

D 250
F 87
0.84
12

C. 2

THE FEDERAL TRADE COMMISSION
VIEWS QUESTIONABLE ADVERTISING COPY

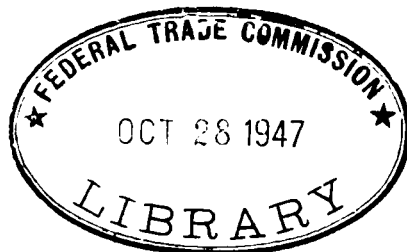
Remarks of

HON. R. E. FREER, VICE CHAIRMAN,
FEDERAL TRADE COMMISSION

Before the

AMERICAN MARKETING ASSOCIATION

New York, N. Y.
Hotel Sheraton 12:15 P.M.
October 28, 1947



THE F. T. C. VIEWS
QUESTIONABLE ADVERTISING COPY

Advertising long has been an engrossing subject to students of business, and to writers of articles for law reviews, as well as to those paying for and engaging in its preparation and dissemination. One nineteenth century pioneer proponent who testified to his "most complete faith" in it as "the royal road to business" was P. T. Barnum. Later, in the first decade of the present century, was born today's slogan, "it pays to advertise." Members of the advertising profession itself from time to time have joined in decrying advertising's alleged excesses and shortcomings. Some "outside" critics of advertising have gone so far as to challenge the economic and social justifications for its existence. Counter charges have been made to the effect that such critics harbor either an emotional grudge or an intellectual spite against advertising.

In making these remarks today, I shall just assume, without undertaking to prove such assumption, that advertising has lived so long in conjugal bliss with selling as to cast the burden of proof upon those who question either the legitimacy or the permanency of their union. I shall also assume, without being put to proof, that the advertising fraternity is constantly engaged in self-improvement as a result of constructive criticism from whatever source. It shall be my purpose to relate factually some of the highlights of the Commission's work as it relates to the elimination of false and misleading advertising and thus to develop my subject "The Federal Trade Commission Views Questionable Advertising Copy."

Before launching into my subject, however, I want to invite your attention to a coming event of interest to the entire membership of your association.

I

THE POST-WAR FINANCIAL REPORTING PROGRAM

On next Friday, the 31st, the Federal Trade Commission and the Securities and Exchange Commission jointly will release a report developing estimates of the financial condition and the operating results for all U. S. manufacturing corporations during the first quarter of 1947. This program is a resumption by the Federal Trade Commission through its Bureau of Industrial Economics of its pre-war financial reporting function and continuance by the Securities and Exchange Commission of its current responsibility for collection of financial information for corporations with securities listed on a national stock exchange. The reports are designed to meet the general needs of Government and the public for current, reliable financial data on a quarterly and annual basis as to the operations of our manufacturing corporations.

This program of joint post-war financial reports was developed after extensive work with the assistance of an interagency committee representing nine Government agencies and functioning under the direction of the Division of Statistical Standards of the Bureau of the Budget. This special committee was formed in the early part of 1946 for the purpose of determining the needs

of the Federal Government for financial statistics as well as the specific needs of the two Commissions. This committee developed a comprehensive program to provide the needed information at minimum cost, and with the complete elimination of any possibility of duplication. In the development of the program, advice and suggestions were obtained from advisory councils of industry and labor.

The key items of profit and loss and balance sheet will be shown by the reports on a quarterly basis, with much greater detail of costs and expenses on an annual basis. The quarterly reports will give the information by five size groups based on total assets, and for 21 industry groups covering all manufacturing operations. The annual reports will contain detailed product classification with extensive tabulation analysis.

Reports covering the pre-war years of 1939 and 1940, issued by the Commission on an annual basis, demonstrated that there exists a great demand for this information not only from Government agencies, but also from private business concerns including advertisers as well as advertising agencies.

The magazine Printer's Ink, an avowed supporter of these reports, on one occasion commented as follows:

"For the marketing executive, the information contained in the F. T. C. reports is highly significant. Here for the first time is gathered information on the selling and advertising expenses in leading industries and the relationship of these expenses to total sales."

In commenting upon the proposed resumption of these reports, the National Industrial Conference Board made the following statement:

"Virtually every sector of American business is vitally concerned over the changes in the wage cost price structure, particularly since the end of the war. Your studies, when completed, should make it possible for American business to resurvey its price and cost structure in the light of essential facts which have not been available since this series was suspended."

From such quarterly and annual reports, enlightened determinations can be made as to the general financial situation, the trend of economic activity, and the nature and scope of deficiencies inherent in the economic positions of various manufacturing industries. From these determinations in turn, it is believed that the public, business and Government at any given time can chart the direction in which a dynamic U. S. economy is moving.

II

GUIDES TO ADVERTISING

The lead sentence of the lead article recently published in a leading law journal reads as follows:

"Advertising copy generative of demand is a natural concomitant of the distributive process in a competitive economy, and therein lies an

inducement to hyperbole that has had its effect on the life, health and pocketbook of the credulous consumer."

We see eye to eye on that and on the proposition, too, that false advertisements, that is, those containing outright falsity as to a material fact, are harmful both to consumers and to business.

Agreed as we are on the intellectual level of forthright condemnation of outright falsity, differences of opinion sometimes arise on the level of practical application to borderline situations. Words and sentences literally true, may be framed in a confusing setting capable of, - if not artfully designed to be, - misleading. It is just our hard luck -- yours, the Commission's and the courts' -- that no magic formula can resolve the implications of such ambiguous advertising copy. There is just no guide to whether calculated insertion of a restrictive weasel word here and a contradicting and subtractive phrase there will prove sufficient in a given case to remedy the deceptive ambiguity.

The Federal Trade Commission Act broadly prohibits unfair methods of competition and unfair and deceptive acts and practices in interstate commerce and directs the Commission to prevent their use. Congress refrained from attempting to catalogue the practices it deemed unfair and deceptive, fearing that precise definition might result in evasion. The failure to enumerate and expressly define has been criticized by some on the ground that no guide is given to businessmen as to what conduct is rendered unlawful. This much is conceded, the statutory test of unfairness is an elastic one under which it is the Commission's duty to keep pace with new promotional inventions.

Court Decisions and Commission Opinions -- Decisions of the courts in unfair competition cases furnish some guidance as to distinguishing unlawful and lawful advertising. Many of the Commission's decisions as printed in some 39 volumes of Commission Reports deal directly with the distinction. Some critics have said that judges are too prone to offer vague generalities about honesty and fairness as substitutes for tangible guidance. The courts, it must be conceded, sometimes do premise their decisions determining rights and duties of private litigants in unfair competition cases on the proposition that each case is "a law unto itself." Substantially the same criticism has been directed to Commission findings and orders. Without conceding the substantiality of the criticism against either, except in isolated instances, the Commission in recent years is giving greater attention to reasoned opinions as a supplement to the general guidance afforded by its orders - particularly orders of dismissal.

The Statutory Language -- Despite the breadth of language, it is arguable with at least equal persuasiveness that section 5 of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, does furnish a concrete guide in outlawing "unfair or deceptive acts or practices." Furthermore, section 15 provides concrete standards for the advertising of foods, drugs, cosmetics and therapeutic devices, as follows:

"The term 'false advertisement' means an advertisement *** which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among

other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

I submit that this language is both definite and succinct and I feel the Commission's interpretation of it has been realistic.

As our highest court expressed it, the public is entitled to get what it chooses even though such choice "be dictated by caprice or by fashion or perhaps by ignorance." Of further relevancy on the question of whether the statutory proscriptions are obscure is the hard economic truth that when a seller publishes statements respecting a product's composition, origin, efficacy, principle of operation, method of manufacture or terms and conditions of his offer, he is deep in the realm of material fact. The same holds true when he makes statements of like tenor to agents in soliciting their services or to retailers in persuading them to put the product on their shelves. Obviously, these claims pertain to matters peculiarly within the seller's knowledge. The practicalities of the public interest require that he who purports to be informed respecting product efficacy and attributes must answer for the veracity of the claims he has asserted.

Mr. Justice Holmes once wrote:

"It is not enough for the knight of romance that his lady is a very nice girl. If you do not admit that she is the best that God ever made, or will make, you must fight."

Unquestionably, there is a legal privilege attaching under ordinary conditions to use of honest expressions of opinion when so characterized even though ultimately they prove erroneous. Some call this puffing. However, if the circumstances are such that they may mislead consumers or unfairly injure a competitor, they fail of justification. Admittedly, the Commission must give very careful study and close consideration to each of the relatively few cases falling in this realm when rendering decision.

As I view it, the mandate of the statute as it applies to false advertising is plain and direct. It lacks, of course, a blueprint showing how to use deceptive, ambiguous or misleading statements without apprehension that such use may lead to a request from the Commission for their discontinuance and the execution of an agreement to forego them in the future.

Trade Practice Conference Rules -- Numerous useful guides to advertisers are found in the trade practice rules promulgated under the Commission's trade practice conference procedure. This procedure was adopted twenty years ago to enable all members of an industry voluntarily to catalog and abandon unfair trade practices simultaneously.

The rules promulgated after a trade practice conference are divided into two groups. The Group I rules paraphrase the law in terms applicable to conditions in a particular industry, specifying as unfair those practices

which fall within the scope of decisions dealing with the statutory inhibitions. The Group II rules express further and higher standards of ethical business conduct which are proposed by the industry and accepted by the Commission as desirable. Many are designed to develop a greater degree of useful information for the consumer than that which the law clearly requires. Concerns engaged in unfair practices in violation of the rules in the first group are subject to formal proceedings by the Commission. The effectiveness of rules in the second group usually depends upon voluntary compliance, but under certain circumstances their violation may lead to action.

The conferences have proved particularly useful in preventing unfair representations by developing an understanding of the meaning of trade terms and of the circumstances under which a seller has a duty to avoid deception by disclosing the facts concerning his product.

Trade practice conference rules designed to aid the consumer may be illustrated by those promulgated for and accepted by the fur industry. Group I rules require that the seller disclose the true name of furs which have been dyed to resemble other fur peltries, together with information as to whether the furs have been tipped, blended or pointed, if such be the case. They require disclosure also of the fact that a garment is made of pieces, tails, paws or scraps rather than of full skins. Such rules clearly inform both consumer and dealer as to the meanings of terms which they use in their dealings with each other and by dispelling the former's ignorance, lessen his chance of self-deception while at the same time freeing scrupulous dealers of an unfair competition based on consumer ignorance.

Rules are in effect for more than 150 industries, including among the more recent, wood cased pencils, razor and razor blades, water heaters, hearing aids, musical instruments, household fabric dyes, masonry water-proofing, vertical turbine pumps, watches, piston rings and dolls and stuffed toys.

In leaving the topic of guides to advertisers, I call attention to the further fact that trade practice conferences are becoming increasingly useful instruments by which the public and businessmen may jointly reach an understanding as to the quantity and quality of useful information needed in the market place.

III

FACTUALLY INFORMATIVE ADVERTISING

Like other consumers I keep looking for signs that the trend observed today in many industries toward more informative advertising is a general one. Advertising can not be considered as a substitute for honest market information. I imply no blanket condemnation of advertisements or commercials solely because they stress the subjective or emotional values; but as the scope of these values is enlarged in a particular advertisement, the greater becomes the need for relevant truth as a competent guide to use of the products. As packaging becomes more general, for example, consumers are less and less able to confirm their impressions by presale use of their senses of touch, taste or sight.

The popularity of some private "bureaus," "institutes" and consumer reports suggests some degree of public approval of proposals for an authoritative or official source of consumer information. Advertising and advertisers both should concern themselves with supplying such information. If they turn a deaf ear who knows but that this polite consumer agitation may become a roar for establishment of governmental machinery bypassing the advertisers.

Advertising and Selling, for December 1946, contains results of a study by Dr. Daniel Starch, New York business consultant and member of your association, of 583 advertisements from which he found that advertisements above average in information had nearly twice the sales power of advertisements below average in information, both being average in reader interest, while advertisements above average in both respects had sales power three times as great as those below average on both counts.

So much for the art of writing nondeceptive factually informative copy. I turn now to how the Commission surveys advertising and how it proceeds to aid in the voluntary correction of unfairness found to exist therein.

IV

THE COMMISSION'S SURVEY OF RADIO AND PERIODICAL ADVERTISING

The Commission feels keenly its statutory responsibility to eliminate false and deceptive advertising. Not all of the questionable advertising considered by it comes to its attention through complaints registered by a competitor or a dissatisfied consumer. The Commission's Division of Radio and Periodical Advertising maintains a continuous survey of advertisements appearing in magazines, newspapers, radio broadcasts and mail order catalogs. This results in earlier investigation of advertisements questionable on their face, whether or not the commodity or claims had been previously the subject of Commission action, as well as in answering the question whether advertisers as to whose representations corrective action has been taken are living up to Commission orders to cease and desist therefrom or to their own voluntary stipulations or agreements to discontinue or modify them.

During the fiscal year ended June 30, last, there were procured for examination 1733 editions of representative newspapers of general circulation

and 1309 editions of magazines and farm and trade journals. Included in the last were 236 issues of farm journals, 179 issues of trade and specialty publications and 10 issues of domestic foreign-language publications. 18,256 advertisements were noted as containing representations that appeared to warrant inquiry as to their factual basis. The catalogs or circulars of 102 mail-order concerns were examined and 238 advertisements marked for further consideration as possibly misleading. Marked for further study were 9573 of the 641,402 radio broadcast continuities examined.

Much credit is due to nationwide network chains, regional network groups, transcription producers engaged in preparing commercial radio recordings, radio stations and publishers who cooperate with the Commission by furnishing the grist ground in its mill.

In instances where advertising agencies or radio station personnel have prepared or participated in the preparation of advertisements questioned as being false or misleading, the agency or station is included with the advertiser as a party to any resulting corrective action. To date the Commission has not joined as parties agencies, radio stations or publications which have done no more than serve as dissemination media. Pertinent to this policy is the fact that Sec. 12 of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act makes it "unlawful" merely to "disseminate, or cause to be disseminated, any false advertisement" of a food, drug, curative device or cosmetic. Under certain conditions specified in Sec. 14, such mere disseminators are exempt from criminal liability, but not from civil proceedings.

V

THE COMMISSION'S PROCEDURES FOR VOLUNTARY CORRECTION

The Commission recently re-examined its own procedures and the methods of handling its work, resulting in an expanded use of industry-wide investigations coupled with increased emphasis upon correction by cooperative procedures as well as in a revision of the rules of practice in formal cases. One criticism of the traditional case-by-case procedure, viz., investigation, complaint, hearing and order, was that competitors of the party so proceeded against were left free to follow the identical illegal practice until such time as the Commission issued orders to cease and desist against each separate offender in turn. Where appropriate, simultaneous uniform corrective measures on an industry-wide basis are now proposed rather than directing action solely against the concern to which the complaining finger first pointed. I say where appropriate, because, application of such simultaneous uniform corrective action must appear not only to be warranted in the public interest, but also to be practicable of execution.

Not only is the Commission expanding its work in establishing trade practice conference rules but also it is giving greater emphasis to the elimination of false and misleading advertising and other unfair trade practices through voluntary stipulations to cease and desist.

VI

CONCLUSION

The time and money saved by use of the cooperative methods of handling false advertising and other matters involving excesses of competition, will be used to implement a broader program of formal proceedings to prevent restraints on competition itself and those tending to monopoly. I hope the results will inspire further confidence on the part of the public in the Commission's effectiveness in both fields.