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FEDERAL TRADE COMMISSION REGULATION OF ADVERTISING

*Earl W. Kintner**

THE success of an economic democracy, no less than that of a political democracy, depends upon informed, intelligent choice. Thus, the widespread dissemination of information with respect to alternatives is imperative; otherwise, choices would be made in a vacuum and would become meaningless, if not plainly capricious. However, there is no paucity of information in our contemporary society; the so-called "mass media" ensure that. Indeed, modern man can hardly escape, even if he should so desire, the constant bombardment of information from television, radio, newspapers, billboards, and other sources.

Since in our society consumer choice is afforded the function of governing what goods are to be produced and who is to produce them,[1] it is natural and desirable that various manufacturers should compete through the mass media for the buyers' attention. By this means the consumer is acquainted with the vast variety and the relative merits and demerits of the goods and services available to him. The information thus obtained forms the basis for each individual's decision as to how to spend his paycheck. The cumulative effect of the choices of all such consumers is to determine what goods will be produced, what services will be performed and who will produce or perform them, since an article that does not sell will no longer be produced. Thus, the buyer gets the merchandise he wants, and the producer who is able and willing to provide it at a price and of a quality satisfactory to the consumer is successful.

A function so vital and so profitable as the dissemination of information intended to guide consumer choice cannot be performed fortuitously. Consumer acquaintance and persuasion is a matter of life or death to a producer. It is therefore only natural that specialized assistance was obtained relative to the marketing aspect of production, as it was with respect to such fields as research and development and manufacturing techniques.[2] In the process of responding

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The author acknowledges his indebtedness to his colleague, Professor Bernie R. Burrus of the Georgetown University Law Center, for valuable assistance in the preparation of this article.

1. SAMUELSON, ECONOMICS 38 (2d ed. 1951).

2. See generally SIMON, THE LAW FOR ADVERTISING AND MARKETING (1956); TURNER, THE SHOCKING HISTORY OF ADVERTISING (1953).

to the need for expert guidance in acquainting the consumer with products and persuading him in his economic choices, advertising has mushroomed into a twelve billion dollar per year industry[3] performing a service that is imperative to our free economy. Through the mass communications media the advertiser provides the consumer the information with which he can make his economic choices intelligently and meaningfully, and thus causes economic democracy to be viable in practice as well as appealing in theory.

However, information *qua* information is not sufficient to sustain an economic democracy. If "a little information is dangerous," misinformation can be disastrous. For example, when goods are praised to the point of untruth, or a competitor's goods are falsely disparaged and the competitor then replies in kind, the result is not informed, intelligent choice, but rather its perversion; there is no "choice" when selection is a function of competing untruths, deceits, and misleading comparisons. Production is no longer regulated by consumer choice, and business success is no longer measured by consumer satisfaction. Moreover, the use of such deceptive techniques is not uncommon in the advertising field. The profit motive can be a powerful inducement to the destruction of principle, and control over consumer choice is a tremendous weapon in the arsenal of the unprincipled.

The valuable service performed by advertising for our American system of free enterprise and the part advertising has played in producing the highest standard of living ever achieved in the history of the world cannot be denied. Nevertheless, the power possessed by advertisers in the "battle for men's minds," as illustrated by their ability to influence the direction of our economic development, carries certain responsibilities with its use. I have described these responsibilities elsewhere in terms of a set of "social obligations" of advertisers.[4] The essence of these obligations is quite simply to

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3. MacIntyre, *FTC Promotes Confidence in Advertising*, p. 4, Address Before the Better Business Division, Miami-Dade County Chamber of Commerce, July 18, 1963.

4. KINTNER, AN ANTITRUST PRIMER 168-69 (1964): "A summary definition of the social responsibilities of advertising would, at a minimum, embrace these three elements:

> 1. To function as an efficient instrument of free and fair competition by focusing public attention on the demonstrable merits of competing products and services.
>
> 2. To foster innovation by affording new entrants to the market place an efficient means of winning public acceptance.
>
> 3. To furnish to consumers the information necessary for intelligent choices.

"These responsibilities are affirmatively stated. Viewing them negatively, we may state the summary in this way:

> 1. To avoid perverting free competition by using advertising as an unfair

"speak the truth," which means more than merely to avoid speaking half-truths; the advertiser must include all the facts that are essential to the formation of an accurate judgment concerning the qualities of the article or services described.

Most advertisers embrace the obligation faithfully, and through such groups as the American Association of Advertising Agencies have established codes embodying standards of truthfulness and good taste for their own governance.[5] However, self-regulation, as salutary and necessary as it is, cannot perform the whole task of meeting the social responsibilities of the advertising industry. There are jackals on the fringes of advertising, as there are on the fringes of any other industry, in whose ethic social responsibility takes a back seat, if it is not, in fact, left on the curbstone. Positive law and its sanctions are required to ensure that the truth will be spoken, thereby protecting the honest advertiser and providing the consumer with the basis necessary for an intelligent choice.

I. The Origin of Federal Regulation of Advertising

The need for governmental regulation of advertising became apparent early in this century, when the rapid growth of communications and transportation provided the means for the widespread distribution of goods and services and thus fostered the development of a new technique in marketing. It had become feasible to market a brand-name product on a national basis, since the advances in transportation permitted inexpensive distribution of goods from a central location. In addition, the tremendous growth of the publishing media, coinciding with the high rate of national literacy, meant

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method of competition. Disparagement of worthy competitors or the diversion of sales through deception are obvious examples of foul competition.

2. To avoid the use of deception or the exercise of market power to stifle innovation. Advertising can be used as a tool of monopoly, just as it can be used as an instrument of free competition.

3. To avoid flooding consumers with false and misleading statements which pervert the right of free choice. The economic damage to consumers produced by such practices is vicious; the weakening of public confidence in a free enterprise economy resulting from such practices is a far greater vice."

5. In its *Creative Code*, published in 1962, the Association described its guidelines thus:

> Therefore, we, the members of the American Association of Advertising Agencies, in addition to supporting and obeying the laws and legal regulations pertaining to advertising, undertake to extend and broaden the application of high ethical standards. Specifically we will not knowingly produce advertising which contains:
>
> a. False or misleading statements or exaggerations, visual or verbal.
>
> b. Testimonials which do not reflect the real choice of a competent witness.
>
> c. Price claims which are misleading.
>
> d. Comparisons which unfairly disparage a competitive product or service.
>
> e. Claims insufficiently supported, or which distort the true meaning or practicable application of statements made by professional or scientific authority.
>
> f. Statements, suggestions or pictures offensive to public decency.

that it had become possible to create a widespread consciousness of a brand name through national advertising.

Unfortunately, among the first to recognize and exploit the new marketing technique was a horde of quacks.[6] The country became saturated with extravagant claims made on behalf of patent medicines and healing services. Soon manufacturers of soaps, cereals, cough drops, and canned milk all joined the ranks of nationwide advertisers and distributors. As the impact of advertising multiplied throughout the nation, the dangers that false and misleading claims held for consumers and honest competitors became evident.[7]

Journalists, doctors, and advertising men who were concerned with the future of advertising contributed to the exposure and condemnation of the untruthful claims of the quacks. Samuel Hopkins Adams made a monumental contribution through his famed series of articles on patent medicines that appeared in *Collier's* in 1906.[8] In 1911 the American Medical Association began its series entitled *Nostrums and Quackery*, and *Printers' Ink* launched a drive for the adoption of a model state statute prohibiting false and misleading advertising. Under the active sponsorship of the Associated Advertising Clubs of the World and the Better Business Bureaus, false advertising statutes were passed in forty-four states. Finally, the federal government also moved against false and misleading advertising,[9] although federal action did not take the form of a direct prohibition against deceptive advertising with criminal penalties for violations. The federal effort began with the establishment of the Federal Trade Commission in 1914.

As originally enacted, the Federal Trade Commission Act was

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6. See HOLBROOK, THE GOLDEN AGE OF QUACKERY (1959).

7. The common law afforded no relief to the problem. See Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 550 (1964):

> 1. *The Inadequacy of Common Law.* American lawyers are prone to take pride in the Anglo-American common law tradition, attributing to it the virtue of flexibility and growth to meet the necessities of the times. But by not providing effective remedies against false advertising, the common law dismally failed to keep up with modern conditions. The ancient doctrine of caveat emptor, the rigid requirements for proof of such elements as scienter and materiality of misrepresentations, stringent doctrines of privity and broad privileges of "puffing," combined with the disproportionately-high costs of litigation to destroy any hope of effective consumer remedies. Actions by competitors against false advertisers were likewise confined to exceptionally limited circumstances because of fear of flooding the courts with litigation despite judicial admission that such conduct was "morally wrong and improper."

8. The first fruit of this effort was the Pure Food and Drug Act of 1906, 34 Stat. 769.

9. The Food and Drug Act was of limited application, its principal protection being the requirement of the correct description of the contents of a medicinal product on the package.

not intended to deal with the problem of false advertising. Rather, the early proponents of the act were interested in the efficient enforcement of the antitrust laws. The "rule of reason" and the apparent hostility of the courts to the Sherman Act[10] had led men like Louis Brandeis to seek a new approach to the enforcement of the antitrust laws. An administrative agency was thought to be in order, and President Wilson vigorously supported the proposal for a trade commission. In 1914 the Federal Trade Commission Act was finally passed, containing in section 5 this basic prohibition: "[U]nfair methods of competition in commerce are hereby declared unlawful."[11]

The language employed in section 5 suggested to many that the prohibition was limited to the enforcement of the antimonopoly policy of the federal government.[12] As was stated in the first definitive treatise on the Federal Trade Commission, the FTC's jurisdiction over advertising was a "fortuitous byproduct."[13] If Congress had been concerned with the problem of false advertising, the author of the treatise suggested, it would have passed a different type of statute with a different procedural and regulatory scheme. It has also been noted that "the regulatory scheme envisioned in the FTC Act for the slower-paced antitrust problem was not ideally suited for the faster moving advertising field, in which speed in enforcement might become of the essence."[14] This restrictive approach was vigorously challenged. Those favoring a broad interpretation of the Commission's power argued that the boundaries of the statutory prohibition had been deliberately left undefined by the sponsors of the act. Mr. Justice Brandeis explained the basic theory of the proponents of a broad interpretation as follows:

> Instead of undertaking to define what practices should be deemed unfair as had been done in earlier legislation, the act left the determination to the commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing, and, if rigorously applied, might involve great hardship. Methods of competition which would be

10. See Standard Oil Co. v. United States, 221 U.S. 1 (1911).

11. 38 Stat. 719 (1914).

12. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 450 (1964). Mr. Millstein, in fact, asserts that "the most important development in the long history of the FTC's prohibition of false advertising was that the FTC concerned itself with the problem in the first place." *Ibid.* See also Austern, *The Parentage and Administrative Ontogeny of the Federal Trade Commission*, in 1955 N.Y.S.B.A. ANTITRUST LAW SYMPOSIUM 83; Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 ACADEMY POLITICAL SCIENCE PROCEEDINGS 666 (1926).

13. HENDERSON, THE FEDERAL TRADE COMMISSION 339 (1924).

14. Millstein, *supra* note 12, at 451.

> unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable.
>
> Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.[15]

Whatever the view held by the sponsors of the original act may have been, the first few Federal Trade Commissioners almost immediately concerned themselves with false advertising.[16] The first two cease-and-desist orders issued by the Commission proscribed certain false and misleading advertising practices.[17] The Commission's first formal order proscribing the deceptive advertising of a drug was issued in 1918.[18] Moreover, the first Commission order reviewed by a court involved the false advertising of food,[19] and as early as 1922 the United States Supreme Court approved a Commission order to cease and desist from deceptive advertising.[20] It has been estimated that as early as 1925 orders directed against false and misleading advertising constituted seventy-five per cent of all orders issued by the Commission each year.

It is interesting to note that the Commission's jurisdiction over false advertising became indisputable during a period in which those Commission functions most desired by the proponents of a trade commission—the antimonopoly powers—were being thwarted by judicial hostility. Thus, while only forty-three Commission orders out of a total of eighty-two reviewed on their merits by the courts up until 1931 were either entirely or substantially upheld, twenty-two

15. FTC v. Gratz, 273 U.S. 421, 436-37 (1920) (dissenting opinion).

16. In the Second Annual Report, members of the Commission stated: "The Commission has made no attempt to define what methods of competition are 'unfair' so that 'a proceeding by it in respect thereof would be to the interest of the public.' Unfair competition, like 'fraud,' 'due care,' 'unjust discrimination,' and many other familiar concepts in the law, is incapable of exact definition, but its underlying principle is clear—a principle sufficiently elastic to cover all future unconscionable competitive practices in whatever form they may appear, provided they sufficiently affect the public interest. Thus far the Commission has been of the opinion that at least those cases in which the method of competition restrains trade, substantially lessens competition, or tends to create a monopoly are subject to a proceeding under section 5 of the Federal Trade Commission Act. *The Commission has gone further than this, however, and in some instances where these elements did not appear, as in certain cases of misbranding and falsely advertising the character of goods where the public was particularly liable to be misled, the Commission has taken jurisdiction.*" 1916 FTC ANN. REP. 6. (Emphasis added.)

17. Circle Cilk Co., 1 F.T.C. 13 (1916); A. Theo. Abbott & Co., 1 F.T.C. 16 (1916).

18. Block & Co., 1 F.T.C. 154 (1918).

19. Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (7th Cir. 1919).

20. FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).

of the twenty-nine FTC orders concerning false advertising reviewed by the courts in the same period were upheld.[21]

II. The Expansion of Federal Trade Commission Jurisdiction and Enforcement Powers

Although Commission jurisdiction over false advertising was established beyond doubt, one important question remained unresolved. The statute proscribed "unfair methods of competition." Commission action was clearly authorized when a company was injured by the false or misleading advertising of a competitor; but did the Commission have jurisdiction to proceed against advertising which was misleading to the public when it could not be shown that there had been an injury to a competing company? For the Commission to serve as a guardian of the informed, intelligent choice which, as has been suggested, is imperative to our economic order, the answer to this question would have to be in the affirmative. No answer was provided by the twenty-nine cases prior to 1931 in which Commission cease-and-desist orders were reviewed.[22] In none of the twenty-two cases in which an order of the Commission had been upheld was the decision specifically grounded upon a finding that honest competition had been injured by the proscribed advertising. On the other hand, in at least one of the cases in which the Commission was reversed, the order was set aside on the ground that the misrepresentation had no tendency to injure competition.[23]

In the famous case of *FTC v. Raladam Co.*,[24] the Supreme Court was squarely confronted with the issue whether it was necessary to show, as a prerequisite to FTC jurisdiction to take action against a false advertising practice, that the practice had an adverse effect on competition. In a unanimous decision, the Court held that the Commission was without jurisdiction to issue an order prohibiting false advertising absent proof that the advertisement affected competitors, even though the advertisement admittedly deceived the public. The *Raladam* decision struck a hard blow because it not only limited the scope of FTC enforcement powers, but also attacked the very base of economic democracy. It was only natural that agitation soon developed for congressional action to broaden the FTC's power to enable the Commission to protect the consuming public as well as hon-

21. See Handler, *Jurisdiction of the Federal Trade Commission Over False Advertising*, 31 Colum. L. Rev. 527, 539 (1931).

22. *Ibid.*

23. FTC v. Klesner, 280 U.S. 19 (1929).

24. 283 U.S. 643 (1931).

est competitors. The fruit of this agitation was the passage in 1938 of the Wheeler-Lea amendments to the Federal Trade Commission Act. Section 5 of the act now reads: "Unfair methods of competition in commerce *and unfair or deceptive acts or practices in commerce,* are hereby declared unlawful."[25] By the addition of the italicized language, the previous emphasis on protection of competition was abandoned, and the Commission was granted a broader basis from which to police false advertisers. "Thus, the necessity for alleging injury to competition was removed and attention was focused on the detriment to the consumer occasioned by advertising misrepresentations."[26] That the Commission was to have a role in guaranteeing informed and intelligent consumer choice was confirmed by Senator Wheeler, a co-author of the amendment, who said: "Broadly speaking, this legislation is designed to give the Federal Trade Commission jurisdiction over unfair acts and practices for consumer protection to the same extent that it now has jurisdiction over unfair methods of competition for the protection of competitors."[27]

The 1938 amendments also enlarged the Federal Trade Commission Act by adding section 12,[28] which declares certain advertisements of foods, drugs, medical devices, and cosmetics to be "unfair or deceptive acts or practices in commerce" within the meaning of section 5,[29] and by providing important new procedural weapons for

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25. 52 Stat. 111 (1938), 15 U.S.C. § 45 (1964). (Emphasis added.) It was still essential that the deceptive act have been committed in commerce—that is, by a competitor rather than by a commentator or someone else not in the business. *Compare* Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941), *with* Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941). That this amendment filled the gap left by the decision in *Raladam* was pointed out in Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941), where the court stated:

> The failure to mention competition in the latter phrase ["unfair or deceptive acts or practices in commerce"] shows a legislative intent to remove the procedural requirement set up in the Raladam case and the Commission can now center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor. The logic of the present trend of the law is apparent when we realize how helpless the Commission would be under the rule of the Raladam case where all the competitors in the industry were using the same practice or where the offender had a monopoly in a field which did not compete with any other field.

See also Rothschild v. FTC, 200 F.2d 39 (7th Cir. 1952), *cert. denied,* 345 U.S. 941 (1953); Globe Cardboard Novelty Co., Inc. v. FTC, 192 F.2d 444 (3d Cir. 1951). See generally OPPENHEIM, CASES ON UNFAIR TRADE PRACTICES 372-74 (2d ed. 1965).

26. Note, 56 COLUM. L. REV. 1018, 1022 (1956).

27. 83 CONG. REC. 3256 (1938).

28. 52 Stat. 114 (1938), adding 15 U.S.C. § 52 (1964).

29. A dual enforcement system was envisioned with respect to food, drugs, cosmetics, and medical devices. Thus, the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040-59 (1938), 21 U.S.C. §§ 309-92 (1964)) vested concurrent jurisdiction over these items in the Food and Drug Administration. That the resulting opportunity for dual enforcement was intentional is shown by statements of Senator Lea. See 83 CONG. REC. 410 (1938).

the Commission's use in its war on false advertising. The Commission's effectiveness had previously been hampered by a lack of effective penalties and by the delay involved in actually accomplishing a termination of the misleading practices whenever the advertiser insisted upon contesting the Commission's action. To remedy this situation, the 1938 amendments added the following three procedures and penalties, of which the last two apply only in cases involving food, drugs, medical devices and cosmetics.

1. If no court review is sought within sixty days of a Commission order to cease and desist, the order becomes final; violation of a final order results in a civil penalty of up to fifty thousand dollars for each violation.

2. Where the advertisement is likely to induce the purchase of a commodity which is injurious to health or where there is intent to defraud, a criminal proceeding may be instituted, with fines up to five thousand dollars and imprisonment up to six months.[30]

3. The Commission may require a temporary injunction against the dissemination of false information about foods, drugs, medical devices, and cosmetics, pending a final determination by the Commission and subsequent court review.[31]

Congressional action in the false-advertising field did not end with the Wheeler-Lea amendments. In 1939 Congress passed the Wool Products Labeling Act,[32] an enactment which substantially enlarged Commission authority to proceed against the false advertising of wool products sold in interstate commerce. Modeled upon the Food, Drug, and Cosmetic Act, the Wool Act prohibited the introduction, the manufacture for introduction into interstate commerce, and the sale, transportation, or distribution in interstate commerce of a wool product which is "misbranded" in that it does not bear a label as required by the act or bears a false label.[33] The required label must remain affixed to the product until it is sold to the consumer.[34] "Cease and desist order proceedings, authority to obtain temporary injunctions in the district courts, criminal prosecution and product seizure and condemnation suits in the Federal district courts

30. 52 Stat. 115 (1938), adding 15 U.S.C. § 54 (1964).

31. 52 Stat. 115 (1938), adding 15 U.S.C. § 53 (1964).

32. 54 Stat. 1129 (1940), adding 15 U.S.C. §§ 68-68j (1964).

33. "Informative labeling of manufactured wool products to indicate percentage of wool and other fibers, disclosure of the use of reprocessed or reused wool and of loading, filling or adulterating matter was specifically required and the name or registered identification number of the manufacturer must also appear on the label." Weston, *supra* note 7, at 552.

34. See FTC, Rules and Regulations Under Wool Products Labeling Act, 16 C.F.R. § 300.5 (1960).

were provided for enforcement of this Act."[35] In addition, Congress in 1950 amended section 15 of the FTC Act to provide that advertisements of margarine are to be deemed misleading in a material respect if "representations are made or suggested that such oleomargarine or margarine is a dairy product."[36] A provision of general significance in the same amendment substantially strengthened the FTC cease-and-desist order by stating that a separate violation could be found for each day the violation of a final order continued; the penalty for each such violation could be a fine of as much as five thousand dollars.

The success of the Wool Act, together with the existence of widespread misrepresentations in the labeling of fur products, led to the Fur Products Labeling Act of 1951.[37] This act prohibited the false advertising of fur products and required informative advertising in addition to informative labeling.[38] The Flammable Fabrics Act,[39] passed in 1953, authorized the Commission to protect the consumer from fabrics and wearing apparel with flammability exceeding prescribed limits. Finally, in 1958 Congress enacted the most comprehensive of all the specialized product statutes enforced by the Commission, the Textile Fiber Products Identification Act,[40] which requires informative advertising as well as informative labeling and applies extensively to retail activities involving products that have been shipped in interstate commerce. Enforcement is provided by the typical means: cease-and-desist orders, product seizures, criminal prosecutions, and temporary injunctions.

It is thus readily apparent that Commission authority to eliminate deception and to provide consumers with the information necessary to make intelligent choices among competing goods has changed considerably since 1914. General legislation, such as the Wheeler-Lea amendments to section 5 of the FTC Act and the penalty provisions added to that act in 1950, has provided a wider jurisdictional basis and broader enforcement powers for Commission action. Moreover, specialized legislation with respect to such products as food, drugs, medical devices, cosmetics, oleomargarine, and wool and fur products has served to make the definition of deceptive advertising with respect to those goods more specific and, therefore, to make violations of section 5 relative to such products more easily

35. Weston, *supra* note 7, at 552.
36. 64 Stat. 21 (1950), amending 15 U.S.C. § 55(a)(2) (1964).
37. 65 Stat. 175 (1951), adding 15 U.S.C. §§ 69-69j (1964).
38. 65 Stat. 178 (1951), adding 15 U.S.C. § 69(c) (1964).
39. 67 Stat. 111 (1953), adding 15 U.S.C. §§ 1191-1200 (1964).
40. 72 Stat. 1717 (1958), adding 15 U.S.C. §§ 70-70k (1964).

discovered and prosecuted. The Commission's response to the challenge posed by the misuse of modern advertising techniques has been well described by Professor Handler:

> Through its outlawing of unfair and deceptive acts the Commission has rendered yeoman service in raising the plane of competition. Efforts to curb false and misleading advertising had foundered before the Commission undertook the vigilant protection of the consumer and the honest businessman. It is here the Commission has made its most notable contributions to substantive doctrine. To be sure, the market place has not been purged of all improprieties, but recent decades have witnessed an impressive elevation of business standards.[41]

III. Typical Patterns of Deception

Because of the thousands of cases which have been decided in the half-century since the creation of the Federal Trade Commission, businessmen and their advertisers should have few doubts about what kind of advertising can legally be shown on television or pictured in print. The range of advertising permitted by these decisions presents a field of endeavor for the advertiser which is both wide and fertile. Yet in this savagely competitive business, ingenuity and craftiness still frequently lead to illegality. The line between the legally permissible and impermissible is, of course, not drawn with specificity in the statute. Recognizing that the very ingenuity and craftiness inherent in the advertising business precluded this approach, Congress couched the law in broad language such as "unfair methods of competition and . . . unfair or deceptive practices," and left it up to the Commission to apply the intent of the law to specific acts and practices as they came into being. Such flexibility was the only practical means of dealing with future chicanery. Nevertheless, the many Commission decisions over the years do provide some specific guidelines which separate permissible from impermissible advertising practices. Many of the cases fall into recognizable patterns of deceptive techniques; these patterns consist of a few basic schemes which have been applied in several diverse factual settings. The more typical categories of deceptive practices will be discussed below in an effort to afford some insight into the ways that the Commission has proceeded in protecting consumers against false advertising and, at the same time, to suggest guidelines concerning what the advertisers may and may not do.

Before considering the specific patterns of deceptive techniques

41. Handler, *Introduction to Symposium—The Fiftieth Anniversary of the Federal Trade Commission*, 64 Colum. L. Rev. 385, 388 (1964).

which have developed over the years, attention should be focused upon certain basic rules which govern all advertising. These may be summarized as follows:

1. *Tendency to deceive.* The Commission is empowered to act when representations have only a *tendency* to mislead or deceive.[42] Proof of *actual* deception is not essential,[43] although evidence of actual deception is apparently conclusive as to the deceptive quality of the advertisement in question.

2. *Immateriality of knowledge of falsity.* Since the purpose of the FTC Act is consumer protection, the Government does not have to prove knowledge of falsity on the part of the advertiser;[44] the businessman acts at his own peril.

3. *Immateriality of intent.* The intent of the advertiser is also entirely immaterial. An advertiser may have a wholly innocent intent and still violate the law.[45]

4. *General public's understanding controls.* Since the purpose of the act is to protect the consumer, and since some consumers are "ignorant, unthinking and credulous,"[46] nothing less than "the most literal truthfulness" is tolerated.[47] As the Supreme Court has stated, "laws are made to protect the trusting as well as the suspicious."[48] Thus it is immaterial that an expert reader might be able to decipher the advertisement in question so as to avoid being misled.

5. *Literal truth sometimes insufficient.* Advertisements are not intended to be carefully dissected with a dictionary at hand, but rather are intended to produce an overall impression on the ordinary purchaser.[49] An advertiser cannot present one overall impression and yet protect himself by pointing to a contrary impression which appears in a small and inconspicuous portion of the advertisement. Even though every sentence considered separately is true, the advertisement as a whole may be misleading because factors are omitted which should be mentioned, or because the message is composed in such a way as to mislead.[50]

6. *Ambiguous advertisements interpreted to effect purposes of the law.* Since the purpose of the FTC Act is the prohibition of advertising which has a tendency and capacity to mislead, an advertise-

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42. *E.g.*, S. Buchsbaum & Co. v. FTC, 160 F.2d 121 (7th Cir. 1947).
43. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).
44. D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942).
45. Bockensette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943).
46. Moretrench Corp. v. FTC, 127 F.2d 792, 796 (2d Cir. 1942).
47. *Ibid.*
48. FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937).
49. Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942).
50. Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir.), *cert. denied*, 352 U.S. 1025 (1957).

ment which can be read to have two meanings is illegal if one of them is false or misleading.[51]

The basic ground rules of all advertising have been indicated; it is now appropriate to examine the typical categories of deceptive practices. Although limitations of space preclude detailed coverage, enough will be said to suggest the basic substantive areas in which the Commission has acted to protect consumer choice.

1. *Deceptive pricing.* This practice may take many forms. Examples include representations that an article may be purchased at a reduction from an established price, representations that an article may be purchased at "wholesale" or "factory" prices, representations that two products may be purchased for the price of one, and preticketing.[52] In each of these situations the consumer is obviously led to believe that he is buying the merchandise at a discount. If in fact no such discount exists—for example, if the "regular" price is never charged—the consumer is misled and trade is diverted illegally. "Bait-and-switch" advertising and offers of "free" goods are other manifestations of the same basic deceit. The essence of the "bait-and-switch" promotion is the attempt to switch the consumer's attention from the advertised product to a product which the baiter actually wants to sell. With regard to offers of "free" goods, the scheme is to require the consumer to purchase certain merchandise in order to obtain the free article. In either case, consumer deception and the diversion of trade are obvious and both techniques have been so attacked by the Commission.[53]

2. *Deception by nondisclosure.* The cases in this area are myriad and cover almost every variety of nondisclosure. Examples include the publishing of "abridged" or "condensed" books and the distribution of "rebuilt" or "second-hand" goods without specifying either type of product as such.[54] Another example is the sale of foreign-made goods without disclosing their origin when there is a consumer preference for domestic goods. Consumer deception is obvious, and the Commission has acted accordingly.[55]

3. *Product or name simulation.* The intention here involved is

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51. Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1954), *rev'd on other grounds*, 348 U.S. 940 (1955).

52. *E.g.*, Rayex Corp. v. FTC, 317 F.2d 290 (2d Cir. 1963); Thomas v. FTC, 116 F.2d 347 (10th Cir. 1940); Del Mar Sewing Machine Co., 49 F.T.C. 1257 (1953); Ideal Mail Order Co., 43 F.T.C. 447 (1947).

53. *E.g.*, Del Mar Sewing Machine Co., *supra* note 52. As regards "free" goods, see Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964); 13 Fed. Reg. 414 (1948); SIMON, ADVERTISING AND MARKETING 358-64 (1956).

54. *E.g.*, Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir. 1960).

55. *E.g.*, L. Heller & Son, Inc. v. FTC, 191 F.2d 954 (7th Cir. 1951).

to market a product by using as one's own the name of another manufacturer which has some degree of consumer acceptance. Such a technique clearly generates consumer confusion; the advertising is thus false and misleading within the meaning of section 5.[56] The law of patents, trademarks, and copyrights protects a brand name from *direct* copying. The protection afforded by section 5 is broader, since illegality under that section does not depend upon the precise, literal copying of a name; it is sufficient if the name of the new product is close enough to that of an established product to deceive the prospective consumer.

4. *False disparagement of competing products.* Attempting to sell one's own goods by disparaging those of a competitor is clearly an "unfair and deceptive act" within the Commission's purview. Thus, questions such as "Did you ever find maggots in your aluminum pans?" and "Do you know that aluminum pans may be full of the most deadly bacteria known to science?" distributed by a manufacturer of stainless steel cooking utensils were enjoined by the Commission as unfair and deceptive practices.[57]

5. *False representations of approval or sponsorship.* Endorsements by "doctors" or "dentists" or "scientific experts" are examples of this technique. Consumers tend to be persuaded by testimonials or sponsorship given by people who are "in a position to know." If the sponsorship is faked or rigged, the consumer is obviously misled and trade is diverted illegally.[58]

6. *Guarantees.* The word "guaranteed" used in connection with the sale of a product may be misleading in suggesting to the purchaser that the seller stands unconditionally behind his product, when in reality hidden conditions or interpretations may persist which make the "guarantee" meaningless. For example, if a tire is guaranteed "for life" and the undisclosed intention of the advertiser is that the life referred to is that of the tire, the guarantee is useless and, because of its deception of the consumer and misdirection of trade, illegal.[59]

7. *False representations of composition, character, or source.* The violation here involved is that of representing an article as containing certain desired ingredients, as being of a certain desired quality or composition, or as having a certain preferred origin when in fact none of these is the case. For example, where white pine is pre-

56. *E.g.*, Standard Brands, Inc. v. Smidler, 151 F.2d 34 (2d Cir. 1945).

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

58. See, *e.g.*, Adolph Kastor & Bros., Inc. v. FTC, 138 F.2d 824 (2d Cir. 1943).

59. See generally Parker Pen Co. v. FTC, 159 F.2d 509 (7th Cir. 1946); Hearst Magazines, Inc., 32 F.T.C. 1440 (1941).

ferred by customers because of its superior durability, to call one's pine "white" when in fact it is "yellow" is to mislead the buyer and thus is a violation of the act.[60] Other examples include suggestions that a product "restores natural moisture necessary for a live healthy skin" when such a claim is untrue,[61] and the use of "Havana" labels on cigars which are actually made from domestic tobacco.[62]

8. *Deceptive television demonstrations.* "Mock-ups," or visual representations of the product or some other object which is not the product itself, are not illegal per se. Substitution of a facsimile for the actual product may be necessary where the technical requirements of the advertising medium prevent the use of the actual object. For instance, real ice cream used in an advertisement will melt under the hot television lights and present to the public a particularly unappetizing spectacle. To avoid this, advertisers may use a mock-up that looks like ice cream but does not melt during the commercial. If, on the other hand, the demonstration represents that a product is doing something which it cannot do or that it has qualities which it does not in fact possess, the practice contains a clear possibility of deception and is illegal. An illustration is the famous "sandpaper" shaving demonstration. The advertiser claimed that its shaving cream possessed a "super moisturizing" power so great that the cream could be used to shave sandpaper. Actual sandpaper was not used in the demonstration, but rather a "mock-up" of loose sand spread on plexiglass. Since ordinary sandpaper had to soak for an hour before it could be shaved, the shaving cream did not have the properties which the demonstration claimed. The practice was therefore enjoined.[63]

IV. Conclusion

The FTC does not, of course, work alone in providing a framework in which informed, intelligent consumer choice can regulate the production and distribution of goods and services in our society. Other federal agencies and departments, such as the Food and Drug Administration, the Post Office Department, the Federal Commu-

60. FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).

61. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

62. El Moro Cigar Co. v. FTC, 107 F.2d 429 (4th Cir. 1939).

63. Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962), *on rehearing*, 326 F.2d 517 (1st Cir. 1963). Another example is the so-called "white coat" or doctor theme. In American Chicle Co., No. 6791, FTC, April 30, 1958, the Commission stopped the practice by prohibiting "the manufacturers of Rolaids from representing 'by use of a white coat and any other object, device or word indicative of the medical profession, that doctors or the medical profession recommend Rolaids, unless the representation is limited to numbers of doctors not greater than has been ascertained to be the fact.'"

nications Commission, the Alcohol and Tobacco Tax Division of the Internal Revenue Service, and the Securities and Exchange Commission, all have a role in making economic democracy work.[64] Moreover, state legislation, common-law rights and remedies, and nongovernmental regulation by private groups, such as the Better Business Bureaus, are available to purchasers and honest competitors.[65] It is clear, however, that the role of the Commission in combating false advertising is singularly significant in rationalizing our economic order by providing accurate and honest information with respect to competing goods and services.

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64. Note, *supra* note 26, at 1038-53.
65. OPPENHEIM, *op. cit. supra* note 25, at 280-309.