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DRUG ADVERTISING AND THE DEFENSE PROGRAM

Address by

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Before the

PROPRIETARY ASSOCIATION OF AMERICA

Biltmore Hotel, New York

Tuesday, May 15, 1951

(For Release in MORNING NEWSPAPERS of WEDNESDAY, MAY 16, 1951)



Ladies and Gentlemen of the Proprietary Association:

It is indeed an honor for me to participate with you in this the 69th annual meeting of the Proprietary Association. Your Association was founded in 1881, with its primary and praiseworthy objective to preserve and improve the integrity and stability of the proprietary industry. You have contributed much to the promotion and advancement of your industry. Tonight we are to discuss a further contribution that may be made, not only to the integrity and stability of your industry but to the promotion and advancement of the defense program. I refer specifically to drug advertising.

When reference is made to advertising in general, we cannot fail to appreciate its tremendous growth as an economic force in this country. Advertising costs, keyed to a vigorously expanding economy, have annually increased --its volume in 1950 was close to \$5,000,000,000. At the same time we must appreciate the improvements in advertising techniques. Perhaps a little historical background might be interesting. Years ago, prior to the establishment of the Federal Trade Commission, there was no regulation of advertising. The prevailing practice was one of laissez faire, epitomized by the standard "Caveat emptor"---"Let the buyer beware." For example, in 1900 the United States Circuit Court of Appeals for the Sixth Circuit 1/ refused to grant injunctive relief to a manufacturer of aluminum-faced washboards in restraining a competitor from using the word "aluminum" in boards which contained no aluminum, saying that

"* * * if persons (are) compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature and not the courts."

Following this decision, there was a growing demand for legislation against untruthful advertising. Indeed many editorials and articles appeared dealing with proprietary medicine advertising and the dangerous character of some medicines, and the methods used to convince people that they had ailments for which the medicine was recommended as a cure.2/

In 1914, the Federal Trade Commission Act was passed; Congress wrote into Section 5 of the Act the prohibition against all "unfair methods of competition in commerce." As it was not practical or possible to define all such methods, Congress left it to the Commission to determine what practices were unfair. The first two formal cases decided by the Commission involved false advertising as a form of "unfair competition."3/ The first Commission case to reach the Courts involved the false advertising of food.4/

Over the years, new landmarks were made in the field of unfair competition, and improvements were achieved. However, in 1931, in a case involving a medicinal preparation designated an "obesity cure," the Supreme Court of the United States held that the Commission did not have jurisdiction over an unfair method alone but it must also be an unfair method of competition in commerce.5/

1/103 Fed. 281, 285 (C.C.A. 6) -- American Washboard Company v. Saginaw Manufacturing Co.

2/March and April, 1905, Ladies' Home Journal, August, 1904; Atlantic Monthly Magazine; Inland Printer Magazine, 1914.

3/F.T.C. v. Circle Cilk Co., 1 FTC 13. F.T.C. v. A. Theo Abbot & Co., 1 FTC Dec. 16.

4/Sears Roebuck & Co. v. F.T.C., 258 Fed. 307, 311 (C.C.A. 7, 1919).

5/F.T.C. v. Raladam Co., 283 U. S. 643 (1931).

In other words, unless there was injury to actual or potential competition, the Commission was powerless to protect consumers against false advertising. The Commission in this case had found, contrary to the advertising, that the medicinal preparation could not be used generally without danger to health except under medical advice.

The Wheeler-Lea amendment in 1938 remedied this situation by abolishing the requirement of proof of injury to competition and made unlawful "unfair or deceptive acts or practices." Thus the consuming public who might be deceived by false advertising was made of equal concern before the law with the merchant or manufacturer injured by the unfair methods of dishonest competitors.

Without any criticism intended, it is a matter of historic accuracy that the consumer and Congressional demand for stricter regulations of advertising, which resulted in the several sections of the Wheeler-Lea amendment, was in a large measure due to the advertising in the field of proprietary medicines. Although the Commission recommended the amendment to Section 5 of its organic Act in regard to the inclusion of "unfair or deceptive acts or practices," the so-called food and drug sections of the amended Act were the results of vigorous public demand for more effective law against false advertising, particularly of commodities affecting the public health.

Chairman Lea, in the House Committee Report upon the Wheeler-Lea amendment, stated the need of amending the Federal Trade Commission Act as

"* * * abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements."

Since the passage of the Wheeler-Lea amendment, there has been considerable improvement in advertising: this is especially true with reference to proprietary medicines. This Association is to be congratulated upon its contributions in this connection. At your 62nd Annual Convention held in New York City in 1944, you adopted a revised 13-point Code of advertising practices designed to eliminate dangerously misleading advertising of proprietary preparations. This Code particularly emphasized "Truth" in advertising; among other things, the Code stated that advertising should not contain statements which may be construed as holding the product as a preventive, cure, or relief of serious diseases requiring treatment of a physician; it recommended careful choice of words in proprietary advertising, particularly with respect to their meanings in common usage; the avoidance of misleading emphasis, contrast, or implication through the special arrangements of statements truthful in themselves; good taste in the use of illustrations; testimonials only when they are authorized and truthful; avoidance of disparagement.

This Association represents manufacturers responsible for the distribution of about 80% by volume of the medicines sold in the United States and intended to be used in self-medication. If the advertising and sale of this great volume of products were entirely governed and controlled by your Code of ethical practices, the work of the Commission in the field of regulating proprietary medicine advertising would be greatly relieved. Furthermore, its attention could be better directed in this field to the advertising of non-members of your Association.

Unfortunately, during the last few years there have appeared in newspapers, magazines and other media, large conspicuous advertisements which have blatantly and grossly misrepresented certain proprietary medicines. In these advertisements there have appeared in large, bold-face type such claims as:

"KILLS COLDS IN ONE DAY."^{6/}

"GOOD NEWS FOR SICK PEOPLE" followed by a list of serious diseases.^{7/}

"NEW MIRACLE DRUG."^{8/}

"AMAZING NEW DISCOVERY FOR RHEUMATISM AND ARTHRITIS."^{9/}

Many members of the consuming public are repelled by such advertising and it tends to impair the good name of all advertising of proprietary medicines. The Commission has taken and will continue to take action against these advertisements by means of formal complaints and orders or through its stipulation procedure. These unethical practices arouse a suspicion in the minds of the public who are your customers.

The conscientious advertiser does not want to disseminate false advertisements of his product. He wants his advertising to be effective. To be effective it must command the confidence of the people. He may ask, "What constitutes a false advertisement"? Section 15 of the Federal Trade Commission Act defines it as one "which is misleading in a material respect."

Of course it is apparent that the lie direct is misleading, but it does not follow that a statement which is one-hundred percent true is not misleading. I think your advertising code takes cognizance of this. The Supreme Court of the United States in Donaldson vs. Read Magazine, Inc. (October, 1947) stated:

"Advertisements as a whole may be completely misleading, although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead."

You will note that the Court referred to matters being omitted as rendering an advertisement misleading, even though every statement made was literally true. Perhaps you may recall that in Mark Twain's "Huckleberry Finn," when Huck and Tom Sawyer were floating down the Mississippi on their raft they were joined by a character who leapt on board just in time to escape from a large and angry crowd bent on doing him serious bodily harm. It later developed that this individual had been selling a product guaranteed to remove tartar and the stains of eating tobacco from the teeth, and which indeed would do so with a speed that was little less than miraculous. There was, however, one other little fact which the seller had not deemed it necessary to disclose, namely, that it also removed the teeth, although not quite so rapidly.

^{6/}Resistab.

^{7/}Geo-Mineral.

^{8/}Anahist.

^{9/}Imdrin.

So bear in mind that literal truth may not be enough to prevent an advertisement from being misleading in some respect. Congress recognized this in another provision of Section 15, which says:

"* * * 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. * * *"

You will note that in arriving at a determination, the Commission is to consider "representations made or suggested," and this includes both representations made categorically and by innuendo and indirection. Of course, neither Congress nor the Commission can furnish the advertisers of proprietary preparations or the many diverse industries of the country with charts and blueprints for the things that they may or may not say about their myriad products. The individual advertiser must make his own determination in the first instance.

The advertiser, particularly of drugs, can answer his own question, "What is false advertising"? The answer is simple, and any seller who will be intellectually honest with himself can find it. Start with the simple premise that it is unlawful to put false ideas in another's head by direct statement, innuendo, or otherwise. Let the advertiser ask himself the question: "What will the reader of this advertisement think about the product"? "Is what he will think the truth"? "Is there anything else he ought to know"?

The matters covered by an advertisement are matters within the peculiar knowledge of the advertiser. Who is in a better position to make an honest appraisal of his product or to frame the advertisements that honestly represent it?

It is an inevitable result of a national defense program, such as is now in operation, that there should develop shortages both of men and materials. These shortages necessarily mean added responsibilities.

First, there is the matter of a shortage of physicians. We have no means of determining at this time how critical this shortage of physicians may become. It is expected that it will be serious enough to limit the number of people who can receive proper medical services. There may be others who, due to the high cost of living, cannot afford the expense of a doctor. These persons who are denied professional medical attention can be expected to place more and greater reliance on proprietary drugs to relieve their suffering. It thus becomes more incumbent upon you to be accurate in your claims. To an equal degree the Commission must recognize its increased responsibility to make certain that your claims are true.

With the shortage of manpower in government, it is the earnest desire of the Commission to utilize its personnel as economically as possible. Some of its trained and experienced employees are already detailed to special duty in

connection with the defense effort and such losses from its regular force are expected to make it increasingly difficult for the Commission to adequately maintain its usual functions.

Another shortage anticipated is that of materials. The members of this industry well remember their experiences of World War II. Many crude drugs, essential oils, and other raw materials for proprietary preparations, normally imported from abroad, became unavailable or in short supply. It became necessary to develop and use substitutes and synthetics because of such shortages as occurred in quinine, glycerine, agar, alcohol, opium, derris and other drugs. It also became necessary to encourage research and domestic production of other important crude drugs such as belladonna, digitalis, ergot, stramonium, and others. Incidentally, we are familiar with the successful and sufficient domestic production of many crude drugs, including belladonna, digitalis, ergot, stramonium, and others, to satisfy our needs which in the past were met almost entirely from abroad. It is recognized that the necessities of the defense program will again force manufacturers to use substitute materials.

The use of substitutes and synthetics, even when made in good faith, due to lack of drugs usually available, is not without peril to manufacturers and advertisers. If the effect is to cheapen the product, it is likely that a violation of Economic Stabilization Administration regulations will occur unless the article is given a new price ceiling.

A substitution of material may also cause a violation of the Federal Trade Commission Act unless extreme care is exercised. Some of you may be familiar with the case involving Royal Baking Powder, which had been sold for more than 60 years with great stress on its cream-of-tartar content. The advantages of cream-of-tartar and the superiority of Royal Baking Powder because it contained this ingredient rather than phosphate and alum, which were included in competitive products, had been the main theme of the advertising for many years. In 1919, when cream-of-tartar was scarce, a phosphate was substituted for it in this product. The Royal Baking Powder Co., in its advertising, did refer to its new and different product. The Commission found, however, that over the period of years the advertiser had developed in the minds of the purchasing public an association between Royal Baking Powder and cream-of-tartar, and that the packaging and advertising for the revised product, substituting phosphate, was not sufficient notice of the radical change made.

Many proprietary preparations, through years of usage and extensive advertising campaigns, have become well fixed in the minds of the public as containing definite ingredients or capable of producing certain results. These impressions are frequently fostered deliberately by the use of slogans or by the actual wording of trade names. Any change in well-known ingredients, or any change in the formula which results in any substantial difference in the action of a preparation, would seem to require a fair and clear disclosure to the public. In this connection if the name of the preparation includes or suggests the nature of the displaced ingredient or ingredients, the continued use of such name would seem to be questionable.

It should be observed particularly that whereas the Economic Stabilization Administration is interested primarily in a cheapening of a product, the Federal Trade Commission is interested in a material change, whether or not cheapening results.

The Proprietary Association can be of real service in these cases by making certain that its members cooperate to the fullest extent and by calling the attention of the Commission to the violations of law committed by those competitors who, for any reason, either mislead or deceive the public or engage in unfair methods of competition.

As your distinguished Executive Vice President, Dr. Cullen, has observed: Advertisements for medicinal products should be dignified. He questions the use of words such as "magic" and "amazing," as they do not lend to the dignity of the copy. The desire to use words that will catch the eye is understandable, but as Dr. Cullen observed, you are not selling automobiles, you are selling products to relieve human suffering. Therefore, the advertising for medicinal preparations should be dignified, in good taste, and based upon facts; and, moreover, in keeping with the high standards of your calling.

Your distinguished legal counsel, Mr. James F. Hoge, one time stated, "The permanent foundation for the life of the proprietary drug industry was in the purity of its products and the truthful and dignified labeling and advertising of them."

The defense program presents a challenge to everyone. To meet that challenge requires sacrifice, industry, initiative and courage. I am confident that your Association will contribute its part. And I know that particularly in the field of proprietary medicine advertising, you--in cooperation with the Federal Trade Commission--will not only protect consumers against unwarranted claims but will keep them fully apprised at all times of the real value of proprietary products.