

"RADIO ADVERTISING AND THE FEDERAL TRADE COMMISSION."

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Address by Hon. EWIN L. DAVIS, Vice Chairman, FEDERAL TRADE COMMISSION, at Twelfth annual convention of NATIONAL ASSOCIATION OF BROADCASTERS, at Cincinnati, Ohio, Tuesday, Sept. 18, 1934.

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This is the third Annual Convention of the National Association of Broadcasters I have been honored with an invitation to address. I am glad to be able to be with you today. Aside from my very great interest in radio, in both the art and industry of which there has been such a rapid and marvelous development, I am pleased to discuss with you the subject of radio advertising and the Federal Trade Commission's relation thereto, as I was requested to do.

Radio broadcasting has become a very important factor in our social, political and economic life. It takes into the remotest homes throughout the land the voices of the great leaders of thought, and a wide variety of music and other forms of entertainment. On occasions a large portion of our population are brought into a single radio audience.

In England and other countries the cost of radio programs is met by charges to the owners of receiving sets. In the United States most programs are paid for by advertising sponsors. I am advised that for the twelve months ending last June the national radio advertising bill exceeded \$65,000,000. Yet the radio art and the radio industry are still in their infancy. I mention this to emphasize the importance of the subject.

Before specifically discussing the subject of radio advertising. I wish to call your attention to the authority and duty of the Federal Trade Commission under the law, as well as to outline what the Commission has done to regulate and improve the character of other forms of advertising.

The Federal Trade Commission Act of September 26, 1914, declares "unfair methods of competition in commerce" to be unlawful, and empowers and directs the Federal Trade Commission to prevent such methods.

The courts have uniformly held that false or misleading advertising constitutes such unfair methods within the meaning of this Act.

From the time the Commission was organized, it has waged war against advertisers who resort to false or misleading representation to sell their products.

One of the first cases was against a large mail order house that made false representations concerning its buying power and the care with which it selected sugar, tea, and coffee, and imported the same. The Commission issued a Cease and Desist Order against this concern, and it was sustained by the Circuit Court of Appeals. The company did not appeal from that decision to the Supreme Court.

Following this, a number of complaints were prosecuted against manufacturers of fabrics and clothing that were making so-called wool fabric, underwear, and hosiery with some 20 to 80 per cent cotton, and labeling and representing it as "pure wool", "Australian wool", "natural gray wool", "natural wool mixed" and various other names that were intended to and did deceive the buying public into believing such fabrics and garments were made only of pure wool.

This same condition obtained with reference to silk and nearly every other article of commerce, including furniture, lumber, etc.

The Commission has published sixteen volumes of its Orders. These cover a period from its organization, early in 1915, to July, 1932. 2,781 cases are reported in full in these sixteen volumes, giving the facts found, and the orders issued. Of these 2,781 cases, 1,993 related to false and misleading advertising. The remainder, 788, related to commercial bribery, restraint of competition, price fixing, and various other offenses under the Federal Trade Commission Act or the Clayton Act. Of the 1,993 cases relating to false advertising, 456 involved food, drugs, or cosmetics, and 1,537 related to other articles of commerce such as household goods, furniture, lumber, forest products, seeds, clothing, fabrics of all kinds, etc.

These reported decisions represent a comparatively small percentage of the cases handled by the Commission.

An overwhelming per cent of all advertising cases have been settled amicably, usually by stipulation, without the issuance of formal complaint.

The facts in a large number of our cases may be found in our Annual Reports, which may be obtained upon application to the Commission.

A cease and desist order against an advertiser is entered by the Commission only after the respondent has had full opportunity to justify his claims, and if not able to do so, then to agree in writing to modify his copy to conform with truth. Otherwise, if the Commission has reason to believe that the advertiser has violated the law, it issues a formal complaint against such advertiser, who has twenty days within which to file an answer, after which proof is taken before a trial examiner; briefs are filed by both sides, and the case heard by the Commission and oral argument granted, if requested. The decision of the Commission is subject to review by the United States Court of Appeals and finally the Supreme Court of the United States. However, a large majority of cases are settled by stipulation and only a few are ever appealed from the Commission to the courts.

Publishers, radio broadcasting companies, and the advertising agencies involved may, and almost invariably do, avoid being made joint respondents with the advertiser by agreeing in writing that they will observe the terms of any cease and desist order entered by the Commission or any stipulation made by the advertiser in such case. This has become an established procedure with the publishers of newspapers and periodicals, and such broadcasting companies as have been cited have followed it as a matter of course.

As the United States Supreme Court has declared:

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license, that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

Gitlow v. New York, 268 U. S. 652 (1925).

"The free speech secured federally by the First Amendment means --- whatever is not harmful in character, when tested by such standards as the law affords."

Fraina v. United States, 255 Fed. 28 (C. C. A. 2d, 1918).

It should be clearly understood that the Federal Trade Commission neither claims the authority, nor has any desire to censor advertising. Its sole purpose is to curb unlawful abuses of the freedom of expression guaranteed by the Constitution. To put it tersely, the Commission does not dictate what an advertiser shall say, but may indicate what he shall not say.

The processes of the Commission are not punitive, but injunctive. How successful this procedure has been is indicated by the fact that during the nearly twenty years since the Commission was established, it has seldom had to appeal to the courts to discipline respondents for disregarding its cease and desist orders.

A few years ago the Commission began a more intensive drive against false advertising and established within its organization a Special Board of Investigation to give special attention to this work. When this campaign was begun, estimates were made that false and misleading advertising was costing the American public Five Hundred Million Dollars annually.

It is a source of great satisfaction to the Federal Trade Commission that national associations of advertisers, publishers, and advertising agents in recent years have not only pledged fine cooperation to the Federal Trade Commission to eliminate false advertising, but have, in fact, cooperated loyally by supplementing the work of the Commission. They have adopted rules, regulations, and resolutions controlling the attitude of their own members in line with the position taken by the Commission.

It is immaterial who gets the credit for initiating the campaign against false and misleading advertising. The principal thing is - protection of the public, and the preservation of the value of advertising by restoring and maintaining the confidence of the reading and listening public.

Upon request of the publishers, a trade practice conference was held under the auspices of the Federal Trade Commission in New York, Nov. 12, 1928, with approximately 6,000 publishers present. These assembled publishers pledged their support to the Commission in its efforts to eliminate false and misleading advertising.

That rapid progress is being made for truth and honesty in advertising is evidenced by the following declaration adopted by the Advertising Federation of America at its twenty-eighth annual convention in June, 1932:

"We agree to conduct our business with due recognition that truth, honesty, and integrity must be the basis of every sound transaction; consider the mutual interests of supplier and consumer and, therefore, avoid anything tending toward misrepresentation, indecent or misleading advertising, deceptive methods, or the promise of performance that can not be reasonably fulfilled."

A new advertising code was recently adopted by the Association of National Advertisers and the American Association of Advertising Agencies. The practices particularly objected to in their code are:

(1) False statements or misleading exaggerations; (2) indirect misrepresentation of a product or service, through distortion of details, either editorially or pictorially; (3) statements or suggestions offensive to public decency; (4) statements which tend to undermine an industry by attributing to its products, generally, faults and weaknesses true only of a few; (5) price claims that are misleading; (6) pseudo-scientific advertising, including claims insufficiently supported by accepted authority or that distort the true meaning or application of a statement made by professional or scientific authority, and (7) testimonials which do not reflect the real choice of a competent witness.

These associations have formed a committee to enforce their code. Such enforcement, according to announcements from the participating associations, among other benefits, will "stem the tide of destructive advertising and restore belief in the eternal truthfulness of the printed word."

Only a few weeks ago, the Proprietary Association appointed an Advisory Committee on Advertising of the Association. This Committee prepared an outline of ethical practices embracing the following:

"Truth in advertising should apply both to the printed word, and to illustrative treatment. Individual words should be carefully chosen not only with respect to one or more of their definitions in the standard dictionaries, but also with respect to their meaning as commonly and generally understood by the public.

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"In addition to the truthfulness of individual sentences and paragraphs, the sequence in which they are employed, or the emphasis, comparison or contrast involved, should not build up any untruthful implication contrary to that of the individually truthful sentences and paragraphs.

"Drawings, photographs, maps, plans, cartoons or other illustrations or designs should be in good taste and should not distort nor unduly exaggerate facts of size, appearance, effect or usage.

"Testimonials, if used, should be honestly secured, should be authorized only by actual bona-fide users of the product, should represent a truthful statement of actual use and experience with the product, and should include no statement either as fact or opinion which is contrary to reasonable expectation in the use of the product under favorable conditions."

Said Committee undertakes through an Executive Secretary to make regulations effective.

"The Committee, it is said, expects to act in cooperation with governmental agencies, as well as with the publishers of magazines and newspapers, and those in charge of other media. It is pointed out that if a case gets as far as the Federal Trade Commission, for instance, a proprietary manufacturer would be in a poor situation to defend himself if it were shown that he had refused to make advertising reforms urged by the Committee." (Editor & Publisher, August 18, 1934).

All of the reputable newspapers and magazines have given their hearty cooperation to the Commission in its efforts to prevent false advertising in their publications, and associations of advertisers, advertising agents and publishers have adopted resolutions in recent years including the present year, condemning false advertising. However, there is always a percentage of the people who will not observe fair methods of competition unless forced to do so by the strong arm of the law. Because of this, the Commission must continually exercise its authority against advertisers who resort to false advertising, advertising agents who write, encourage and place for publication such advertising, and publishers who continue to publish advertising copy containing false or misleading representations, and such broadcasting stations as may permit such violations.

Ethical advertisers - and they include the great majority - require little or no regulation. Their own self-respect and regard for the proprieties prompt them to tell the truth. However, among our vast population, there will probably always be some unscrupulous advertisers, and unless curbed by some authority, they are apt to trespass upon truth and decency.

Not a small part of the mischief lies in the fact that unrestrained, dishonest advertisers have in times past set a pace of gross exaggeration, if not outright falsification, which the advertising agents of more ethical houses felt necessary to follow to some degree, at least, in order to get, or hold, business.

The result of regulation of printed advertising has been that accurate claims are now the rule, not the exception. Readers of reputable publications have come to understand that generally they can safely rely upon what they read.

The National Industrial Recovery Act, Sec. 3. (b) provides:

"(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

Numerous NRA codes contain provisions against false and misleading advertising.

A code of fair competition for the Radio Broadcasting Industry was approved by the President November 27, 1933. Among other things this code provides as follows:

Article VII, 4

(b) No broadcaster or network shall defame or disparage a competitor, directly or indirectly, by words or acts which untruthfully call in question such competitor's business integrity, ability to perform contracts, credit standing, or quality of service.

(c) No broadcaster or network shall claim for its service a character, scope, or quality which cannot be substantiated, nor shall it claim as regular characteristics of its service features which it knows to be purely temporary or accidental.

(e) No broadcaster or network shall knowingly permit the broadcasting of any advertisement of, or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

(i) No broadcaster or network shall use any subterfuge to frustrate the spirit and intent of this Code, and the violation of any of the provisions of this Article VII of this Code shall be deemed an unfair trade practice.

While the statute directing the Federal Trade Commission to prevent unfair methods of competition in commerce, including false and misleading advertising, applies equally to all forms of misrepresentation, yet heretofore the Commission has generally dealt with printed advertising and has only had an occasional radio case. This has been due to the fact that radio advertising is a comparatively new development, and also because it is much easier for a complaining competitor or consumer to send in a printed advertisement than to undertake to definitely recite an advertisement he has heard over the radio. Also it has been easier and more economical for the staff of the Commission to scan periodical advertising than to listen in on radio programs in order to catch and take down any apparent false or misleading advertising. In an effort to perform its statutory duties, the Commission has generally had to labor under restricted appropriations and consequent limited personnel.

Naturally, there were complaints that the Commission was not giving proper attention to radio advertising and even charges of discrimination have been made. Furthermore, there has not only been an increasing demand on the part of the general public for clean advertising, but publishers, associations, advertising associations and many trade associations themselves have recently demanded a clean-up along advertising lines, as heretofore indicated. Generally speaking, the resolutions adopted by these organizations go as far as the Federal Trade Commission does against false and dishonest advertising.

As a matter of fact, the Federal Government is under a higher duty to keep radio broadcasts free from unlawful advertising than perhaps any other form of advertising. No broadcasting station can operate without a license from the Federal Government to do so. Aside from the fact that such licensees are given without cost very valuable and much sought privileges, the Government certainly cannot afford to be placed in the attitude of licensing stations to violate the law or permit others to do so.

The statutory basis for granting a broadcasting license is "public convenience, necessity or interest." In other words, the station is authorized to render a public service. The primary function of radio is not to sell goods. There is no justification for the Federal Government maintaining an instrumentality for the benefit of advertisers. The only justification for radio advertising is that the station or system may be maintained financially for the purpose of rendering a greater public service.

As some of you are aware, when I was a member of Congress I took occasion to express my views with respect to the quality and volume of radio advertising, as well as the character of radio programs generally. However, in my present official capacity I am concerned only with the question as to whether the advertising continuities violate the laws under the jurisdiction of the Federal Trade Commission. Consequently, my remarks here relate only to that phase of the problem.

Last spring, the Federal Trade Commission definitely determined to take steps looking to a closer scrutiny and regulation of the large volume of radio advertising. We held conferences with your very efficient Secretary, Mr. Philip G. Loucks, and other leading executives in

the industry who displayed a fine spirit of helpful cooperation. As a result of various conferences and a careful study of the problem, it was decided by the Commission to request the networks, transcription companies, and individual broadcasting stations to file with the Commission copies of their advertising continuities, the individual stations being relieved of filing the advertising continuities in net work programs, as they were to be furnished by the networks; the same being true with respect to transcriptions insofar as the transcriptions themselves contained advertising continuities. The first call for these advertising continuities was made on May 16, 1934, the request being made for such continuities to be filed, commencing July 1st, and until further notice. The time for filing was fixed that far in the future in order that duplicate copies of the continuities might be prepared, thus avoiding the trouble and expense of having copies thereof made especially for the Commission.

In response to the Commission's request all of the networks, two national and eight regional, complied. Of the 36 transcription companies listed I regret to state that 9 small companies have not responded. A number of the transcription companies reported that they do not make commercial continuities. Those who responded produce 95 per cent of the transcriptions.

Of the 596 broadcasting stations now operating 593 have responded. Of those not complying one is a small station in Alaska and the other two are small local stations.

You may be sure that the few delinquents will not be ignored.

The Commission has received nearly 180,000 continuities. They have made a preliminary detailed examination of 146,117 of such continuities. Of these 125,126 were found unobjectionable and filed without further action. 20,941 were distributed among members of the Special Board for further checking and possible investigation. There remain on hand not yet examined approximately 33,000 continuities.

I am sure that you will agree that the examination of this number of continuities entails considerable labor. You will be pleased to learn that the members of our staff conducting these examinations were impressed with the fact that there was a much larger percentage of these advertising continuities free from any objectionable features than they had anticipated. The fact that such a large number of radio advertisers are observing the law is all the stronger reason why those who may show a disposition to engage in unfair methods of competition by making false claims for their products must be restrained.

On July 30th the Commission advised those stations which had complied that they might discontinue forwarding continuities until further notice, although the network and transcription companies will continue sending their continuities. Further calls will be made upon the individual stations from time to time as the Commission is able to handle the continuities.

This scrutiny of radio advertising is being conducted with a minimum of expense to the Government as well as to the industry, by reason of the cooperation of members of the industry and the method of procedure worked out. The broadcasters simply require their advertising patrons to file



with them two copies of their continuities, the additional copy being for use of the Commission.

Limitations of the Federal Trade Commission over radio advertising are that interstate commerce shall be involved, that there must be a public interest as distinguished from a mere private controversy, and that the practices involved are unfair to competitors. As you are aware, radio broadcasting, as transmission of intelligence, has been held by the courts to be interstate commerce. Furthermore, nationally advertised products are sold and transported in interstate commerce.

Reverting to the examination of these continuities, if they appear unobjectionable from a legal standpoint, they are filed without action. If it appears that the advertising is objectionable or of a doubtful character, questionnaires may be forwarded to such advertisers requesting information to aid the Commission in reaching a conclusion. Generally such questionnaire calls for formula, sample and follow-up literature. The formulae and samples may be submitted by the Commission to other proper agencies of the Government for tests and reports. These follow-up letters and literature frequently contain false or misleading claims not contained in the contact advertisement or announcement.

These radio continuities are being handled primarily by our Special Board of Investigation.

If it appears that a radio advertiser has violated the law, the further procedure is as heretofore explained.

The Commission has been very much gratified by the splendid spirit of cooperation shown by nearly all of those engaged in the radio broadcasting industry. We have been much pleased that this new procedure on our part has been received by the industry in the same spirit in which it is undertaken. It is refreshing that such an overwhelming percentage of your industry are so deeply interested and so fully appreciative of the importance of permitting only truthful and honest advertising over the radio -- thus not only preventing the violation of the law through that medium, but also preventing advertisers from defrauding the public and thereby causing a loss of listener confidence in radio advertising.

We also deeply appreciate the loyal cooperation accorded by the Federal Communications Commission.

The Federal Trade Commission's success in its effort to stamp out false and misleading advertising, having as it does the support and cooperation of advertisers, the press and broadcasters generally, affords an example of what may be done by the government to protect legitimate business and the public without recourse to drastic punishment, penalties or forfeitures. It is largely a case of self-government made effective by the aid of the Federal Government in restraining the comparative few who are unwilling to play the game fairly.