broad concept of unfairness in section 5. The same sanctions—*i.e.*, the cease and desist order and the injunction—are available.

[53] The enactments purport to regulate not only conduct after these goods had reached the market but also conduct at the stage of introduction into commerce; if such conduct is "unfair" under § 5, the Commission may forbid their entry into the channels of trade.

[54] Holland Furnace Co. v. FTC, 269 F.2d 203 (7th Cir. 1959); Asheville Tobacco Bd. of Trade, Inc., v. FTC, 263 F.2d 502 (4th Cir. 1958); Shafe v. FTC, 256 F.2d 661 (6th Cir. 1958).

the words "in commerce" consistent with the modern trend of federal constitutional law in this general area.[55]

Thus, both by statute and by judicial determination, the FTC has become buttressed with broad jurisdictional grants of power. A more detailed examination of the Commission's operating practices—the evolution of substantive regulatory standards and the availability of administrative procedures and sanctions—should assist in evaluating how well the FTC has used this grant within the limits of its annual budget and of judicial review of its actions.[56]

The Commission as It Exists Today

Consideration up to this point has been directed at the birth and development of the Commission. This gives a true perspective for the evaluation of the Commission in its present state and an estimate of trends for the future. This evaluation is divisible into three major categories:

(1) The *methods of detection* of false advertising, including careful surveillance of the advertising field by the Commission to discover deceptive practices on its own, as well as the reception and processing of complaints from outside sources;

(2) The *present standards* against which the Commission measures advertising in order to declare it either objectionable as deceptive or objectionable; and

(3) The *procedures* by which the Commission can and does take action against deceptive practices.

Methods of Detection of False Advertising

The first major step in the Commission's comprehensive program for the elimination of false advertising is a surveillance of the entire field of advertising that will be as extensive and yet detailed as time, money and manpower will permit. The Federal Trade Commission Act has given broad powers of investigation to the Commission,[57] including subpoena powers,[58] but obviously these powers are not self-activating. They reach only as far

[55] An additional problem, more relevant to the control of monopolistic practices than to the regulation of false advertising (see supra, notes 26 and 34) involved the issue of whether the unfair methods of competition were to be limited to those which were prohibited at common law or under the Sherman Act. Although the majority of the cases had answered in the negative (see FTC v. R. F. Keppel & Bros., Inc., supra note 38, at 309; Sears, Roebuck Co. v. FTC, 258 Fed. 307 (7th Cir. 1919)), the question was not fully settled until after the passage of the Wheeler-Lea Amendments when substantially all of the courts followed this trend, concluding that the purpose of the Amendments was to enlarge the jurisdiction of the FTC to include the power to regulate not only those trade practices which were illegal in 1914, but also those which may arise in the future. FTC v. Cement Institute, 333 U.S. 683 (1947); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962). Note that again, final resolution of the problem was a result of action by both the judiciary and the legislature.

[56] A large number of the Commission's orders are appealed to the courts since, pending a final ruling, the advertising practice in question may be continued. See text at notes 132-36 infra.

[57] 38 Stat. 721 (1914), 15 U.S.C. § 46 (1958).

[58] 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958); 38 Stat. 724 (1914), 15 U.S.C. § 50 (1958).

as available personnel can carry them. At present the Bureau of Deceptive Practices consists of a Director, Assistant Director, assistant to the Director, four Division Chiefs, and sixty attorneys. It also has a Division of Scientific Opinion with a chief and seven professional employees. Comparing this manpower limitation to the vast breadth of the advertising spectrum, the Commission is ultimately forced to allot its attention on a priority basis depending upon the seriousness of the potential effect of a misrepresentation upon the public. The advertising of certain products is more carefully scrutinized than that of others. The list of priority products includes food, drugs, cosmetics, health devices (particularly if potentially dangerous), wearing apparel, household goods, building materials, hygienic products (soap, dentifrice, toilet preparations), correspondence courses, auto repair parts and accessories, optical supplies and the like.[59]

In 1962, FTC Chairman Earl W. Kintner announced an intensified examination of the communication media:

> Instead of the present system of selective monitoring of TV commercials, all national television networks are to be monitored throughout the time they are on the air. Any advertising of doubtful integrity will be investigated on a priority basis, with the scope of the investigation to reach all those responsible for the deception.[60]

At present, all TV networks submit commercials disseminated during one week in each month; television stations submit scripts covering a 24-hour period four times a year. Radio stations submit continuities for a 24-hour period every three, six or twelve months, dependent upon their size and location. Twenty five newspapers, distributed geographically and representing metropolitan and rural areas, and ten magazines are surveyed every week.[61] The problem is always present of allocating the services of approximately sixty attorneys engaged in investigation and trial work so that the field will be most effectively covered.

Three types of specialization most commonly suggested are division according to commodity, type of deception, and medium of advertising. Specialization according to commodity seems highly impractical when one considers dividing the thousands of commodities and services advertised among the scant personnel available. This system would require every investigator to be familiar with every medium of advertising and every type of deceptive practice in order to adequately police the full advertising campaign of each commodity. Similarly division of manpower according to media —magazines, television, radio, pamphlets—would require expert understanding of every type of misrepresentation as applied to every important commodity. A strict adherence to the third possibility of creating experts in each type of false advertising—from misleading prices to misstatements about the quality, quantity, origin and manufacturer of the goods—would lead to gross reduplication of effort. Every investigator would have to scan

[59] Barnes, "False Advertising," 23 Ohio St. L.J. 597, 617 (1962).

[60] F.T.C. News Summary, No. 59, Nov. 4, 1962, cited in 37 Notre Dame Law. 524, 528 (1962).

[61] F.T.C. Ann. Rep. 1961, at 30.

the same television or magazine advertisement for a violation in his particular field. The system presently used seems to be a resultant of the three in which the investigators by chance of experience have individually become specially qualified in matters involving certain commodities.[62] In the same way experience has made some investigators more expert in the special problems of television or radio or newspaper advertising, etc. Because the deception of fictitious pricing is well adapted to any medium and nearly any commodity or service, practically all the investigators have to be competent in this field.[63] In the more specialized areas of deception, such as misrepresenting "guarantees" or television mock-ups, again some investigators become experts through the chance of experience. While this "system" seems to be the product of erratic evolution it does provide to some extent the benefit of expertness that comes of specialization, without falling heir to the impossibilities and reduplication of effort that would accompany any suggested method of strict specialization.

In addition to the efforts of the Commission itself, a major portion of the job of surveillance is done by other officials and, more significantly, by the general public. Incidents of false advertising come to the attention of the Commission through complaints of deceived purchasers, competitors, members of Congress, the Attorney General and other government agencies. Complaints are investigated in every case possible on the priority basis referred to above. In 1962, 48.9 percent of the Commission's investigations in the deceptive practice field arose directly from outside complaints.[64] The complainant's identity is not divulged[65] and he is not made a party to any subsequent proceeding.[66]

Standards of False Advertising

A. *Introduction*

> The term false advertisement means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the circumstances prescribed in said advertisement, or under such conditions as are customary or usual.[67]

By means of Section 15(a)(1) of the Federal Trade Commission Act,

[62] Memorandum from Daniel J. Murphy, Director, Bureau of Deceptive Practices, to Frank C. Hale, Program Review Officer, Nov. 1, 1962.

[63] Ibid.

[64] Auerbach, "Federal Trade Commission," 48 Minn. L. Rev. 383, 394 (Table IV) (1964).

[65] 16 C.F.R. § 1.15.

[66] 16 C.F.R. § 1.14.

[67] 52 Stat. 114 (1938), 15 U.S.C. § 55 (1958).

Congress has indicated the broad field but has left it to the Commission to string the fence lines.[68] Actually the distinction between allowable and violative advertising has little of the clarity of a fence line, but rather comprises an area of discretion which can only be defined up to a point. While the Commission must have standards, rules and yardsticks to guide its actions, they must not be so well-defined and inflexible as to bind the Commission in a straight-jacket. As earlier suggested, the Commission must be free to adapt its actions to meet the most ingenious, novel and subtle shifts in the techniques of misrepresentation. Congress realized the impossibility of meeting the problem with the standard, slow-moving legislative-executive-judicial machinery, and placed the problem squarely in the hands of this administrative agency, leaving it to their expertise to color in the broad forms raised by such terms as "unfair or deceptive acts or practices."[69] The field of false advertising is dynamic and constantly changing as creative minds are applied to the problem of selling thirty-six per-cent more dog food than the indistinguishable Brand *X* without breaking any of the *existing* Commission standards. This is why the Commission is not submerged in the cement of strictly interpreted, all-inclusive statutory law, and it is also why an attempt at a precise definition of the line dividing the allowable from the *verboten* would be obsolete before it was proof-read.

B. *Who Is to Be Protected—Reasonable Man or "Fool"?*

Conceptually, deception suggests an interaction of personalities. It is but an abuse of the obvious to state that what may deceive a gullible individual might not deceive one possessed of reasonable powers of observation and analysis. In defining what acts are to be characterized as deceptive, it is thus necessary to determine which cross-section of the community is to be protected. In this respect there has been a steady progression from the "reasonable man" standard in determining the capacity to deceive, to the present standard of protecting the "fool."

In 1927, the Ostermoor Company advertised their mattresses by pictures of a mattress with a tear in one corner from which the stuffing flared out several feet. The court found that actually the stuffing would extend no more than three to six inches. This, however, in 1927, was dubbed the "time honored custom of at least merely slight [*sic*] puffing." The standard the court applied in reaching its judgment was that "this pictorial representation . . . even though exaggerated . . . cannot deceive the *average purchaser*." (Emphasis supplied.)[70]

Just ten years later the Supreme Court had before it an appeal from a cease and desist order by the Standard Educational Society, an enterprising encyclopedia concern whose representative told prospects that they (the prospects) had been chosen from a small list of "well connected representative people" and would receive a full set of books FREE as an advertising plan for just the privilege of using the name of the prospect—and $69.50 for a loose-leaf extension service. The entire performance was fraudulent.

[68] Kalwajtys v. FTC, 237 F. 2d 654, 656 (7th Cir. 1956).
[69] 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1958).
[70] Ostermoor & Co. v. FTC, 16 F.2d 962 (2d Cir. 1927).

Considering the scheme, the prospects were hardly chosen for their brilliance of perceptiveness, and the $69.50 covered the price of the books as well as the loose-leaf service. The appellate court had concluded that a man buying a set of books would not be "fatuous enough to be misled" and overruled the Commission.[71] The Supreme Court, however, reversed in favor of the Commission and re-set the standards with the words, "There is no duty resting on 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."[72]

Circuit Judge Augustus N. Hand nailed the next rung on the ladder with language that has found its way consistently into the wording of court opinions ever since. General Motors Acceptance Corporation (GMAC) devised a plan for installment purchasing of automobiles which it attractively and elaborately advertised as the "6% Plan." The natural interpretation of the unwary public was that the plan contemplated a simple interest charge of six per-cent per annum on the *unpaid* purchase price. Actually the rate of interest was six per-cent on the *full amount* financed until the account was closed. This amounted to an actual interest rate of approximately eleven and one-half per-cent per annum on the unpaid balance. Judge Hand upheld the Commission and also clearly defined the present level of society at which the Commission's protection is to be aimed:

> It may be that there was no intention to mislead and that only the careless or the incompetent could be mislead. But if the Commission, having discretion to deal with these matters, thinks it best to insist on a form of advertising clear enough so that in the words of the prophet Isaiah, 'Wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment.[73]

Just prior to quoting these words of Judge Hand, Judge Lindley, in *Aronberg v. FTC*, aptly expressed the principle in these words:

> 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.[74]

Judge Gardner reaffirmed this position since the advertising disseminated by the company respondent reached people of "all classes and conditions."[75]

C. *What Practices Will Deceive the Fool?*

Having decided to aim its protection at this level of public gullibility, the Commission has levelled its attack on a great variety of deceptive techniques. It would be impossible in this paper to discuss each technique in detail, but for all their variety they do fall into specific categories. A detailed

[71] Standard Educ. Soc. v. FTC, 97 F.2d 513 (2d Cir. 1938).
[72] FTC v. Standard Educ. Soc., 302 U.S. 112, 116 (1937).
[73] General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940).
[74] Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

examination of each category and the types of practice that fall within it will give a basis for judging any practice not treated.

(1) Direct Misstatement About the Quality of the Product

The most direct approach is a clear misstatement, express or implied, about the quality, character, capacity or performance of a product. For example, the Commission found it a clear deception when Procter & Gamble used the name "Naphtha Soap" to describe soap containing less than one half of one per-cent of naphtha, a completely ineffective amount.[76] The same applies to calling a product "Duraleather" if in fact the product contains no leather;[77] or use of the name of a fruit to designate an artificially colored and flavored product without indicating its artificial nature;[78] or calling products "preserves" or "pure preserves" which did not reach the minimum standard formula used by manufacturers of "preserves" or "pure preserves" (fruit content of 45 pounds to 55 pounds of sugar, cooked to a consistency of approximately 68 per-cent water soluble solids).[79] Use of the world "gold" is carefully scrutinized. When a product is described unqualifiedly as "gold" it must be composed throughout of twenty-four karat fineness within one-half karat tolerance.[80] If the word is used to denote color rather than composition this fact must be clearly expressed.[81]

The progressive tightening of standards is evident in the degree of relevance of the misrepresented quality which will draw the Commission's official attention. In the 1927 *Ostermoor* case a direct misrepresentation of the amount of stuffing in a mattress was not considered to give the advertiser an unfair advantage. But compare the recent Colgate-Palmolive television commercial in which the announcer said, "To prove Rapid Shave's super-moisturizing powers we put it right from the can onto this tough dry sandpaper."[82] A close-up then showed a hand drawing a razor through the lather and leaving a smooth path in the purported sandpaper. "It was apply . . . soak . . . and off in a stroke." When the Commission found that the sandpaper was a piece of plexiglass covered with sand on a jelly like substance, a cease and desist order was issued. In defense, Colgate claimed first that the cream would actually moisturize sandpaper to the point at which it could be "shaved" clean; but it would require upwards of an hour's soaking, and the limits of a sixty-second commercial compel the use of a more practical method of demonstration. This defense was of no avail, since the deception could easily have been cleared up by a word from the announcer or a visual fade or dissolve to indicate passage of time. The clear implication was that "rough sandpaper" could be so dramatically moisturized in the time usually used to soak a beard before shaving.

A further contention of the respondent, and the one to be compared to

---

[76] American Life and Acc. Ins. Co. v. FTC, 255 F.2d 289, 293 (8th Cir. 1958).
[76] Procter & Gamble Co. v. FTC, 11 F.2d 47 (6th Cir. 1926).
[77] FTC v. Masland Duraleather Co., 34 F.2d 733 (3d Cir. 1929).
[78] FTC v. Good-Grape Co., 45 F.2d 70 (6th Cir. 1930).
[79] Fresh Grown Preserve Co. v. FTC, supra note 45.
[80] 16 C.F.R. § 23.32.
[81] Ibid.
[82] Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962).

the *Ostermoor* case, is that the "sandpaper" demonstration was mere metaphorical puffing. No one buys shaving cream to shave sandpaper, and Rapid Shave did possess adequate moisturizing power to shave the human beard. Here the court distinguished between harmless metaphorical references to "sandpaper beards", or pictures of Frank Gifford of the New York Giants behind a sandpaper mask just prior to shaving with Rapid Shave on camera to illustrate the analogy, and clear direct misrepresentations of fact. The sandpaper demonstration was not merely an eye-catcher. It was meant to "prove" Rapid Shave's moisturizing power. It is immaterial that a buyer does not intend to shave sandpaper, if his judgment in choosing a brand can be affected by this misrepresentation. As Judge Manton put it in the case of a retailer advertising himself as a wholesaler, "It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented."[83] As the court further noted, "the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference."

A further distinction was drawn by the court in limiting the cease and desist order to misrepresentations which pertain directly to a quality or selling point of the product, as opposed to irrelevant misrepresentations that do not affect the buyer's judgment of the product. For example, the television camera distorts the true color of coffee, orange juice and iced tea; ice cream and the head on a beer melt under the hot lights. Obviously the substitution of a substance that gives the appearance of these articles on a television screen is not a misleading representation. But here again there is a distinction between showing a celebrity sipping what is actually heated red wine to advertise coffee, and a close-up of that same red wine to the accompaniment of a claim that the quality of the coffee is proven by its rich dark appearance. Similarly, there is nothing injuriously deceptive in an announcer-model wearing a blue shirt which photographs white to show the *fit* and *collar style* of the sponsor's new white shirts, but if he is advertising the strength of a detergent by pointing to the *whiteness* of his shirt, it is another matter.

The central, in fact the only issue before the Commission in passing upon an advertisement is *capacity to deceive*. The fact that a representation is literally true is no defense if the over-all impression is misleading. The classic example of misuse of the "truth" occurred shortly after Reader's Digest published an article on nicotine and tar content in cigarettes, concluding that "the differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful." In fact, "the smoker need no longer worry which cigarette can most effectively nail down his coffin. For one nail is just about as good as another." From an accompanying table showing the insignificance of the differences between brands, it was seen that Old Golds contained less nicotine and tars than the others examined. Old Golds proceeded to "advertise this difference as though it had received a citation for

[83] L & C Meyers Co. v. FTC, 97 F.2d 365, 367 (2d Cir. 1938).

public service instead of a castigation from the Reader's Digest." In affirming a cease and desist order, the court referred to this use of technically true statements as "a perversion which results in the use of the truth in such a way as to cause the reader to believe the exact opposite of what was intended by the writer of the article."[84]

In this regard it should be noted that the clarification of claims by the use of small print will not be deemed to destroy the misleading effects of easily read false representations. Misrepresentations about insurance contained in easily readable form letters and application forms sent by mail to prospective customers were not overcome by inclusion of miniature policies, which of necessity were in small print and of considerable length.[85] Similarly, a subsequent clarification of a false representation does not defeat a charge of misrepresentation. The publishing firm that made its initial contact with authors by misrepresenting its policy on "royalty payments" does not completely cleanse itself by later sending literature which clarifies the initial misleading statement.[86]

In these and other examples it is at least arguable that the Commission is being excessively critical. If the buyer receives an article that will completely accomplish the purpose for which he bought it, how is he or anyone harmed if the article cannot perform some outlandish and irrelevant feat claimed by an over-enthusiastic advertiser? The answer lies in defining the term, "relevant." If a false claim, no matter how divorced from the use to which the buyer applies the product, plays a part in convincing him to buy brand Y rather than brand X, that false claim is sufficiently relevant to warrant a cease and desist order. At some point in the enforcement spectrum we cease protecting primarily the interests of the buyer and begin protecting the interests of competing sellers. The effects of a successful advertising campaign has an obvious bearing on the success of one company and the corresponding failure of another. On this basis, the Commission's standard of relevancy is justified.

(2) Misstatements About the Status or Connections of the Manufacturer or Seller.

A slightly different avenue of deception is misrepresentation of the business status or connections of a manufacturer to lend the prestige of an established name or governmental agency to the sales pitch. For example, when a correspondence school called itself the Civil Service Training Bureau, Inc., the Commission felt it was drawing a bit heavily on the status of the Civil Service Commission with which it had no connection. The court agreed.[87] The Supreme Court upheld an order that companies which only

[84] P. Lorillard Co. v. FTC, 186 F.2d 52, 57 (4th Cir. 1950). Accord: Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943). This decision might have heralded the effective Cigarette Advertising Guide issued by the Commission on Sept. 22, 1955, which affected the discontinuance of all claims regarding nicotine and tars, in view of the difficulty of scientific proof either of the claims or of the implied significance of the claims as affecting the health of smokers.

[85] American Life and Acc. Ins. Co. v. FTC, 255 F.2d 289 (8th Cir. 1958).

[86] Herzfeld v. FTC, 140 F.2d 207 (2d Cir. 1944).

[87] FTC v. Civil Service Training Bureau, 79 F.2d 113 (6th Cir. 1935).

blend flour for sale rather than do the actual grinding from wheat cease referring to themselves as "mills," as for example "Royal Milling Company." Mr. Justice Sutherland, speaking for the Court, said,

> If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the commission, supported by the evidence, amply disclose that a large number of buyers, comprising customers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article . . . which they might or might not buy if correctly informed of the origin. We are of the opinion that the purchasing public is entitled to be protected against that species of deception. . . .[88]

In 1929, the Commission put an end to the practice of a company that had been the sole distributor of rugs made by the blind for the Chicago Lighthouse when it began manufacturing and selling its own rugs under a corporate title including the word "Lighthouse" and advertising itself as "sole distributors of the Chicago Lighthouse."[89]

Similarly, use of the word "wholesaler" is carefully restricted by the Commission since the implication to the buying public is that the prices charged are those available to retailers and therefore substantially less than prices usually available to the consuming public.[90] The use of the word "laboratory" was prohibited when the respondents did not own, operate, or control an appropriately equipped laboratory in which their products were made or in which research connected with their products was conducted by trained technicians.[91] Use of the words "manufacturer," "manufacturing" or "mfg." is prohibited unless the goods are actually manufactured by the seller.[92] Since the word "University" implies an educational institution of higher learning having power to confer degrees and accredited by educational and governmental authorities, use of the word was prohibited where there were no entrance requirements or resident students, no library or laboratory, and no faculty, and no educational or governmental authorization to give degrees or issue diplomas.[93]

Similarly, the borrowing of the prestige of a brand name is *verboten*. Manufacturers of automotive supplies such as spark plug cable sets were forbidden to use the name "Champion" without the consent of the Champion Spark Plug Company even if the latter did not manufacture the same

[88] FTC v. Royal Milling Co., 288 U.S. 212, 216-17 (1933).
[89] Lighthouse Rug Co. v. FTC, 35 F.2d 163 (7th Cir. 1929).
[90] L & C Meyers Co. v. FTC, supra note 83.
[91] Albertz v. FTC, 118 F.2d 669 (9th Cir. 1941).
[92] FTC v. James Kelley, 87 F.2d 1004 (2d Cir. 1937).
[93] Branch v. FTC, 141 F.2d 31 (7th Cir. 1944).

articles.[94] The same reasoning was applied in the case of a company which used the name "Underwood" on its electric razors, "Remington" on its cameras, and "Elgin" on other products.[95]

There is a subtle shift of emphasis in the cases included in this section. In the first section, the misrepresentation went directly to a provable or disprovable quality in the product. In the latter section it goes rather to a myth in the mind of the buyer, founded or unfounded, about the product. Without considering the quality of the item itself, many buyers will place immediate confidence in a product with the name "Remington" or "Champion" stamped on it. The buyer is sold, not on a detailed inspection of the item itself, but rather on trust in the brand name and the proven experience, workmanship and reliability for which that name has stood. Here again the Commission's strict standards are justified in the important dual protection they offer. Whatever may be his reasons for wanting an article made by Remington, the fact remains that the buyer has a right to receive an article as represented both in tangible and intangible qualities. In the case of the *Lighthouse Rug Co.*,[96] it is evident that the buyer intended to give his business to a company of blind people. The quality of the rug he purchased is immaterial to the misrepresentation. The same applies to the perhaps unreasoned confidence in the solidity or responsibility of a seller who is also the "manufacturer." In this age of science there can be no doubt of the elevated image of a company that can include in its name the word "laboratories." These arguments apply with greater force to the more gullible, impressionable buyer. But this merely reaffirms the opening position that the protection of the Commission will be aimed at those most in need of it, the least sophisticated rather than the most.[97] Also vitally in need of protection in this area is the competing seller. The economic value of exclusive use of a brand name is indisputable. Since this type of false advertising is aimed primarily at elevating the *dealer* in the mind of the public with the resultant esteem for his product, the competing dealer is placed at a disadvantage that can outweigh his efforts to produce a superior product. Strict regulation in this area is more than justified.

(3) Misrepresentations About *Third Parties*, False Testimonials

Having considered deception involving the product itself, and secondly the manufacturer or seller of the product, the third category involves fraudulent use of the selling power of third parties, or false testimonials. The Commission has attacked such flagrant abuses as failure to disclose that manufacturers were paid to include a box of Tide or Dash in their washing machines. The court sustained the Commission in ordering Bristol-Myers to stop informing the listening public that "the 1940 National survey recently conducted among thousands of dentists revealed the following remarkable fact—twice as many dentists personally use Ipana Toothpaste

[94] FTC v. Real Prod. Corp., 90 F.2d 617 (2d Cir. 1937).
[95] Galter v. FTC, 186 F.2d 810 (7th Cir. 1951).
[96] Lighthouse Rug Co. v. FTC, supra note 89.
[97] American Life and Acc. Ins. Co. v. FTC, supra note 75.

as any other dentifrice preparation." Actually, of ten thousand questionnaires sent out, approximately 2467 replies came back, of which 621 dentists chose Ipana compared to 258, 189, 144, and 128 choosing the other four leading brands—far from a conclusive basis for the extravagant advertising that sprang from it.[98]

In 1960, the Commission issued a cease and desist order against the Niresk Industries, which sold an electric cooker, the *cover* of which had received the Good Housekeeping Seal. The advertisements were worded in such a way as to mislead the public into believing that the entire cooker had been endorsed.

One area of critical public concern is the use of fraudulent endorsements by alleged medical authorities. The Cigarette Advertising Guide issued in September 1955 said, "No representation, claim, illustration, or combination thereof, should be made or used which directly or indirectly, . . . (4) represents medical approval of cigarette smoking in general or the smoking of any brand of cigarettes." This was the cue for the disappearance from television commercials of the man in the medical white jacket surrounded by medical journals thoroughly and confidently enjoying a particular brand of cigarette, and has led to the present innocuous advertisements picturing pretty girls and tattooed cowboys. One company has built its current advertising campaign around this dramatic, but practically meaningless phrase: "No medical evidence or scientific endorsement has proved any other cigarette superior to Kent." In the same vein, a Commission order was affirmed in the case of a medicinal preparation which is not endorsed by any doctor but which included the letters "M.D." in the brand name. The advertisements of the product which pictured a woman in a trained nurse's uniform saying into a telephone, "Yes . . . M.D. is Decidedly Better," and another of a young woman saying into a telephone, "Thank you . . . for your advice, Doctor," were also considered gross violations.[99]

This form of deception works to the disadvantage of three groups. The buyer is affected in much the same way as discussed in the section above on misrepresentations regarding the identity of the manufacturer or seller. While the quality of the article may be equal to claims made about it, the confidence which a buyer places in the person to whom the false endorsement is attributed is misplaced. This can become extremely dangerous when medical opinion is involved. It is an unfortunately well-known occurrence for a buyer to place his confidence in a product falsely endorsed by supposed medical authority and to delay seeking medical advice until a major disease or disorder has reached serious or irreparable stages. Here again the trustful buyer is in serious need of protection. In other cases involving products from which the buyer suffers little or no damage, there are still two other interests to be protected. The unfairness to competing dealers is obvious and the discussions in the previous two sections are equally applicable here. The third interest is of course the alleged third party endorser whose testimony may be twisted or falsely attributed. The name of Good Housekeeping, whose value depends on public confidence in its reliability, must

[98] Bristol-Myers Co. v. FTC, 185 F.2d 58 (4th Cir. 1950).

[99] Stanley Laboratories v. FTC, 138 F.2d 388, 391 (9th Cir. 1943).

have the exclusive right to place its seal only on products it has in fact approved or it becomes worthless. This same applies to any person or company whose reputation is fradulently placed behind a product. It does not apply to situations in which the endorser gives permission to falsify his opinions. Thus, barring damage to the other two interests, the field of "paid testimonials" has been left relatively untouched.

(4) Misrepresentation of *Prices*

This area of prices has characteristics sufficiently distinct from the other categories to warrant a section of its own. In fact, there has been more fraudulent activity centered around pricing than any other area. It is perhaps the most fertile area for fraud because it appeals directly to the one desire common to nearly all buyers—the desire for a bargain.

Some words have proven consistent sore spots because of their limitless capacity to deceive in the proper context. The English language could supply the inventive mind of the deceiver with a no more deliciously baited hook than the word "free." The theme described above in the *Standard Educational Society* case[100] of offering an attractive article *free* with some other purchase, when the price of the second actually covers the first, has been played with infinite and profitable variations. The Commission has issued extensive rules and guides in this area, including a rule against offering any article free if another article must be purchased as a condition precedent and the price of the second article is increased.[101] Needless to say, as the object of the Commission's protection went from "reasonable man" to "fool" the quantity of decision law surrounding the word "free" expanded geometrically.

Generally, violations take the form of a direct false statement that a certain price is "below cost,"[102] "special," "reduced," "introductory" or "sale" price when the price charged is actually the usual price.[103] The most common misrepresentation is that regular prices are higher than they actually are. For example, a carpet salesman could not refer to "usual" or "regular" prices in his advertising when he had actually never sold this merchandise before. This was held to be misleading although the "regular" prices quoted were those at which other retailers in the market area were selling.[104] The Commission also held it a violative practice when a watch manufacturer attached price tags to his watches substantially in excess of the usual retail price so that the buyer would think he was getting a large saving when buying from the retailer.[105]

In this, more than any other area, the Commission fulfills its purpose by concentrating its attention and applying strict standards. Prices in this

100 FTC v. Standard Educ. Soc., supra note 72.

101 FTC Standard Trade Practice Conference Rule, Dec. 3, 1953.

102 Sears Roebuck & Co. v. FTC, supra note 55.

103 William H. Wise Co. v. FTC, 246 F.2d 702 (D.C. Cir. 1957); Consumer Sales Corp. v. FTC, 198 F.2d 404 (2d Cir. 1952); Thomas v. FTC, 116 F.2d 347 (10th Cir. 1940); FTC v. Standard Educ. Soc., supra note 72.

104 Bankers Securities Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961).

105 Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961).

country are not worked out between the individual buyer and seller to represent the value of the product to each. Rather they are set by the seller when he places a price tag on the goods. The price generally represents what the traffic will bear. If by the use of fraudulent techniques the traffic can be made to bear a little more, the difference between the price and value grows, and the stability of the economy ultimately suffers.

On a more personal basis, a buyer can frequently be induced to purchase an article that he does not need or can not afford if he can be convinced that he is getting a bargain. Here particularly, the gullible, less perceptive buyer needs extensive protection, because in most cases he is not only most susceptible to this kind of practice but also least able to afford it. Here the wisdom of aiming the Commission's protection at the fool rather than merely the reasonable man becomes most obvious. Also, since this form of deception takes the greatest effect on the buying public, the corresponding prejudice to competing merchants is at its highest point.

(5) Miscellaneous Areas of Deception

While the four categories set out in the sections above encompass most of the cases of false advertising, the Commission has shown a unique mobility in attacking deceptions that fit no defined category. The need for this kind of mobility in dealing with the creative minds of the advertising industry is perhaps manifest in the following examples.

Bait advertising is the practice of making an insincere offer to sell a well-known product at a large reduction in order to get a prospective customer into the store. Once the customer is inside, the salesman can refuse to show the advertised product, disparage the product, fail to have it available for sale in reasonable quantity, or refuse delivery within a reasonable time, all for the purpose of switching the customer to the item the salesman actually intends to sell.[106] This technique of deception differs from each of those discussed above in that no misrepresentation is made in any way relating to the article actually sold. The deceiving merchant has however, gained the advantage of having the prospective customer in his display room, having come there with an original purpose of buying. The practice has proven profitable to those who have tried it, and the Commission has been of the view that a profit gained by this kind of deception should not be allowed to continue. The protection again covers both the deceived public and competing merchants.

There can be no question of the unfairness to both the buying public and competition in the practice of false disparagement of a competitor's product. A blatant example was the promotion of stainless steel cooking utensils by claiming that consumption of food prepared on aluminum utensils would cause cancer, stomach trouble and anemia.[107]

In dealing with an industry which depends on imaginative and creative minds, the Commission must have an awareness and mobility that will allow

[106] Pati-Port, Inc. v. FTC, 313 F.2d 103 (4th Cir. 1963); Better Living, Inc. v. FTC, 259 F.2d 271 (3d Cir. 1958).

[107] Steelco Stainless Steel v. FTC, 187 F.2d 693 (7th Cir. 1951).

it to move in any direction that the public interest in advertising may lead. For example, in a recent case,[108] The Haven Company offered the buyer a selection of twelve articles which he could select from a list and buy at specified prices. As an eye-catching alternative the buyer could pull out one of twelve tabs attached to the display. By then looking at the back of the tab he could see which of the twelve items he had drawn. At this point the buyer was free to buy that article or not as he wished. If he preferred he could pull out another tab. He was also still free to select any of the twelve articles from the list. The price to be paid was exactly the same regardless of which method of selection he used. In other words the tab device placed him under no obligation and gave him no advantage. It was completely pointless except that this mock gambling aspect proved an attractive inducement to buyers who would not otherwise be interested in the articles sold. The Commission felt that although no misrepresentation was made either about the products or the tab procedure, the appeal of the device was intentionally aimed at the "take a chance" gambling instincts of the public. Since this contravened what the Commission felt was a sound public policy against inciting and playing upon the desire of the public to gamble, it was an unfair method of competition. The court sustained the Commission, which would seem to give the Commission a free hand in effectively closing this avenue to the public pocket in the future.

Formal Proceedings in Dealing with Deceptive Practices

The Commission faces the assignment of eradicating deceptive practices from the broad field of advertising with an unfortunately underpowered assortment of artillery. Consider the position and purpose of the Commission. It attempts to fill the need for an experienced, qualified referee on the spot in the midst of the action to call the "fouls" as it sees them through the eyes of an expert. To be effective in policing the dynamic and creative field of advertising, the Commission needs a freedom of discretion that will allow it to move immediately into any newly devised area of deceptive and unfair advertising practices. In addition to this freedom, the Commission must have the power and procedures to effectively stop deceptive practices where it finds them, and when it finds them. Against this one need, consider the procedural weapons the legislature has placed in the hands of the Commission.

When the Commission learns through investigations or complaints that a party may be practicing deceptive advertising, it has two avenues of approach. In cases not involving an inherent danger to the public (such as highly flammable fabrics or dangerous drugs) the Commission may notify the party of its intent to issue a formal complaint. The party is then allowed ten days in which to notify the Commission that he is willing to enter into an agreement containing a cease and desist order. If the party agrees, and if the agreement is submitted to the Commission within thirty days after, the files are referred to the Office of Consent Orders,[109] the consent order is

[108] Gerson v. FTC, 325 F.2d 93 (7th Cir. 1963).

[109] 16 C.F.R. § 3 (Supp. 1963).

entered and the cease and desist order takes effect immediately. By the agreement, the party has waived any further procedural steps on appeal.

The consent order has a primary advantage of leading directly to an enforceable cease and desist order without the inevitable delay of a formal proceeding followed by exhaustive appeals, during which time the respondent is free to continue his deceptive practice. Since the consent order procedure was revised in 1963, the new procedure has been invoked to attempt a consent settlement in every case but one in which the Commission has determined to issue a complaint.[110]

Whether the party will accept the consent agreement depends on many factors including willingness to comply with the Commission's standards, chance of success in litigation and desire to continue the deceptive practice as long as possible. Under the revised procedure,[111] once the formal complaint issues, the consent order is no longer available. With the Commission ready and willing to prosecute at the end of the ten day period, a party knowingly in the wrong is now more likely to avoid the expense and unfavorable publicity of formal proceedings while the chance is available. Before the rule was adopted that "all hearings will be held at one place and will continue without suspension until concluded,"[112] the Commission could delay the major part of its investigations until well after the complaint had issued and even after the hearing had opened. As a delaying tactic, the respondent could commence negotiations for a consent settlement and effectively stop further investigation until the negotiations collapsed. This allowed him more "free time," as it were, to practice his deception until a final cease and desist order could be entered. Under the new rule the Commission is forced to complete its investigation and preparation before hearing time, and the respondent can no longer interrupt the hearing by a delaying offer of consent. If the party fails to accept a consent settlement within ten days, a formal complaint will issue stating the charges and giving notice of a hearing at which the party may show cause why a cease and desist order should not issue. Any person, for good cause shown, may intervene.[113]

The central issue at this hearing is the capacity of the questioned statement or picture to deceive;[114] the burden of sustaining the complaint is upon the counsel prosecuting the case. The proof problem in this area is rather unique, in that the central issue is not susceptible of factual evidentiary demonstration in most cases. Short of requiring a representative poll in each case to see if people actually are deceived, the question can most practically be decided as it is, by a Commission, deemed to have both expertness and experience in dealing with false advertising, drawing on its experience to determine the natural and probable result of the questioned advertising technique. It is essential to note that the basis of a cease and

110 Murphy Memorandum, supra note 62.

111 16 C.F.R. § 3, supra note 109.

112 16 C.F.R. § 4.14 (d) (Supp. 1963).

113 Gimbel Bros. v. FTC, 116 F.2d 578 (2d Cir. 1941).

114 Herzfeld v. FTC, supra note 86; Charles of the Ritz v. FTC, 143 F.2d 676 (2d Cir. 1944); General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940); FTC v. Hires Turner Glass Co., 181 F.2d 362 (3d Cir. 1935).

desist order is the capacity to deceive and it is unnecessary to prove either actual deception or any intent to deceive.[115] When the Commission found that a hair coloring product given the name of "D'Oréal Henna" was giving unfair competition to a previously established product called "L'Oréal Henne," it ordered the manufacturer to cease and desist from use of the proper name; the court in affirming said, "A deliberate effort to deceive is not a necessary element in unfair competition . . . . Nor is it necessary to support the order below, to find actual deception, or that any competitor of the respondent has been damaged."[116] It is in fact not even necessary that the seller *know* that his representation is false.[117] When Gimbel Bros. conducted a sale on 7150 yards of mill end fabrics and advertised them as "woolens" the question of knowledge on the part of Gimbel Bros. that a large part of the material was a mixture of wool and other fabrics was immaterial, since to the purchasing public the term "woolens" connotes a fabric composed wholly of wool.[118] As stated by the court, "the purpose of the statute[119] is protection of the public, not punishment of the wrongdoer."[120]

Congress has given the Commission broad discretion as to what evidence it will hear, allowing introduction of any "relevant, material, and reliable evidence."[121] Here again the Commission is recognized as being peculiarly qualified in its field, being given freedom from most of the technical rules for exclusion of evidence which are applicable in jury trials.[122]

In considering what impression an advertisement will make on the public, the Commission considers the implications of the advertisement taken as a whole rather than carefully dissected into individually, technically truthful statements. Circuit Judge Learned Hand described a decision of the Commission as

> the resultant of those unexpressed determinants which collectively we conceal under the term, "discretion." We do not forget that from time immemorial this duty has been entrusted to courts. But that is irrelevant. Congress having now created an organ endued with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed.[123]

Thus, when the E. F. Drew Co., selling and distributing oleomargarine under the name "Farm Queen," described its product in circulars and other ad-

---

115 FTC v. Hires Turner Glass Co., supra note 114.

116 FTC v. Balme, 23 F.2d 615, 621 (2d Cir. 1928). Accord: Bockenstette v. FTC, supra note 84; Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941); Brown Fence & Wire Co. v. FTC, 64 F.2d 934 (6th Cir. 1933).

117 See text at notes 12-13 supra.

118 Gimbel Bros. v. FTC, supra note 113.

119 The court here was referring to the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41-48 (1958).

120 Gimbel Bros. v. FTC, supra note 113. Accord: FTC v. Klesner, 280 U.S. 19, 27 (1929); Royal Baking Powder Co. v. FTC, 281 Fed. 744, 752 (2d Cir. 1922).

121 16 C.F.R. § 3.14.

122 Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953).

123 Herzfeld v. FTC, supra note 86, at 209.

vertisements as "churned to delicate sweet creamy goodness," "country fresh," and "the same day to day freshness which characterizes our other dairy products," the Commission decided that these statements had the capacity to mislead purchasers into believing that the oleomargarine was a dairy product. The Second Circuit Court affirmed, holding that "the Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements."[124]

Not only is the Commission not required to take its own polls, but it is under no obligation to give public polls controlling weight over its own determinations. The Rhodes Pharmacal Company built an elaborate advertising campaign around IMDRIN—"Amazing new discovery for Rheumatism, Arthritis." The Commission found that statements such as "Resume Confident Pain-Free Living With Amazing New Imdrin" and "Imdrin . . . the brand new safe and reliable way to cure pain that's being prescribed by many doctors to bring quick, pleasant relief from Arthritis pains, stiffness, and swelling" could be interpreted by the public to imply a *cure* for arthritis and other related ailments. The respondent offered in evidence a poll of 300 people in New York City showing that 91 per-cent of those interviewed interpreted the advertisement as implying merely relief from pain as opposed to a cure, but failed to persuade the Commission. The Commission was upheld on appeal.[125]

The Commission has frequently allowed the testimony of witnesses drawn from the general public as to the impressions they had received from reading certain advertisements,[126] but such public poll testimony is not controlling over a different conclusion by the Commission. In 1962 Commissioner MacIntyre assessed the weight of public poll evidence in this type of decision making. When Gimbel's advertised luggage which it sold at prices from $6.98 to $15.98 as *usually* priced from $9.98 to $24.98, although Gimbel's had not previously sold the luggage at higher than the sale price, the Commission issued a cease and desist order. In the opinion, Commissioner MacIntyre stated:

> There can be no doubt that among the many millions in the New York City area, ten, twenty, or even fifty witnesses could be produced to testify that they understand that the term "list price" means the price generally charged by retailers in their area. And, doubtless, respondent could produce an equal number to testify to a different understanding of the term. A record containing such conflicting testimony would, at substantial expense, prove only what is already obvious from a reading of the advertisment itself, that is, that some people are likely to be misled thereby.[127]

Recently the Commission has adopted the evidentiary tool of official

[124] E. F. Drew Co. v. FTC, 235 F.2d 735 (2d Cir. 1956).

[125] Rhodes Pharmacal Co. v. FTC, supra note 122.

[126] Gulf Oil Corp. v. FTC, 150 F.2d 106, 108 (5th Cir. 1945); Stanley Laboratories Inc. v. FTC, supra note 99, at 391.

[127] Gimbel Bros., Inc., 1961-1963 FTC Complaints, Orders, Stipulations ¶ 16020 (1962).

notice to expedite proceedings. In the *Manco Watch Strap Co.* case,[128] the Commission ordered respondents (a) to cease and desist from distributing imported merchandise packaged in such a way as to conceal from prospective purchasers the name of the country or place of origin of the merchandise (Japan or Hong Kong) and (b) to disclose such information clearly in a conspicuous place on the package or container. Commissioner Elman announced in his opinion that the Commission would adopt the following policy concerning the requirements of proof in cases of this type arising in the future:

> In view of the frequency and consistency with which proof [that a substantial number of buyers prefer American goods and believe they are getting American goods unless informed to the contrary] has been [offered] in countless prior proceedings, the Commission may take official notice of that fact, and dispense with the need to reprove it in each new proceeding that is brought.[129]

The Commissioner suggested that the hearing examiner set forth the officially noticed general presumption of fact when relied on and give the respondent the chance to rebut it by showing the contrary in the particular circumstances. It seems likely that official notice will come into extensive use to prevent the repeated deciding of many such recurring instances of deception. Once established, such a procedure may stimulate the party, uncertain of his chances in litigation, to accept a consent settlement.

Appeal from a formal decision and order of the Commission may be had as of right to the appropriate federal Circuit Court of Appeals,[130] and once the record is filed on appeal, the circuit court has exclusive jurisdiction to affirm, enforce, modify or set aside the order of the Commission.[131] The further right to petition for certiorari to the Supreme Court is the final step available to the respondent.

Until all appeals taken are concluded, the cease and desist order does not become final, and the respondent can continue his questionable and probably lucrative advertising techniques. This explains why most orders that are contested are appealed to the hilt—or at least until the cost of appeal exceeds the profit from the advertising. The classic case in this regard is *Carter Products, Inc. v. FTC.*[132] The Commission found that Carter's Little Liver Pills did not stimulate the liver, aid the flow of bile or have a therapeutic value in the treatment of any condition or disorder of the liver, and thus sought to prevent Carter from making false advertising claims in this regard and to direct excision of the word "liver" from the trade name. The Commission's original order was set aside on the ground of unjustifiable restriction of cross-examination of a witness.[133] On certiorari,

[128] Manco Watch Strap Co., 1961-1963 FTC Complaints, Orders, Stipulations ¶ 15781 (1962) at 20595; cited in Auerbach, "Federal Trade Commission," 48 Minn. L. Rev. 383, 460 (1964).

[129] Ibid.

[130] 38 Stat. 720 (1914), 15 U.S.C. § 45(c) (1958).

[131] 38 Stat. 720 (1914), 15 U.S.C. § 45(d) (1958).

[132] Carter Prods. Inc. v. FTC, 268 F.2d 461 (9th Cir. 1959).

[133] Ibid.

the Supreme Court ordered a re-opening of the case,[134] and a new order was finally affirmed in 1959.[135] Over sixteen years of litigation finally ended with a denial of certiorari in November of 1959.[136]

The role played by the appellate courts in creating the standards for allowable advertising has been progressively diminished as the courts have become more aware of the implications intended by Congress in enacting the mandate, "The findings of the Commission as to facts, if supported by evidence, shall be final."[137] The Senate Committee on Interstate Commerce stated that the Commission was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected."[138] It was organized in such a manner, with respect to the length and expiration of terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."[139] On appeal, the court merely seeks to establish that the Commission's determinations are supported by substantial evidence on the record as a whole. The court may not substitute its own findings for those of the Commission.[140] Because of an authority of expertness in its field, the appellate courts give great respect to determinations of the Commission[141] and will not reverse them unless they are clearly unreasonable.[142] In effect, the courts have followed the spirit of the intent of Congress to give the Commission the relatively free hand of discretion.

Although Section 5(c) of the Act makes the Commission's findings of fact conclusive (if supported by evidence), the appellate court has the power to modify the Commission's order as well as affirm or reverse it.[143] This review is, however, similarly limited by judicial concession to the authority of expertness of the Commission. A leading case on this point involved a fur dealer who labeled certain coats "Alpacuna."[144] It was determined that the label was misleading because of the absence of any vicuna in the make-up of the material. The appellate court found that the Commision's order banning the use of the word "Alpacuna" was unnecessarily harsh in view of the considerable business value of a well known trade name. The court wished to amend the order to permit use of the label with some qualifying explanation, but reluctantly affirmed the Commission's order since "the choice of remedy is a matter confided primarily to the expert

134 Carter Prods., Inc. v. FTC, 346 U.S. 327 (1953).

135 Carter Prods., Inc. v. FTC, supra note 132.

136 Carter Prods., Inc. v. FTC, 361 U.S. 884 (1959).

137 38 Stat. 720 (1914), 15 U.S.C. § 45(c) (1958). See text at notes 35-38 supra.

138 Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., p. 9, 11; cited in FTC v. R. F. Keppel & Bros., Inc., 291 U.S. 304 (1934).

139 Ibid.

140 FTC v. Standard Educ. Soc., 302 U.S. 112, 117 (1937).

141 FTC v. Pacific States Paper Trade Ass'n 273 U.S. 52, 61 (1927).

142 E. F. Drew Co. v. FTC, supra note 124.

143 38 Stat. 720 (1914), 15 U.S.C. § 45(c) (1958).

144 Jacob Siegel Co. v. FTC, 150 F.2d 751 (3d Cir. 1944).

judgment of the Commission, [and] the courts are quite properly loath to set up their own judgment in opposition to that of the administrative tribunal."[145] On certiorari, the Supreme Court agreed that "[the Commission] has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[146]

When the Colgate Company used a deceptive demonstration to "prove" the moisturizing power of Rapid Shave in a television commercial,[147] the Commission's order prohibited use of demonstrations or pictures in television commercials which misled the television viewer as to what he was seeing. The order appeared harmless, until the court pointed out the distinction between such practices as the use of a yellowish substance on camera to exaggerate the richness of a particular brand of milk, and that of using colored water which gives the exact appearance of iced tea on a television screen to compensate for the fact that the camera distorts the color of actual iced tea. In the latter case the viewer is not led to believe any false claim about the product, while in the former he is. The court reversed the order as originally entered and remanded the case for drafting of an order in compliance with this distinction. Here the Commission's order had clearly exceeded the bounds of the problem and would have worked a great and needless hardship on all television advertising. Theoretically under the original order, painted backdrops would have to go as misrepresentations, and conceivably the girl next door would have to cease to be an eye-catching starlet.

In key industries which rely heavily on advertising, such as the cigarette industry, the Commision convenes periodic Trade Practice Conferences in which all members of the industry are invited to participate. The results of these conferences are the publication of Trade Practice Conference Rules for advertising practices. Future violations of these rules are dealt with by the Commission by the usual cease and desist procedures, although a formal complaint would charge violation of the statute on which the rules are premised rather than violation of the rules themselves.[148]

The issuance of Advertising Guides by the Commission for various key industries has proven a successful means of providing guidance to the members of the industry who want to comply with legal standards, and also of giving notice to the industry of the standards currently being employed by the Commission in evaluating advertising claims.[149] The Cigarette Advertising Guides are credited with eliminating some sixty-two questionable claims

---

[145] Id., at 756.

[146] Jacob Siegel Co. v. FTC, 327 U.S. 608, 613 (1946). The case was remanded because it appeared that the Commission had not considered the more limited order. On remand, the Commission modified its order as suggested. 43 F.T.C. 256 (1946).

[147] Colgate-Palmolive v. FTC, 310 F.2d 89 (1st Cir. 1962). See text at notes 82-83, infra. In the most recent *Colgate* decision, 326 F.2d 517 (1st Cir. 1963), it was held that the Commission still had not followed the mandate of the court as to the proper scope of the order.

[148] 16 C.F.R. §§ 2.21-2.32.

[149] Barnes, "False Advertising," 23 Ohio St. L.J 597, 616 (1962).

involving some thirty brands of cigarettes, the most notable being discontinuance of all "tar and nicotine" claims by the leading manufacturers.[150]

These, then, are the procedural weapons Congress has given the Commission. But consider the span of the task of effectively blocking every avenue of deception opened by any company so inclined throughout the country with nothing but individual cease and desist orders for enforcement. It summons the ridiculous picture of men patrolling an immense porous dam attempting to plug up constantly erupting cracks and holes with cork plugs.

The first and perhaps most obvious problem is the enormity of the area to be covered. The most constructive approach to adequate coverage would be an extensive effort to enlist the aid of state Attorneys General in policing local deceptive activity within their own state. This would initially involve expenditure of valuable man-hours in assisting state personnel in establishing an effective local system of surveillance and prosecution of violations—a system that would allow smooth and efficient cooperation with the Federal Commission through the regional offices. The experience of the Commission would also be invaluable in assisting in the drafting of state legislation which would give the state Attorney General the procedural equipment necessary to do an effective job on his own. The impact of advertising media in influencing the buying habits of the public has become so apparent that state Attorneys General are in most cases deeply aware of the need of protection for their state citizens which the Commission is simply not equipped to give.[151] However, between this realization of the need and the willingness to expend the money, time and personnel necessary, there is a gap that might be bridged only at the expense of a substantial enlistment and training effort on the part of the Commission. Special assistance in informing state legislatures of the wisdom of giving adequate power to the attorney general in this respect might require more Commission time. But the end result, if successful, would be a network of manpower far more equal to the task. The Commission would hopefully be relieved of the burdens of investigating and prosecuting innumerable state-wide violators and could give its full concentration to nation-wide deceptive campaigns through the nation-wide media of television, radio, national magazines, etc.

In addition to manpower, the second major limitation on the Commission is lack of appropriate procedural powers. When the Commission attacks a practice widely used throughout an industry, such as deceptive advertising of sale prices as being "greatly reduced"; "going out of business sale"; or "buy one and get one free" (when the price charged for one is raised to cover both items), among retail stores, it faces two immediate problems. First, it is beyond the Commission's resources of time, men, and money to attack individually every offender throughout the industry. Secondly, those individuals reached first may have to compete for years with competitors who can continue with impunity to use deceptive practices until the Commission finally has time to proceed against them. Notice also that the deceiver gets

[150] Cigarette Advertising Guide, Sept. 22, 1955. See text at notes 98-99, infra.

[151] Memorandum from James McI. Henderson, General Counsel, to Frank C. Hale, Program Review Officer, Nov. 6, 1962.

the "first bite" free of charge. At most he can be ordered to cease and desist from deceiving again in this particular way.

One possible solution to the problem would be to give to the Commission substantive rule-making power—the power to enact rules, reviewable by the courts, which would specifically make practices which have consistently been proven to be violations punishable whenever and by whomever they are committed. If, for example, the Commission could enact a rule making the common types of price deception actionable by criminal and civil penalties, the entire retail industry would be put on notice. Infractions would be widely eliminated in one step if the penalty for infraction were an effective fine rather than an order not to do it again. The "wait till they catch me" attitude would become unprofitable and risky. The effect would of course be to delegate legislative power from Congress to the Commission, but consider which of the two is in a better position to effect rules that will be current and effective in a constantly changing field. Constitutional safeguards would be provided by judicial review. At present, Section 6(g) of the Act empowers the Commission to "make rules and regulations for the purpose of carrying out the provisions of this act." But the Commission is not empowered to provide penalties for violations of these rules. The Trade Practice Conference Rules mentioned above merely give warning of the type of infractions for which the Commission will impose cease and desist orders. Substantive rule-making power would also eliminate the "free first bite." Presently those who employ deceptive practices have virtually nothing to lose and a lucrative advantage over the public and competitors to gain. If, however, that advantage could cost them a sizeable fine, the percentage might lie in the side of not attempting the deception in the first place. Effective and publicized prosecution of a relatively small number could have a widespread effect in keeping advertisers honest. This theory has worked well to the advantage of the Bureau of Internal Revenue.

As a minimum, however, the power of the Commission should at least be bolstered to the extent of allowing the issuance of cease and desist orders on the basis of violations of Commission rules. Presently, the violation charged must in each case be proven to have the capacity to deceive. If the Commission could issue rules to the effect that certain practices do have the capacity to deceive and then issue cease and desist orders for violation of those rules, considerable duplicative litigation could be avoided. Another desperately needed procedural weapon is the power to issue interlocutory cease and desist orders in prima facie cases to take effect immediately and to be appealable immediately. In this way the Commission could put an effective stop to the violation without awaiting interminable appeals during which the violation continues free of charge.

Problems in Overlapping Administrative Jurisdiction

No analysis of federal regulation of advertising would be complete without some discussion of the vesting of jurisdiction over this regulation in agencies whose responsibility is supplementary to that of the FTC. As of 1956, controls in this area were exercised by twenty-one separate admin-

istrative bodies,[152] with differing scopes of authority ranging from the broad authority of the Federal Trade Commission to the narrow power of the Interior Department to regulate advertising pertaining to Indian arts and crafts.[153] In addition to the conflicting areas of authority, the various agencies employ different statutory standards in testing the legal validity of advertisements. For instance, the Wheeler-Lea Amendments define false advertising as that which is "misleading in a material respect," while the stricter Food, Drug, and Cosmetic Act defines mislabelling as that which is "misleading in any particular." Further, the agencies use different administrative sanctions—contrast the cease and desist order of the FTC with the authority of the Federal Communications Commission to revoke broadcasting licenses. Four of the more important of the several agencies which exercise concurrent jurisdiction with the FTC will be considered in some detail: the Department of the Post Office; the Alcohol and Tobacco Tax Division of the Internal Revenue Service in the Department of the Treasury; the Federal Communications Commission; and the Food and Drug Administration in the Department of Health, Education, and Welfare.[154]

The regulatory authority of the Postmaster General stems from the power of Congress to establish post offices and post roads.[155] It has long been settled that the Postmaster may deny the use of the mails to certain materials and to stipulate the terms on which the material may be excluded or omitted.[156] Thus, any use of the mails to advertise, deliver or receive orders or remittances subjects the user to an indirect regulation of his materials.

The Postmaster General has three types of sanctions at his command: the revocation of second class mailing privileges, the fraud order and the criminal penalty. Each of these, however, has certain limitations which impair its effectiveness. The Postmaster may refuse to grant second class mailing privileges to an advertiser, who may not be able to operate without the advantage of these lower rates. The courts, however, have strictly limited

---

[152] Note, "The Regulation of Advertising," 56 Colum. L. Rev. 1018, 1020 (1956).

[153] 49 Stat. 891 (1935), 25 U.S.C. § 305a (1958).

[154] Other government agencies whose operation embraces some kind of advertising control either by specific language or by statutory implication include:

Advertising for the sale of securities through the mail or any instrument of interstate commerce:

the SEC 48 Stat. 881 (1934), 15 U.S.C. §§ 78(a)-78(jj) (1958); 48 Stat. 74 (1933), 15 U.S.C. §§ 77(a)-77(aa) (1958)

Authority to suppress advertising abuses in the areas under their jurisdiction:

the CAB, 52 Stat. 1003 (1938), 49 U.S.C. § 491 (1958)

the ICC, 24 Stat. 379 (1887), 49 U.S.C. § 1 (1958)

the FPC, 41 Stat. 1063 (1920), 16 U.S.C. § 791(a) (1958).

Common carriers and airlines covered by the above are specifically excluded from FTC jurisdiction, thus decreasing the possibility of inter-agency conflicts. There are also qualified exceptions to FTC jurisdiction for parties subject to the regulations promulgated under certain statutes such as the Packers and Stockyards Act, 42 Stat. 169 (1921), 7 U.S.C. § 227 (1958).

For an exhaustive compilation, see 56 Colum. L. Rev. 1018, supra note 152, at 1097 (Appendix).

[155] U.S. Const. art. I § 8.

[156] Ex parte Jackson, 96 U.S. 727 (1877).

this power, reasonably fearing that its abuse would restrain freedom of expression.[157] Secondly, the Postmaster is empowered to issue a fraud order,[158] in effect returning to the sender with the stamp of "fraudulent" all mail addressed to a party found to be conducting a scheme to obtain money through the mails under false pretenses. Thirdly, the Postmaster may prosecute such an offender criminally.[159] The last two remedies similarly require the showing of an intent to defraud as well as the use of the mails in furtherance of this intent.[160] The courts have been strict in requiring a showing of actual fraud; thus, if the Postmaster is unable to prove this, he should leave the remedy to other agencies.[161]

The Alcohol and Tobacco Tax Division of the Internal Revenue Service is authorized to regulate liquor advertising under the Federal Alcoholic Administration Act.[162] Although it is unclear whether this statute divests the FTC of jurisdiction over liquor advertisements, in practice the Commission rarely acts in that area.[163] The advertisers of alcohol have cooperated with the regulatory authority, partly because of their fear of a reinstigation of the Prohibition movement and partly because of the Division's extensive powers.[164] The Division may act against deceptive and misleading representations and may promulgate regulations setting its own standards of legal validity. Its sanctions include its licensing power over the privilege of engaging in all aspects of the liquor business and its corresponding authority to fine and/or revoke or suspend the licenses, although, as a matter of policy, the revocation is used only as a last resort.[165]

The Federal Communications Commission is charged with responsibility for encouraging proper standards of radio and television transmission.[166] The broadcast station licensee has the direct responsibility of selection and presentation of program material, including advertising, subject to its statutory obligation to operate in the public interest. The regulatory scheme is predicated upon the FCC's broad licensing power; control of advertising is effected indirectly, through the sanction of license revocation against the broadcaster, who will probably discontinue the offensive advertisement rather than lose his license. The FCC also employs pressures less formal

---

157 Hannegan, Postmaster General v. Esquire, Inc., 327 U.S. 146 (1946). For further discussion of the constitutional problems involved see Deutsch, "Freedom of the Press and of the Mails," 36 Mich. L. Rev. 703 (1938). For a related issue see Grosjean v. American Press Co., 297 U.S. 233 (1936), where the Court struck down a state tax on newspaper advertising as an infringement upon freedom of the press.

158 26 Stat. 466 (1890), 39 U.S.C. § 259 (1958).

159 62 Stat. 763 (1948), 18 U.S.C. § 1341 (1958).

160 Atlanta Corp. v. Oleson, 124 F. Supp. 482 (S.D. Calif. 1954). Note that in FTC proceedings it is not necessary to show intent; the misrepresentation alone is a sufficient predicate of liability.

161 Pinkus v. Walker, 61 F. Supp. 610 (D.N.J. 1945), modified, 338 U.S. 269 (1949).

162 49 Stat. 977 (1935), 27 U.S.C. §§ 201-212 (1958).

163 56 Colum. L. Rev. 1018, supra note 152, at 1037.

164 Id. at 1049.

165 Id. at 1050.

166 48 Stat. 1064 (1934), 47 U.S.C. §§ 151-609 (1958).

than revocation, such as the threat of initiating hearings on a license renewal application.[167]

Given the various degrees of guilt in false advertising and given the indirect operation of the harsh penalty of revocation against the offending advertiser, it would seem that the Federal Trade Commission has a better arsenal of administrative sanctions with which to regulate false advertising. Nonetheless, the Federal Communications Commission has entered the field by reason of its concern with both the qualitative merits of the advertising copy and the proportionate amount of time allotted to substantive programming as compared to advertising. In recognition of this concern, the two agencies have recently reached a working agreement,[168] wherein it was agreed that the FCC would advise the station of any complaint received by the FCC regarding deceptive advertising, since, if an authority such as the FTC found that the copy was deceptive, its continued broadcast would raise doubts that the station was meeting its obligation to broadcast in the public interest. To facilitate this practice, the FTC agreed in turn to advise the FCC of any questionable advertising broadcasts and, if the copy were in fact the basis for the issuance of a complaint or a cease and desist order by the FTC, that agency agreed to supply all relevant papers and information to the FCC.

In 1938, the same year in which it enacted the Wheeler-Lea Amendments to the Federal Trade Commission Act, Congress passed the Federal Food, Drug, and Cosmetic Act.[169] The most glaring example of concurrent agency jurisdiction is illustrated by the interaction between the Federal Trade Commission and the Food and Drug Administration, the agency given control over misbranding and mislabelling of food, drugs, devices, and cosmetics. The Wheeler-Lea Amendments gave the FTC authority over the false advertisement of these same products, and the misbranding sections of the Food and Drug Act cover labelling (material accompanying the article)[170] as well as labels (material on the immediate container). The relevant legislative history manifests a Congressional intent *not* to give the FDA exclusive jurisdiction in the area of false advertising generally,[171] but to limit it to misbranding. Early cases, however, further confused the situation by holding

[167] 56 Colum. L. Rev. 1018, supra note 152, at 1046.

[168] 22 Fed. Reg. 2318 (1957); 3 CCH Trade Reg. Rep. ¶ 9851.

[169] 52 Stat. 1040 (1938), 21 U.S.C. §§ 301-392 (1958).

[170] U.S. v. Urbuteit, 335 U.S. 355 (1948); Kordel v. U.S., 335 U.S. 345 (1948).

[171] Note, "Developments in the Law: The Federal Food, Drug, and Cosmetic Act," 67 Harv. L. Rev. 632, 650 (1954).

This seems wise, since the basic tool of the FDA is seizure of the adulterated or misbranded products. It is thus, unlike the FTC cease and desist order, limited by the number of offensive articles. Such a weapon has obvious inadequacies when applied to advertising in a national market.

For a history of the legislative controversy on this topic before the bills were passed see Cavers, "The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and its Substantive Provisions," 6 Law and Contemp. Prob. 3-22 (1939). It has also been suggested that the retention of FTC authority was a concession to the business and advertising interests who were opposed to a stricter enforcement of advertising controls and who thus favored the then weak FTC. See 56 Colum. L. Rev. 1018, supra note 152, at 1054.

that despite the exclusion of the word "labelling" from FTC jurisdiction over food, drugs, devices, and cosmetics under the Wheeler-Lea Amendments, the FTC could act in this area through its grant of power over unfair practices in section 5.[172]

One of the more important and controversial problems arising from the fact of concurrent jurisdiction is that of res judicata. This area is still quite unsettled, and the commentators are divided as to the holdings of the cases.[173] The only clear rule seems to be that a decision favorable to the respondent advertiser cannot be disturbed in a subsequent proceeding by another agency based on the same charge of misrepresenting the character of the goods.[174] A recent case[175] has indicated that the FDA will not be precluded by an earlier FTC order unless the *same issues* (strictly construed) are litigated. Despite the statement in that decision, however, that the FTC and FDA remedies are cumulative rather than exclusive, until such policy is further clarified to meet the various forms and stages of finality of the procedural sanctions employed by both agencies, it would seem that the ultimate determination of a controversy may depend on the agency which is the first to act.

To meet these and other problems, the two agencies in 1954 entered into an agreement[176] acknowledging the primary responsibility of the FTC for advertising and of the FDA for mislabelling, but recognizing their common goal—the prevention of deception of the public. The agreement provided for the creation of a liaison system between the agencies to exchange information before the regulatory machinery begins to act. The two agencies also restricted their simultaneous initiation of proceedings involving the same parties to those unique situations where the public interest demanded such action. Although the agreement is merely an expression of policy and does not, therefore, preclude the exercise of full jurisdiction by either agency, the very fact of its existence manifests a cognizance of the problem that is necessary for the eventual elimination of duplication of administrative effort of inter-agency rivalry.

The embryonic beginnings at inter-agency coordination, as exemplified by the aforementioned "working agreements" and the FTC's tacit withdrawal from the area controlled by the Alcoholic Tax Division are not to be overlooked as steps in the direction of the needed eventual reallocation of responsibility in the tangled thicket of advertising regulation. Given, however, the different statutory standards employed by each agency, as well as their invocation of regulatory sanctions of varying degrees of severity (often with little relationship to the gravity of the offense), the utility of these private cooperation agreements would seem to be limited. The advertis-

[172] Houbigant, Inc. v. FTC, 138 F.2d 1019 (2d Cir. 1944); Fresh Grown Preserve Corp. v. FTC, 125 F.2d 917 (2d Cir. 1942).

[173] Compare 56 Colum. L. Rev. 1018, supra note 152, at 1036, with Kleinfield and Goding, "Res Judicata and Two Coordinate Federal Agencies," 95 U. Pa. L. Rev. 388 (1947), and cases cited therein.

[174] United States v. 1 Dozen Bottles, etc., 146 F.2d 361 (4th Cir. 1944).

[175] United States v. 5 Cases . . . of Capon Springs Water, 156 F.2d 493 (2d Cir. 1946).

[176] 3 CCH Trade Reg. Rep. ¶ 9850.

ing media should be entitled to rely on some degree of certainty and consistency in the law. Thus, some legislative recodification of agency functions and sanctions seems necessary. There are two paths such recodification could follow: a stricter delineation of agency jurisdiction or a greater concentration of regulatory powers in the Federal Trade Commission.[177] Since the former alternative could very possibly result in such rigid definitions that it may leave matters beyond the control of any agency, and since most of the other agencies are more importantly concerned in other areas of regulation, it would seem that the proper solution would lie in the direction of greater centralization and concentration of jurisdiction in the agency of primary responsibility, the Federal Trade Commission.[178]

Conclusion

An analysis of federal regulation of advertising reflects the traditional balancing of interests in American constitutional history between the private legal order and the public law, between the freedom to contract (in the broadest sense of economic competition) and the use of the police power of the state to preserve the conditions under which such competition may flourish without injury to the public. In the field of advertising, the purpose of this regulation is to secure the free flow of truthful information to the marketplace. Even conceding the statutory expansion of Federal Trade Commission jurisdiction since 1914, that agency still lacks the procedural weapons to effectuate this purpose. Further expansion is necessary in the following directions: a grant of substantive rule-making power to the FTC with effective penalties for violations; and of power to issue interlocutory cease and desist orders. Legislative reorganization toward a greater concentration of power in the hands of the FTC by a removal of jurisdiction over advertising from several of the other agencies presently involved in the field is also imperative. In addition, administrative practice has lagged in accomplishing what the present law does prescribe. Greater effectiveness could be achieved by widespread enlistment and utilization of the resources of state Attorneys General in patrolling deceptive practices on the state and local level and by more extensive employment of the official notice doctrine.

Judith L. Olans
John F. Dobbyn

[177] This latter alternative has been recently suggested by Dean Landis but on a much less comprehensive level. Landis, Report on the Regulatory Agencies to the President Elect, Subcommittee on Administrative Procedure and Practice of the Committee on the Judiciary of the U.S. Senate, 86th Cong., 2nd Sess. 48-52 (Comm. Print 1960).

[178] This suggestion is viable only if the F.T.C. were given the power to make substantive rules and the authority to issue interlocutory cease and desist orders as advocated in the section entitled "Formal Procedures in Dealing with Deceptive Practices," supra at 725-33.