5-1-1969

Federal Regulation of False Advertising

George J. Alexander
Santa Clara University School of Law, gjalexander@scu.edu

FEDERAL REGULATION OF FALSE ADVERTISING

*George J. Alexander**

The federal government regulates falsity in advertising in a number of ways. Several governmental agencies are involved in the process: The Food and Drug Administration, the Securities and Exchange Commission, and the Post Office to mention only a few. Except for the Federal Trade Commission, however, no agency has authority over all of the many forms of false advertising. The others are limited to their own subject matter areas or to a particular mode of transmission of information.[1] The Federal Trade Commission, on the other hand, has broad statutory authority to prohibit "unfair methods of competition . . . and unfair or deceptive acts or practices in commerce. . . ."[2]

The Commission was founded in 1914 and has, almost from the beginning, divided its functions into two principal areas: the regulation of restraints of trade, and the regulation of false advertising.[3] In both fields, the Commission has taken its authority quite seriously. In its pronouncements concerning false advertising, it has made clear that Commission intervention is not to be limited merely to cases in which large segments of the population are probably misled, but may be invoked where a substantial segment of the population might be victimized.[4] Furthermore, the latter group need not even be comprised of average citizens. The cases continually speak of protecting the credulous and less intelligent members of the consuming public. One commissioner has expressed the fear that the Commission might find itself protecting the Mortimer Snerds of our society,[5] and Judge Augustus Hand solemnly pronounced that the Commission could anticipate the millenium by protecting the wandering man, though fool, of whom the prophet Isaiah spoke.[6] Protection of the easily deceived has been a goal of the Commission ever since.

It is fairly easy to make oneself look foolish in this business of protecting fools, and the Commission has certainly done so a number of times. In 1944, the Commission became concerned about false indications of origin on products. In one of several cases, the Commission thought that the name "New Bedford" on a rug made in Belgium might be deceptive.[7] In an attempt to substantiate its suspicions, it sent out a questionnaire to an unspecified number of people listed in the New York telephone directory and requested that

* Professor of Law and Associate Dean, Syracuse University College of Law. A.B. 1953, LL.B. 1959, University of Pennsylvania; LL.M. 1964, Yale. This article was delivered, in substance, at the State University of New York at Buffalo Law School on October 24, 1968.

[1] *See generally,* Note, *The Regulation of Advertising,* 56 COLUM. L. REV. 1018 (1956).

[2] Federal Trade Commission Act, 38 Stat. 719 (1914), *as amended,* 15 U.S.C. § 45 (1964).

[3] G. HENDERSON, THE FEDERAL TRADE COMMISSION, 1-48 (1924).

[4] That there be at least a substantial number of persons endangered seems an accepted limitation on the Commission's solicitude toward trusting buyers. Feil v. FTC, 285 F.2d 879 (9th Cir. 1960).

[5] Independent Directory Corp., 47 F.T.C. 13, 31 (1950) (dissenting opinion), *aff'd and enforced,* 188 F2d 468 (2d Cir. 1951).

[6] General Motors Corp. v. FTC, 114 F2d 33, 36 (2d Cir. 1940), *cert. denied,* 312 U.S. 682 (1941).

[7] Stephen Rug Mills, 34 F.T.C. 958 (1942), *aff'd sub nom.,* Herzfeld v. FTC, 140 F2d 207 (2d Cir. 1944).

each answer a series of questions. Included was the following: "If hooked rugs were identified or described to you by the name given below, would you or would you not, from those names, form any opinion or gain impression as to the country where they were made? If you would not, please write 'No' [in the answer] otherwise please insert the name of the country . . . ."[8] Although the Commission did not indicate how many of these questionnaires it sent out, thirty-eight were returned. Sixteen of the respondents indicated that the name "New Bedford" gave them no impression as to where the rug was manufactured. Twenty-two thought the name indicated domestic manufacture, whereupon the Commission solemnly found that the name was deceptive.[9] The questionnaire failed to mention that at the bottom of the label containing the name "New Bedford" was printed, in almost identical size, the words "Made in Belgium." According to the Commission, that made no difference, since once an advertisement was determined to be false, inconsistent qualifying language was not relevant.[10]

The Commission has never been able to develop a consistent policy as to what the adjective "free" means to a credulous consumer. At times, the Commission has concluded that that word invokes such avarice in the hearts of the consumer that even when goods are in fact given without additional charge in connection with other purchases, the word is deceptive.[11] At other times, the Commission has permitted the word to be used so long as no hidden charges would make the supposedly gratuitous product in fact one for which the customer has paid.[12] Between these two positions similar problems arose in interpretation. The whole matter eventually became so complex that one of the current commissioners, not noted for his intemperance in decision, wrote the following:

> [H]ow will a lawyer answer a client who asks: "May I advertise something 'free' to purchasers who buy another article at the stated price, if the advertisement clearly discloses all of the terms and conditions of the offer?" The only safe answer would seem to be: "I don't know. I've read all of the Commission opinions on the subject, and I still don't know. What's more, I don't think the Commission knows."[13]

---

[8] 34 F.T.C. at 966.

[9] Even a bare majority was not necessary since the Commission has taken the position that sufficient consumer deception is indicated when a substantial percentage of those reporting indicate their misunderstanding. Feil v. FTC, 285 F.2d 879 (9th Cir. 1960).

[10] No mention was made in the entire questionnaire of the "Made in Belgium" indication.

[11] In *Book-of-the-Month-Club, Inc.*, 48 F.T.C. 1297 (1952), *petition to set aside order denied*, 202 F.2d 486 (2d Cir.) *cert. dismissed*, 346 U.S. 883 (1953), Chairman James M. Mead was driven to analogizing the use of the word with an illegal lottery. At 48 F.T.C. 1313 Chairman Mead quoted from a lottery case, *Rast v. Van Deman & Lewis*, 240 U.S. 342 (1916):

> [T]hey rely on something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called . . . gaming; it may, however, be considered as having the seduction and evil of such . . . .

[12] Samuel Stores, Inc., 27 F.T.C. 882 (1938).

[13] Mary Carter Paint Co., 60 F.T.C. 1827, 1866 (1962), *rev'd*, 333 F.2d 654 (5th Cir. 1964), *rev'd*, 382 U.S. 46 (1965).

In another case, where the Commission decided that a medication did not live up to its promoter's claim of drying up pimples, despite evidence to the contrary at the hearing, and despite a contrary ruling of the hearing examiner who recommended dismissing the complaint, the court of appeals severely restricted the FTC's order.[14] The court said, in a terse opinion, that the Commission was wrong and, besides, it was "making a mountain out of a pimple."[15]

The appearance of foolishness is, in my judgment, the least of the Commission's faults. A second, and more serious fault, is the Commission's single-minded devotion to its task of driving from the market place cheats and frauds. In the history of FTC cases, one finds almost no weighing of competing interests. Indeed, one looks in vain for the suggestion that competing interests even exist. This is a strange business indeed. It is especially curious since the same commissioners, reviewing antitrust cases, have made it clear in several decisions that they recognize the competitive impact of advertising.[16] Recently in the Proctor and Gamble-Clorox merger case,[17] the Commission argued at length how advertising could be used by Proctor and Gamble further to reduce competition in the chlorine bleach market. Proctor and Gamble's advertising budget was many times that of Clorox's though Clorox had already been able to achieve a price substantially higher on what the Commission found to be chemically identical chlorine bleach, presumably through advertising promotion distinguishing Clorox from other brands of chlorine bleach. The forces which immunized Clorox from the competition of other sellers of bleach would, the Commission felt, be enhanced by the increased advertising budget available after the merger. New entry would be discouraged for the same reasons and, in general, the market would move toward even greater concentration.[18] It apparently did not occur to the Commission that the reason that Clorox had been so effective in outdistancing its competition in chlorine bleach was because it was a false advertiser. If, as the Commission found, its bleach was identical with other bleaches and its advertising had indicated, as indeed it still does, that Clorox bleach was different from and superior to its competitors, then it seems that the Commission was remiss in allowing the advertising to continue.

If the Commission has not moved to eliminate abuses in the advertising industry such as those described above, it at least should not assist this form of consumer deception. In fact, however, it has. In the mid-thirties, for example, a group of coal producers determined to promote their coal by calling it "New River Coal." This was not a trademark, since it belonged to no single producer, and was independent of the corporate names of the producers.

[14] Kleerex Co., 46 F.T.C. 898 (1950), *modified sub nom.* Folds v. FTC, 187 F.2d 658 (7th Cir. 1951).
[15] Folds v. FTC, 187 F.2d 658, 661 (7th Cir. 1951).
[16] FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); General Foods Corp. v. FTC, 386 F.2d 936 (3rd Cir. 1967).
[17] FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967).
[18] *Id.* at 580-81.

It was merely an attempt to identify the coal being promoted. Another seller, selling coal which apparently was identical in quality and came from the same geographic coal bed, also called his coal "New River Coal" to indicate that consumers could use it interchangeably. The Commission ordered him to cease and desist from so deceiving the public.[19] Logically extended to the bleach case, such reasoning would prohibit other bleach manufacturers from selling their product as "chlorine bleach" if Clorox had done so first. Unwarranted product differentiation was in this case not only allowed, but enforced.

In another case,[20] the Commission was asked to consider whether a promotional campaign by the Chevrolet Division of General Motors for the sale of its replacement parts was deceptive. The Division had encouraged consumers to buy genuine Chevrolet parts and had asserted that "Your Chevrolet knows the difference."[21] Deception was alleged because a number of the parts to which the cars were alleged to react differently were parts manufactured not by Chevrolet but by other companies, and a good number of them were sold in identical form (without, of course, the Chevrolet trademark) to competing sellers of replacement parts. Clearly, the difference between these parts and genuine Chevrolet replacement parts was nil. The Commission concluded, however, that there was no actionable deception and dismissed the complaint.

A final example of unwarranted product differentiation by the Commission may be found in the litigation surrounding the advertising of chamois cloth. When the natural source of chamois cloth began to diminish, a substitute was developed from sheepskin which the Commission permitted to be advertised as "chamois."[22] When a different method of tanning sheepskin was developed, however, the Commission prohibited calling the product "chamois" on the ground that it was not identical with the already approved form of making what appeared to be a functionally almost identical product.[23] Since neither name accurately described the traditional process for making chamois, it is not clear why the Commission preferred the first over the second. It becomes even murkier when one recognizes that, contemporaneously with the decision the federal government was purchasing type-one and type-two chamois, one number being assigned to each of the two processes. Finally, as the respondent in one of the cases pointed out, since there were only four producers of the approved chamois in the United States, what the Commission was effectively doing was granting to these four a monopoly in a product which really was being produced by a number of others as well. The Commission cynically responded: "The order does not reject respondents' products. They may still sell their products so long as they do not sell under the name 'chamois.'"[24]

The chamois litigation was an outgrowth of an earlier established Commission policy. In the 1930's a species of wood produced on the west coast and

[19] Walker's New River Mining Co., 18 F.T.C. 176 (1934).
[20] General Motors Corp., 53 F.T.C. 1239 (1957).
[21] *Id.* at 1242.
[22] Pigro Chamois Co., 25 F.T.C. 929 (1937).
[23] Atlantic Sponge & Chamois Corp., 52 F.T.C. 500 (1955).
[24] *Id.* at 530.

initially called yellow pine began to compete in the east where white pine had an established market. The wood was by that time commonly called California white pine in the west. No one was greatly upset by that name until both California white pine and eastern white pine became available to the same group of customers. When it did, the producers of the eastern pine complained to the Commission of the falsity they thought inherent in calling the California wood a species of white pine. Actually the western manufacturers were not without a rational explanation for the use of the name. The wood was not demonstrably inferior to the eastern pine in its uses, and the name had been adopted in California without any apparent deceptive intent. Furthermore, the Bureau of Standards had recognized the name "California white pine" as a legitimate description of the wood. The litigation[25] was hotly contested, and ultimately reached the United States Supreme Court where the main argument made on behalf of the California interest was the argument of functional equivalence. The west coast producers also asserted that the price of the California wood—lower than that of eastern white pine—made it a useful substitute in the eastern market. Justice Cardozo found, however, that the Commission had properly prohibited the use of the name "California white pine." In one of the most important decisions in the law of deceptive advertising, he wrote:

> [The] saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.[26]

This rationale was applied by the Commission in a wide range of cases to prevent the use of the name, associated at one time with a certain product, on another product differently produced or differently made. Thus, for a long time, the Commission prohibited the use of "Sheffield plate" on silver plate which had originally been made by brazing sterling silver to a copper base—a process abandoned throughout the world, even in Sheffield, England—for functionally similar products made by modern electroplating techniques.[27] Similarly, it prohibited the use of the word "engraving" for any of the processes developed subsequent to the traditional process of etching metal surfaces to obtain a desired pattern. More significantly, the Commission prohibited as well any reference to the product historically made differently in the description of a new functionally-equivalent product.[28] Consequently, it was found deceptive to speak of a functionally-identical printed paper as having been produced by "engraving," or "non-plate engraving," or "engraving without

[25] FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).
[26] *Id.* at 78.
[27] Louis Batlin, 9 F.T.C. 143 (1925).
[28] *Id.*

copper plates." It was likewise deceptive to refer to "Sheffield design reproduction"[29] in a product manufactured through an electroplating process. In the chamois cases the Commission prohibited any reference to chamois for the type-two process. "Carpincho chamois cuts" for a process made from pig-like carpincho hide was disallowed,[30] as were even such modestly stated titles as chamois-like sheepskin and chamois-type sheepskin.[31] In other words, one could sell a functionally similar or even equivalent chamois so long as he neither called it "chamois" nor stated in the name that it was functionally similar to chamois. The words that come to mind as useful in indicating a functional similarity in a product differently made have, one by one, fallen to Commission interdiction. For example, the Commission has held that to refer to a product as a copy or reproduction of another product is deceptive if the process by which it is copied or reproduced is less arduous than the process originally employed.[32] A hand-woven oriental rug, therefore, may not be machine reproduced and sold as a copy because the Commission has taken the position that the handweaving must be copied as well.[33]

Justice Cardozo's opinion in the white pine case essentially defined the goal of advertising regulation as the prevention of frustration of consumer desires, irrespective of whether those desires were well-founded.[34] The Commission, on the other hand, seems completely indifferent to whether consumer preferences in fact exist for a prior process and asserts instead that consumers are entitled to receive their products through the historic production processes. In the chamois litigation it was quite explicit on this point. The opinion noted, "[a]lthough the ordinary buyer does not know how chamois is made, he is entitled to believe that the particular product sold under that name is in fact 'chamois' as that terms is understood by *manufacturers* and *distributors*."[35]

Similarly, the Commission has looked to historic product distribution patterns to identify the sellers who may appropriately call themselves "retailers" or "wholesalers" as well as those who may legitimately indicate that the product comes directly from the factory or is produced by the seller. Here again, the Commission is not concerned with whether customers view a wholesaler as primarily a person who gives them a wholesale price (although he sells a substantial volume of products to ultimate consumers), or whether their

[29] National Silver Co., 44 F.T.C. 1 (1947), *modifying* Samuel E. Bernstein, Inc., 10 F.T.C. 223 (1926).

[30] Pigro Chamois Co., 25 F.T.C. 929 (1937).

[31] Atlantic Sponge & Chamois Corp., 52 F.T.C. 500, 526. The first advisory opinion issued by the Commission expressly forbade use of the terms "Chamois-like Sheepskin" and "Chamois-type Sheepskin." Adv. Op. No. 1 [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 17,010 (F.T.C. 1964).

[32] Bigelow-Sanford Carpet Co., 34 F.T.C. 1252 (1942).

[33] *Id.*

[34] FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).

[35] Atlantic Sponge & Chamois Corp., 52 F.T.C. 500, 531 (emphasis supplied).

interests lies in identifying his precise distributive function. The Commission opts in favor of the latter.[36]

The result of tying both product descriptions and distributive descriptions to their historic meaning is to insulate historic manufacturing and distribution patterns from the impact of functionally more desirable alternatives. The competition of the new form of engraving would presumably make a more substantial contribution to a better and cheaper process if its promoters could emphasize to the consumer its functional equivalence with the older form. Similarly, the fact that chamois was first produced from one process rather than another does not guarantee that consumers might not prefer the second at its price level to the product previously offered.

A similar reverence for tradition appears in the pricing cases. In *Mary Carter Paint Co.*[37] for example, the respondent traditionally sold paint through a buy-one-get-one-free promotion. The Commission claimed that the price of the second can was included in the price for the combination, and that, therefore, the use of the word "free" was deceptive. The company claimed that the can of paint required to be purchased was functionally equivalent to comparably priced paint. Thus, the second can of paint was in fact given without additional charge. However, the Commission and the reviewing courts were unpersuaded. In their judgment, functional equivalence had nothing to do with it. Since Mary Carter had traditionally sold paints in this manner, they reasoned, the second can was in fact figured in in the price of the combination. Thus, it was not "free."

Putting aside questions of the meaning of the adjective "free," the unwillingness of the Commission to look to the prices of competitors and the insistence that the price structure be examined solely in terms of Mary Carter's prior practice seems to disregard the information competitively most useful. If one assumes, as Mary Carter Paint asserted, that paint could really be sold of equal quality at half the current price, it is difficult to imagine any information of more potential use to the consumer in product differentiation, which the Commission presumably desires to preserve. Even harder to understand is the fact that the Commission would presumably allow any of Mary Carter's competitors who had sold paint at twice the price to run a promotion of the sort denied Mary Carter. For them, a two-for-the-price-of-one sale would be legitimate because in terms of their historic pricing pattern two cans had previously been sold for twice the price of one.

[36] Wholesalers are defined in terms of the traditional role performed rather than the price advantage that the use of the symbol is thought to represent. "A wholesaler . . . is one who sells to a retailer or jobber, usually in quantity lots, and not direct to the ultimate consumer of an individual unit." Progress Tailoring Co., 37 F.T.C. 277, 290 (1943), *aff'd*, 153 F.2d 103 (7th Cir. 1946). "A wholesaler . . . is one who sells to the trade for resale and seldom, if ever, to the purchasing public, with the exception [of] sales to industrial concerns, public utilities, banks and other similar organizations, which purchase in quantity lots . . . not for resale. . . ." L. & C. Mayers Co., 21 F.T.C. 434, 439 (1935), *aff'd*, 97 F.2d 365 (2d Cir. 1938).

[37] Mary Carter Paint Co., 60 F.T.C. 1827 (1962), *rev'd*, 333 F.2d 654 (5th Cir. 1964), *rev'd*, 382 U.S. 46 (1965), *modified order entered*, TRADE REG. REP. ¶ 17,660 (F.T.C. 1966).

Fortunately, there is a philosophy abroad at the moment in Congress which promises to alleviate a number of the conditions which the Commission has either not touched or aggravated. Most notable of legislation along these lines have been the recently passed Fair Packaging and Labeling Act[38] and the Truth-in-Lending Act.[39] The former legislation is modest in its requirement that consumer products indicate on their face an intelligible quantity description, an identification of the product, and something of the ingredients of the product, and that quantity units be standardized in order to facilitate comparison with competing brands. The latter act provides for full disclosure of the terms and conditions of finance charges in credit transactions. The evident thesis of this new legislation is that the consumer needs more intelligible information in order rationally to choose between competing products. Governmental interdiction of falsity has been demonstrably insufficient in the past and certainly cannot be wholly relied on in the future to prevent deception. While he was Assistant Attorney General for Antitrust, Professor Donald Turner suggested that disseminating information to consumers was a possible solution to the present anti-competitive effects brought about by advertising.[40] He found this approach more promising than any direct form of intervention in advertising itself because he thought it too difficult to distinguish between those advertisements which usefully inform and those which merely promote.[41] Perhaps indicative of his general antipathy to much of present advertising was his suggestion that efficiencies in advertising should not be regarded as justifications for mergers although efficiencies in other areas might well merit consideration.[42] He spelled out in broad language the manner in which advertising had established barriers to entry of new enterprise and led toward greater concentration of industries already in the market.[43] During his tenure, however, Professor Turner did not move to implement legislation affecting his proposals for direct consumer information, and it is probable that no such broad legislation will be enacted in the immediate future. If in fact advertising does have a substantial anti-competitive effect, the most immediate effective remedy, short of obtaining Congressional approval for new sources of consumer information, would lie in revamping the present false advertising policy of the Federal Trade Commission in an attempt to shift more of advertising from the anti-competitive promotional type, which endeavors to sell a product by disguising its functional identity with its competitors, to informative advertising which sells products by giving consumers a valid reason for preferring them. The latter form of advertising is, of course, essential to intelligent consumer decisions.

[38] Fair Packaging & Labeling Act, 80 Stat. 1296 (1966).
[39] Consumer Credit Protection Act, 82 Stat. 146 (1968).
[40] Advertising and Competition, speech by Donald Turner, June 2, 1966, excerpted in 5 TRADE REG. REP. ¶ 50,162.
[41] *Id.* at 55,209.
[42] *Id.* at 55,207.
[43] *Id.* at 55,208.

There is currently in progress a heated debate as to whether advertising really has a relevant impact on consumer demand and, if it does, whether its effect is desirable or undesirable. Professor Galbraith suggests that we have long since slipped from a free enterprise economy to a "new industrial state" in which competition is replaced by planning.[44] In his scheme, advertising does not serve the function of promoting products in competitive markets, but rather of channelling demand to meet pre-planned capacity. While I admit I am somewhat less frightened by a society conceived and planned by Madison Avenue than I am by one wholly managed in Washington, I find even the former frightening enough that I take some pleasure in the fact that I believe him to be wrong. I believe competition is not dead, though it be moribund, and that consumers are still not totally the servants of large corporations. I take some small pride in the demise of the Edsel and am persuaded that studies like Dr. Backman's in his recent book *Advertising and Competition*[45] support the idea that advertising still has an effect on competition and that, on occasion, the effect is positive rather than negative by helping to establish mass markets, by making possible methods of national distribution, and more significantly, by providing necessary information to consumers. Further, the findings of Professors Bauer and Greyser in their book, *Advertising in America: The Consumer View,*[46] indicate that an overwhelming majority of Americans find advertising essential, and a similarly large majority believe that it helps improve products and raise the standard of living.

Another contribution that the Bauer-Greyser study makes is its refutation of the opinions of former FCC Commissioner Loevinger who thought that ads didn't really motivate people to make purchases they didn't want to make but were actually quite useful because they gave consumers information not about the products promoted but about the standard of living to which they should aspire.[47] He went so far as to suggest that the riots in the ghetto were a direct response to that kind of information.[48] The study suggests, to the contrary, that about two-thirds of the subjects interviewed in depth thought that advertising leads consumers to make purchases that they really shouldn't make.[49]

One may, then, conclude that advertising is not irrelevant to consumer purchasing and that competition is not so dead as to be unresponsive to consumer demand. Neither does it have in many instances the anti-competitive effect of misinforming consumers so that they make purchases not on the competitive merits of products but on false merits attributed to them by Madison Avenue. Therefore, consideration must be given to the manner in which the Commission's false advertising policy might deal with the problem. The problem is

[44] J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).
[45] J. BACKMAN, ADVERTISING AND COMPETITION (1967).
[46] R. BAUER & S. GREYSER, ADVERTISING IN AMERICA: THE CONSUMER VIEW (1968).
[47] Speech by Commissioner Lee Loevinger, The Power of Advertising, date and place of delivery not indicated, on file in author's office.
[48] *Id.* at 10.
[49] R. BAUER & S. GREYSER, *supra* note 46.

considerably more important than merely whether a few gullible consumers have been led astray by an over-optimistic product promotion.

First, the Fededral Trade Commission should either provide or insist that sellers provide intelligent consumers—as well as the gullible and credulous—with basic information. This is a mammoth task. In the past, the Commission has tended to suppress rather than distribute information. For example, after an extensive study of analgesics to determine whether comparative claims made by competing sellers of products were justified, the Commission refused to publish its results.[50] The results indicated that aspirin was as beneficial as anything else sold. When the Bayer Aspirin Company attempted itself to publish this study to prove its claim that aspirin was medicinally interchangeable, the Commission, far from applauding, sought an injunction against the publication of the study.[51] It said it feared that the publication of the study would be interpreted by credulous consumers as governmental endorsement of Bayer aspirin. Fortunately, it lost the case.

The Commission could implement a pro-competitive advertising policy with a number of specific measures. For example, it might move toward the position that advertising promotion of a product which does not provide a rational basis for preferring the product to others is itself an unfair method of competition. Since such a position is an extreme departure from present practice, the Commission might appropriately start with some intermediate steps pointing in the same direction.

It is probably necessary to be selective in formulating a new pro-competitive advertising policy not only as to principles to be advanced but also as to respondents to be charged. No reason appears why a pro-competitive false advertising policy need apply uniform standards to advertisements irrespective of the market position of the advertiser. It would seem quite appropriate to place a heavier burden of informative advertising on those whose products are found in highly concentrated markets and especially those whose products are among the leaders in that product line. A variable conduct standard depending on the market power of the actor certainly has substantial precedential support in antitrust cases.[52] One might further distinguish between advertisers on the basis of the extent of their advertising. Thus, for example, one might single out such leading companies in the soap, detergent, and cleanser market as Proctor and Gamble, Colgate-Palmolive and Lever Brothers because of the market position that their products enjoy or because of the heavy advertising expenditures of the companies. Proctor and Gamble in 1967 spent 280 million dollars on advertising; Colgate-Palmolive 105 million; and Lever Brothers seventy-five million dollars.[53] One might measure advertising expenditures as a percentage of sales, in which case for the same period, Colgate-Palmolive

[50] *See* G. ALEXANDER, HONESTY AND COMPETITION 94-96 (1967).
[51] FTC v. Sterling Drug, Inc., 215 F. Supp. 327 (S.D.N.Y. 1963), *aff'd*, 317 F.2d 669 (2d Cir. 1963).
[52] Levi, *A Two Level Anti-Monopoly Law*, 47 Nw. U.L. REV. 567 (1952).
[53] ADVERTISING AGE, Aug. 26, 1968, at 48.

would be the most appropriate respondent since its advertising expenditures constituted about twenty-two per cent of its total sales.[54]

Having identified those companies which have a prominent place in the hierarchy of a concentrated industry and those with exceptionally high advertising expenditures in markets that are not vigorously competitive, the Commission might then reinvoke doctrines developed in earlier cases which, apparently, it has currently abandoned.

It should first prohibit advertising which suggests that the product promoted is unique when in fact it is chemically identical, as in the case of chlorine bleach, or largely interchangeable as in the case of deodorants, soaps, and analgesics. The prohibition should be applied irrespective of whether the ad expressly asserts that the product in question is the best or the only product of its kind,[55] or whether that conclusion is left to inference. Thus, the promotion of a soap with supposedly unique colorful additives, which upon analysis are found to be merely the traditional soap which has been colored, should be prohibited.[56]

Similarly, selected companies should be prohibited from establishing straw men in their advertising against whom they demonstrate a hypothetical superiority. When Clorox advertises that its bleach is more effective than weak bleaches, it should not be allowed falsely to create the impression that the competitive bleaches are weak. Likewise, manufacturers should be prohibited from using comparative words, when no comparison is in fact made. An advertisement stating that a product is better, milder, softer, or cheaper than an unspecified competitive product or "Brand X," falsely conveys the impression to consumers that the advertiser's product is actually superior to the major competitive products. Since this is the message conveyed, it should be treated as deceptive advertising in the event that it is not a true statement with respect to the major competitive brands though they remain unnamed. The Commission once took this position in the *Dolcin* case,[57] and its logic should be revived.

Also, both tangible and intangible assertions that will be understood as indicating functional features of a product should be held to a truth standard on the basis of what is likely to be understood. Thus, it should be equally objectionable to refer to a floor wax incapable of full effectiveness for a six-month period as "six month floor wax,"[58] and to indicate durability metaphorically by rolling a sheet of vinyl over the floor and identifying the wax as capable of providing a similar finish, unless the wax durability is comparable to that of vinyl sheeting. A claim that a product will cut the time involved in cleaning by half should be interdicted if untrue, and similarly, a metaphoric presentation as by a tornado cleaning dishes in the sink should be held

[54] *Id.*
[55] American Remedy Co., 24 F.T.C. 1128 (1937); Adams Paint Co., 19 F.T.C. 7 (1934) (consent order); Franklin Paint Co., 16 F.T.C. 250 (1932).
[56] *Cf.* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).
[57] Dolcin Corp., 57 F.T.C. 49 (1961).
[58] Continental Wax Corp. v. FTC, 330 F2d 475 (2d Cir. 1964).

violative of the Federal Trade Commission Act under similar circumstances. An express statement that a child can operate a machine should be required to meet the truth standard as should the same implicit assertion when an obviously unintelligent person is shown operating a complicated device with great relish and skill. Carrying the suggestion one step further, if the name rejuvenescence cream improperly suggests an impossible rejuvenation,[59] advertisements which suggest sexual ecstasies as a result of using after shave lotions or deodorants should also be prohibited.

Finally, if a seller of magic potions is to be prohibited in the distribution of those potions irrespective of the fact that people believe in their magical powers,[60] a similar logic would seem to allow the interdiction of those advertisements which suggest a magical transformation of a hum-drum life into one of extreme well-being in connection with the use of the product. I think, in this respect, of pastoral scenes and nubile maidens cavorting on beaches—pleasant scenes to behold, but suggestive of no rational basis for the preference of the product. The latter suggestion approaches most closely the initial suggestion that a rational basis for product preference should be a *sine qua non* of permissible advertising. Unfortunately, however, Commission precedents would not support interdiction of the metaphoric representations previously listed. The decisions to date have merely prohibited express statements which the Commission deems untrue. There seems little reason, however, in permitting a statement to be made metaphorically that could not be made directly. If anything, since metaphor is inherently ambiguous and ambiguity facilitates over-interpretation, metaphoric statements ought to be more harshly treated than their literal counterparts. Metaphoric statements carry a far greater emotional impact than more precise assertions and appears especially suspect if one views advertising as undesirable when it exceeds the bounds of providing consumer information.

In addition to a more vigorous pro-competitive advertising policy, the Commission might reconsider its present reluctance to judge products comparatively. At the very least, the Commission should allow the defense of the equivalence of products. Were it willing to look to equivalence, it could then admit price comparison such as that urged in *Mary Carter Paint*[61] in which paint claimed to be equivalent was offered at, effectively, half price. As long as it remains unwilling to test equivalence, the Commission appears bound to rely solely on historic pricing patterns which are of far less importance to consumers than information as to the availability of an equivalent product at a susbtantial price reduction. Not only would the testing of equivalence have impact in the pricing cases, but it would also serve to stimulate reconsideration of the policies governing the use of generic product names, an area much in need of re-examination.

[59] Charles of the Ritz Distribs. Corp. v. FTC, 143 F2d 676 (2d Cir. 1944).
[60] Calvert, 39 F.T.C. 268 (1944).
[61] Mary Carter Paint Co., 60 F.T.C. 1827 (1962), *rev'd*, 333 F2d 654 (5th Cir. 1964), *rev'd*, 382 U.S. 46 (1965), *modified order entered*, TRADE REG. REP. ¶ 17,660 (F.T.C. 1966).

To suggest that equivalence be examined is not, of course, to request the Commission to undertake the testing of all consumer products. The issue need not be raised at all until a seller has been accused of deception in his advertising. At that point, the Commission should be prepared to accept (as a defense perhaps) a claim of equivalence and either to obtain expert testimony or through its own independent testing to judge whether equivalence in fact exists.

Second, the Commission should at times engage in testing products in markets in which it has reason to suspect consumer information to be substantially inadequate. Although in the analgesic study mentioned earlier the Commission did precisely this, its unfortunate decision to supress the information acquired rendered the study useless for purposes of consumer education. If such studies are undertaken, their results should be made available to the public as rapidly as possible, especially when they demonstrate, as did the study of analgesics, that there is substantial equivalence among a large range of products, each of which allegedly has a unique function.

Neither of these steps will by themselves create a wholly effective pro-competitive advertising policy but both would serve to initiate a trend against the present anti-competitive nature of the Commission's advertising policy. For a Commission charged with preserving both competition and truth in advertising, that appears to be the least one can demand.