The FTC and Television: A New Rule for Misrepresentation by Test and Demonstration

St. John's Law Review

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Conclusion

Traditionally, the apportionment remedy had been limited to totally unproductive realty. The reluctance to expand this remedy to include unproductive personality has, at present, been largely overcome. At the same time, the theory extending apportionment to underproductive property has received greater extrajudicial expression and support. It is this latter issue of underproductivity, however, with which the New York judiciary and the legislature have been loath to deal, possibly due to the formidable practical problems associated with it. The adoption by the courts of a test which grants apportionment of the proceeds from the sale of those assets which have become substantially unproductive would resolve, in a practical and sound manner, the theoretical inconsistency which exists in limiting apportionment to totally unproductive property.

The FTC and Television:

A New Rule for Misrepresentation by Test and Demonstration

The Federal Trade Commission was established to further the national interest by preserving and promoting a free enterprise economy, the natural development of which was being hampered because of increasing disregard for ethical conduct in the market place. Among the chief armaments available to the Commission is Section 5 of the Federal Trade Commission Act which renders unlawful "unfair methods of competition ... and unfair or deceptive acts or practices in commerce. . . ."2 Recently, the Commission invoked this section and found deceptive a televised commercial which, in purporting to prove the moistening qualities of a shaving cream through an actual demonstration of its ability to soften sandpaper, substituted a mock-up of sand adhered to plexiglass. While momentarily conceding the product to be in fact capable of softening sandpaper, the following rule is implied

in the opinion: Mock-ups, props or simulated demonstrations, purporting to prove or otherwise establish the truth of a claim made with respect to the product advertised, are unlawful misrepresentations, notwithstanding the product in fact possesses the qualities alleged, if the tendency is to induce the viewer to believe he is seeing one thing when instead he is seeing another.3

The obvious significance of this ruling lies in its application to the television advertising industry, chief user of the mock-up form. A more subtle but no less meaningful analysis indicates that this decision represents the natural consequence of an evolving judicial interpretation of section 5, and a clear indication of the Commission’s attitude regarding novel forms of misrepresentation which may be devised in the future. However, critics of the Commission have labeled the ruling an extension of the FTC’s regulatory authority to include representations not reasonably describable as “unfair or deceptive” within the meaning of section 5.4

This note will attempt to resolve that issue by examining the scope of section 5 in terms of: 1) the common law which prompted its passage, 2) the level of public sophistication at which the act is aimed, 3) the traditional defenses available to the advertiser, and 4) the unique problems presented by misrepresentation in television advertising.

Historical Background

At common law, a purchaser who found himself deceived by his vendor generally had to settle for such relief as was afforded by one of three civil actions available, i.e., fraud and deceit, breach of warranty or rescission of the contract. It gradually became apparent that these remedies were ill-suited to the needs of a rapidly industrializing society. The traditional actions were concerned with reparative measures rather than preventive ones. Further, even when available, a prima facie case was difficult to establish since it was quite susceptible to a failure of proof. For example, in the action of fraud and deceit a purchaser had to establish a misrepresentation of fact, knowingly made by the vendor with the intent of inducing reliance, and on which the purchaser as a reasonable man relied, to his actual damage.5

Similar difficulties had been encountered under both the common-law6 and statutory actions for breach of warranty. For

3 Colgate-Palmolive Co., 3 CCH TRADE REG. REP. ¶ 15643 (FTC Dec. 29, 1961).
5 Prosser, TORTS ¶ 86 (2d ed. 1955).
the most part, the privity of contract doctrine prevented recovery against the manufacturer, who was fast becoming the real salesman. And, although the local retailer continued to transfer title to the goods,7 he was relieved from liability because of not having made the misrepresentation.8 The inequities of this situation became particularly evident in the face of growing national advertising by manufacturers.

Rescission was the third, and perhaps least effective, of the traditional remedies. The unique problem posed by this action was that the goods purchased had to be in a returnable condition, a highly impractical requirement for consumables and nonconsumables alike.9

The injuries wrought by deception and misrepresentation are not confined to the purchaser alone. A competitor also stands to receive significant harm. Traditionally, an action for unfair competition10 has been his legal remedy. Case law has fairly well established that a misrepresentation to the public by one manufacturer vests no cause of action in his competitor absent the violation of a property right,11 e.g., the typical palming-off situation which involves the dilution of a trade name. However, very often the injury suffered by competitor A which results from a misrepresentation to the public by competitor B is substantial notwithstanding the absence of a palming-off element. Thus, a false claim by competitor B, which induces a consumer to buy, deprives competitor A of a potential customer. Further, when the falsehood is discovered by the consuming public, it may depress generally the market for that item. In such a case, although an injury is clearly present there is no traditional cause of action to which it may be attached. The situation is one of damnum absque injuria which leaves competitor A without redress. Clearly, the diversion of business is the real ground for complaint, whether or not there happens also to be a violation of a property right for the court to consider in satisfaction of its requirement. The

7 See Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922).
8 See Handler, False and Misleading Advertising, 39 Yale L.J. 22, 25-27 (1929). Although §12 of the Uniform Sales Act provides that any affirmation of fact or promise with respect to the goods has the effect of an express warranty, reliance and privity must be proven. See also Note, 29 Colum. L. Rev. 805 (1929); N.Y. Pers. Prop. Law §§ 93-97, 150.
9 See 5 Williston, Contracts § 1463 (rev. ed. 1936).
reasonableness of allowing recovery in such a situation is present, although there is no palming-off. 12

Within this context, Congress passed the FTCA of 1914, intended to mitigate these inequities, many of which had become so firmly established as to be incapable of modification without direct statutory intervention. As originally enacted, section 5 was confined to "unfair methods of competition." 13 Interpreting this phrase in FTC v. Raladam Co., 14 the Supreme Court held that for a misrepresentation to fall within the prohibitions of the act it must result in an injury to competition. As a result of this decision pressure was applied on Congress to broaden the meaning of section 5 so that misrepresentations would also be actionable when the only effect was to produce injury to the public. 15 Consequently, in 1938 the Wheeler-Lea amendment expanded section 5 to read "unfair methods of competition . . . and unfair or deceptive acts or practices. . . ." 16

Statutes framed in terms of "unfair or deceptive" are no more readily susceptible of comprehension than the concept of proximate cause. 17 The question is one of interpretation. 18 What is deceiving to the credulous may be nothing more than humorous to the sophisticated. Therefore, before a representation can be called deceptive in the first instance, regardless of defenses, it is necessary

12 Judge L. Hand stated, in Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603, 604 (2d Cir. 1927), rev'd on other grounds, 273 U.S. 132 (1927), that the law traditionally did not recognize such forms of injury as actionable because the difficulties of proving damage prevent just determination. See Grismore, Are Unfair Methods of Competition Actionable at the Suit of a Competitor?, 33 Minn. L. Rev. 321, 322-33 (1935), in which the author answers his proposition in the affirmative.

14 283 U.S. 643 (1931).
16 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1958) (emphasis added). "[T]here are two general purposes. . . . The first is to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce. The second . . . is to provide the Commission with more effective control in the exercise of its jurisdiction over false advertisements of food, drugs, devices, and cosmetics." H.R. Rep. No. 1613, 75th Cong., 1st Sess. 1 (1937). False advertising is defined as "misleading in a material respect" in 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1) (1958), and is confined to the four categories mentioned, labeling excepted. Control by the Commission over false advertising in other areas is derived from section 5, which confers a general authority over all forms of deception. 83 Cong. Rec. 398 (1938).
17 See Prosser, Torts § 47 (2d ed. 1955).
to determine what level of public intellect section 5 contemplates as the standard.

Disregard of the Reasonable Man Concept

Earlier cases arising under the FTCA seemed prepared to confine the protection afforded by section 5 to the reasonable man. In *Ostermoor & Co. v. FTC* 19 the petitioner, a mattress manufacturer, pictorially displayed his product to illustrate the resiliency of the filling. A mattress was shown with a tear in the covering and the filling material flaring out several feet. The Commission alleged that, if any of the petitioner’s products were torn open, the filling would not bulge more than half a dozen inches; and that based on the public’s belief that the petitioner’s product was particularly resilient, its sales had increased to the detriment of competitors who made no such misrepresentations. The court held: “In our judgment this pictorial representation . . . even though exaggerated as to their characteristics, cannot deceive the average purchaser. . . .” 20 The standard at this point, if one may be drawn from this frequently cited holding, is that misrepresentations must be clear, literal and are to be measured against the average purchaser.

A decade later the Supreme Court handed down an opinion in *FTC v. Standard Educ. Soc’y* 21 which was markedly more sympathetic toward the FTC. It had been alleged and found by the Commission that the respondent was guilty of misrepresentation in purporting to distribute free encyclopedias, accompanied by a charge to cover a supplemental looseleaf service, when actually the charge covered both items. The Court said:

There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has . . . decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception. 22

The preceding holding served to set the pace for a line of subsequent interpretations of the amended section 5 which seem to have lowered still further the level of public sophistication to be considered as the proper object of protection under section 5.

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19 16 F.2d 962 (2d Cir. 1927).
20 *Id.* at 964. In Consolidated Book Publs., Inc. v. FTC, 53 F.2d 942, 962 (7th Cir. 1931), *cert. denied*, 286 U.S. 553 (1932), a Commission order was vacated because it appeared no ordinary purchaser could be misled.
22 *Id.* at 116. See also FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922).
In *General Motors Corp. v. FTC*, Judge A. Hand was quick to recognize this trend, and said:

It may be . . . that only the careless or the incompetent could be misled. But if the Commission . . . thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "Wayfaring men, though fools, shall not err therein," it is not for the courts to revise their judgment.  

Thus, the fictional reasonable man is no longer a standard to be used in applying section 5; in his place appears the more careless and credulous element of our society.

**Defenses to Misrepresentation Under Section 5**

An allegation by the Commission of deceptive practices automatically draws either or both of two common-law defenses to complaints of that nature—puffing and expressions of opinion. Properly speaking, both defenses are opposite sides of the same coin. Thus, "puffing . . . is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely." The theory underlying puffing as a defense rests on the distinction between objective and subjective representations. Objective representations are susceptible to some degree of proof or disproof; all those which are not are subjective. For example, "Eight out of ten users have said . . ." is objective, while "that our cleaner has everything . . ." is subjective. A glue that "holds like iron," a facial cream which "restores youthful radiance," and a tonic to make one feel "like a new man," are all subjective expressions. These and similar superlatives have been traditionally classified as permissible trade puffery. The argument most often relied on to justify this classification, accepted with declining enthusiasm more recently, is that subjective representations are not of a nature to produce reliance on the part of a reasonable buyer and hence are not deceptive in

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23 General Motors Corp. v. FTC, 114 F.2d 33 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941).
24 *Id.* at 36.
25 Prosser, Torts § 90, at 557 (2d ed. 1955).
27 *Id.* at 95-99. To the extent that a manifested opinion is evidence of a state of mind it is of course objective and relevant to the issue of good or bad faith, but since at the present time good faith is no defense to deceptiveness the distinction is more academic than significant. See Note, *The Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1025-29 (1956).
nature. It has also been urged that reasonable latitude in puffing products is a prerequisite to effective selling.

It is at once seen that such arguments, although sufficient for the common-law situation, should not prevail when the reasonable man standard has been discarded. An early case realizing this inapplicability concerned the manufacturer of a foundation cream for facial make-up who used "Rejuvenescence" as a trade name. The product was advertised as containing organic ingredients capable of bringing to the user's skin "clear radiance . . . the petal-like quality and texture of youth," which gives the skin "a bloom which is wonderfully rejuvenating. . . ." The Commission objected to the trade name "Rejuvenescence" as conveying to the purchaser a belief that the product would renew youth. Quoting from Standard Educ. Soc'y, the court refused to accept any reference to a reasonable man standard and interpreted the act as affording protection to the ignorant, the credulous and the unthinking. To the petitioner's contention that the word signified nothing more than nondeceptive boasting and fancifulness, the court quoted the "wayfaring men, though fools" standard of Judge Hand.

It might well have been argued that the manufacturer's representations fell within the previously sacrosanct category of superlative representation called puffing. Certainly, "Rejuvenescence" is not appreciably distinguishable from expressions like "amazing distance" and "perfect lubricant" which had earlier been justified as permissible puffing by another circuit.

At this point it could have been anticipated that one court would find it deceptive to say a preparation "stopped" itching and that another would object to "stop bedwetting," both on the ground that the negative implies a cure. Nor was it unexpected that a third would enjoin "Favorite of the Stars" when used in conjunction with "Hollywood" because of the implied testimonial and place of origin. When the latter court attempted several years later to withdraw from this rather protective position it was reversed. The case involved a cushion-insert foot sup-

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28 Handler, supra note 26, at 97-99.
30 Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).
31 Id. at 678.
32 Id. at 680.
33 Kidder Oil Co. v. FTC, 117 F.2d 892, 901 (7th Cir. 1941).
34 D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942).
35 Feil v. FTC, 285 F.2d 879 (9th Cir. 1960).
36 Howe v. FTC, 148 F.2d 561, 562 (9th Cir.), cert. denied, 326 U.S. 741 (1945).
37 Sewell v. FTC, 240 F.2d 228 (9th Cir. 1956), rev'd per curiam, 353 U.S. 969 (1957).
porter, advertisements of which the Commission had found de-
ceptive in that they misled the public to believe "everyone can enjoy
better posture," and that the inserts were "especially designed to
help you." A majority of the court sustained these nonscientific
portions of the ad on the ground that substantial evidence es-
established that there were many benefited and contented users.
The dissent, apparently ratified by the Supreme Court, said the
import of the Commission's complaint was not that some or
many had or had not been pleased with the product but that
the advertisement implies all users will be benefited, whereas such
claims were not justified on the evidence.\(^3\)

The defense of puffing has been further weakened by rules
promulgated by the FTC, which govern the use of words such
as "free," "guaranteed" and "price."\(^3\) Nonconforming use of
these words in a way which it is felt is unfair or deceptive will
subject the infringer to charges under the act. The same result
is likely to obtain from a violation of the Commission's Trade
Practice Conference Rules, which are applicable to all significant
industries and indicate what claims are not to be made for a
product, what information should be revealed in advertising
programs, etc.\(^4\)

Nor is there a guarantee that superlative words found un-
objectionable in one context will be so found in another. "Perfect,"
for example, was declared permissible puffing and "easy" was held
a true factual representation as applied to a weight-reducing plan.\(^4\)
However, "easily" has been disallowed when applied to the use of
a home weaving kit,\(^4\) and "perfect" would be an unfair trade
practice if used to describe diamonds which fell below standards
set by that industry, according to FTC rules.\(^4\)

Occasionally respondents have turned to dictionaries in an
effort to justify misleading representations, but a defense of literal-
ness, if it ever did obtain, certainly does not today. In P. Lorillard
Co. v. FTC,\(^4\) the court sustained a misrepresentation charge by
the Commission even though the objectionable claim, that the
respondent's cigarette contained less nicotine and tar than any other
leading brand, was literally true. The Commission had found
that the claim would be interpreted by the public as a representation
that smoking the respondent's cigarettes would be less injurious
to the health than smoking those of its competitors, whereas the

\(^3\) Id. at 236.
\(^3\) 16 C.F.R. §§ 18.8, 18.11, 18.10 (1960).
\(^3\) 16 C.F.R. § 16 (1960).
\(^4\) Carlay Co. v. FTC, 153 F.2d 493 (7th Cir. 1946).
\(^4\) Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957).
\(^4\) 16 C.F.R. § 23.27 (1960).
\(^4\) 186 F.2d 52 (4th Cir. 1950).
difference in nicotine and tar content was too negligible to be of any significance.

Based on the foregoing, it seems clear that the deceptive nature of glittering superlatives—trade puffery—is not tested as it was at common law. The question is no longer what the reasonable buyer has a right to rely on, but rather, what the credulous buyer does rely on. Today, if an automobile manufacturer advertises that his product gives "thirty-five miles to the gallon" and comes "completely equipped," he may not expect to avoid FTC objections by arguing that during a three-mile controlled test his automobile did average thirty-five miles to the gallon, or that no one should expect a heater to be stock equipment. For a manufacturer to say he does not expect a buyer to rely on such representations smacks of hypocrisy. It seems axiomatic that the small-town dealer is not anxious to waste his time on talk, nor the large manufacturer his money on advertising, without expecting these representations to have an inducive effect on the buyer. Recent cases indicate that in passing on puffing as a defense, the courts have displayed a marked affinity for this line of reasoning. The question now arises: have the courts undergone a similar change in attitude when the representation has been defended as merely an expression of opinion?

The argument has traditionally been made that a misrepresentation must be of fact; and that if one makes a good faith representation of opinion, of a nature which cannot be proven false, then there has been no misrepresentation.

The landmark case accepting this distinction between fact and opinion, American School of Magnetic Healing v. McAnnulty,\(^45\) occurred prior to the FTCA under a postal regulation prohibiting use of the mails for fraudulent schemes. The issue involved was whether or not solicitation of customers is fraudulent where the petitioner's business is the mental healing of "diseases and ailments of the human family and . . . teaching the science of healing . . . ."\(^46\) The Supreme Court, referring to the conflicting schools of thought as to whether the mind alone may be the source of physical ailments, stated:

Both of these different schools of medicine have their followers. . . . But there is no precise standard by which to measure the claims of . . . this mental theory. . . . That [it is false] cannot be averred as a matter of fact . . . and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses. . . .\(^47\)

\(^{45}\) 187 U.S. 94 (1902).
\(^{46}\) Id. at 96.
\(^{47}\) Id. at 106-07.
Some twenty years later the lower courts were still of the same attitude. In *L. B. Silver Co. v. FTC* 48 the court, citing *American School*, reversed an FTC factual determination on the theory that where experts disagree a representation cannot be condemned unless it is made to cover an actual fraud. In turn, both cases were soon after relied on to justify a similar result in *Raladam Co. v. FTC*, 49 which held that representations made as to the scientific character and safety of a tablet advertised as an obesity cure were statements of opinion and not fact, and hence could not be banned. The *Raladam* decision is clear in its implication that, absent fraud or bad faith, opinions cannot result in unlawful representations. The court stated that words such as "scientific" and "safe" have no absolute meaning and are not to be so taken by the public. 50

While more recent cases appear to affirm this traditional common-law position, they nevertheless consistently uphold Commission determinations of misrepresentation based on factual evaluation of professional testimony. One example is *Koch v. FTC*, 51 in which the Commission brought an action against a manufacturer who claimed to sell a remedy with curative values for cancer, leprosy, malaria, all infections, insanity, etc. The petitioner produced numerous doctors and scientists whose opinions supported the product's effectiveness. A similar array of experts was presented by the Commission. In the face of evenly divided professional testimony, the court upheld the Commissioner on the ground that an opinion, if given so as to imply to the public that it is a fact, loses its protected classification. 52

Several years later this attitude was carried further in a case which moved through the courts for over eleven years. 53 The Commission had held that since "Carter's Little Liver Pills" did not stimulate the production of bile, use of the word "liver" was a misrepresentation. Here too, the petitioner urged a conflict of medical opinion as a defense. The court said, however, that it was up to the Commission to decide if the totality of evidence refuted the medical opinions advanced by petitioner's expert witnesses. 54

The change in attitude which had come about since *American

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48 289 Fed. 985, motion to recall mandate denied, 292 Fed. 752 (6th Cir. 1923).
49 42 F.2d 430 (6th Cir. 1930), aff'd on other grounds, 283 U.S. 643 (1931).
50 Id. at 432-33.
51 206 F.2d 311 (6th Cir. 1953).
52 Id. at 318.
54 Id. at 498.
School and Raladam was neatly summed up in a Seventh Circuit ruling sustaining the Commission's findings of misrepresentation as to the curative powers of hair and scalp-treating kits. The court said that whether or not there exists a medical consensus, and if so, to what effect, is a question of fact; and that it is also a question of fact whether or not a preparation is as effective as claimed. Therefore, the Commission was justified in finding, even though there existed conflicting expert testimony, that the product in question did not possess the medical virtues represented. It hardly seems arguable, following decisions as broad as the above, that "opinion" in its traditional sense poses any significant barrier to the FTC short of the first amendment itself.

This constitutional problem was raised several years following the Wheeler-Lea amendment to section 5. In *Scientific Mfg. Co. v. FTC*, the petitioner was the president and controlling stockholder of a closely held family corporation engaged in the publishing business. He was a registered pharmacist of some twenty years experience and had arrived at an honest belief in the detrimental effects of consuming food which had been stored in aluminum containers. When he began to publicize his views in pamphlet form, the Commission charged him with distributing false and misleading statements to the injury of the public and business. Drawing on the Supreme Court's opinion in the Raladam case the court held that the unfair acts must emanate principally from traders in commerce or others materially interested in the trade, stating:

If . . . given any broader scope, the Act would relate to far more than trade practices and the Commission would become the absolute arbiter of the truth of all printed matter moving in interstate commerce. . . . The Constitutional inhibition of any such abridgement . . . [justifies] rejection of the Commission's contention.

But the court admitted without hesitation that even expressions of honest opinion, if wanting in proof, are enjoinable when utilized within the trade to deceive the public or to harm competition. It cited with approval an earlier decision which had enjoined a stainless steel cooking utensil distributor from cir-

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55 Erickson v. FTC, 272 F.2d 318 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960); *accord*, United States v. Kaadt, 171 F.2d 600 (7th Cir. 1948).
56 124 F.2d 640 (3d Cir. 1941).
57 *Id.* at 644.
58 Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941). Another interesting case, *E. F. Drew & Co. v. FTC*, 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957), involved an oleomargarine manufacturer who advertised his product in terms such as "churned . . . sweet creamy goodness," "country fresh [as] . . . our other dairy products." The Court said "There is no constitutional right to disseminate false or misleading advertisements." *Id.* at 740.
culturating the same pamphlets which had prompted the Scientific Mfg. Co. litigation. It is to be noted that this interpretation of the act does not go to the nature of the representation—opinion—but only to its source, i.e., from one neither materially interested nor engaged in trading.59

At the present time it seems quite arguable that if common-law concepts of puffing and expressions of opinion were ever properly applicable as a measure of the Commission's authority under section 5 they are much less so today. Particular words or acts are not sacrosanct, nor are opinions used in trade; they may all be found deceptive if phrased in a way which misleads, or has a tendency to do so. The question in all cases will be determined by the Commission. In those instances where a "defense" of puffing prevails it is not because the answer is sufficient as an affirmative defense in the legal sense, such as performance in a contract action; but rather, because the Commission has found that the act or statement is not unfair or

59 A requirement of the act is that actions brought by the Commission be "to the interest of the public." 38 Stat. 719 (1914), 15 U.S.C. §45(b) (1958). The absence of this element has been occasionally set up in the form of an affirmative defense. FTC v. Klesner, 280 U.S. 19 (1929), represents the first commanding interpretation. In overruling an FTC determination, Mr. Justice Brandeis said that the test is something more than mere misapprehension or confusion on the part of the public. The traditional suit by a private trader to enjoin passing-off requires a showing that the purchaser has been deceived. The element of public protection is incident only to the enforcement of a private right. Under section 5, however, protection afforded to private parties is the incidental element; while public protection becomes the primary concern. Public interest may exist even where no private right has been violated, however the public interest must be specific and substantial, and not merely a collateral concern to the enforcement of private rights. Further, although the injury to any one person might be too insubstantial to justify litigation, sufficient public interest may still be present. If it appears at any time that the action is no longer maintainable in the interest of the public then the Commission must withdraw, and the courts, should the Commission seek enforcement, must refuse. Id. at 27-28. See FTC v. Royal Milling Co., 288 U.S. 212, 216-17 (1933).

Recent decisions have given a liberal interpretation to the Klesner dictum. Addressing itself to the public interest issue, one court said: "[T]hat the deception may be remedied before the customer has suffered any more pecuniary loss than the price of a postage stamp does not foreclose the Commission from acting to proscribe it in the first instance." Exposition Press, Inc. v. FTC, 295 F.2d 869, 873 (2d Cir. 1961). The court went on to say that it is not in a position to foresee the Commission's particular objective in instituting a given proceeding. The court indicated that the Commission believes "this proceeding is a step forward in the attainment of a higher morality in the great mass of information and propaganda designed to influence the public." Id. at 873-74.

This interpretation of public interest leaves little to be desired by the Commission and should not in the future be a significant obstacle to the Commission's functioning.
deceptive in the first instance. “Puffing” and “opinion” as used today appear to be nothing more than a means of cataloguing those complaints which the Commission and courts find insufficient in themselves, just as the ground for dismissal might be “no showing of interstate commerce” or “not in the interest of the public.” In lieu of “puffing” equally indefinite expressions such as “insignificant,” “irrelevant,” or “inconsequential,” might instead be chosen. When the courts dismiss a request for enforcement they have merely concluded that the representation is not deceptive even to the most credulous. This is quite apart from any finding that although the representation may create a false picture in the minds of some it is excusable because such persons have no traditional right to rely thereon or because the respondent has a right to so represent, regardless of reliance. This appears to have been the prevailing attitude of the FTC when television was born as a new advertising vehicle.

Misrepresentation in Television Advertising

Misrepresentation in television in its broad sense is like misrepresentation in any other medium, whether it be newspaper, radio or personal interview. The same principles have carried over into the young industry, so that the average deceptive representation, if filmed and reproduced on television, would generally be no more excusable. This is not to say that these principles are exclusive. A substantial percentage of misrepresentations occurring in television are by test and demonstration. This form of misrepresentation has a limited practical application outside that medium and hence has seldom been previously considered. It is because authoritative precedent was lacking that the “sandpaper” case, setting forth as it does a new rule covering future televised tests and demonstrations, is particularly significant to the television advertising industry. But, admitting the rule itself to be new, the question then presented is: Does the same hold true for the reasoning behind it, or should the rule have been

See, for example, In the Matter of Colgate-Palmolive Co., No. 7660, FTC, March 9, 1961. A complaint issued charging deception in advertisements, both printed and televised, regarding the effectiveness of a dental cream. It was alleged that in representing that the product formed a “protective shield” around teeth, the respondent implied complete protection against tooth decay, but in fact neither complete protection nor a protective shield resulted from application. The parties entered into a stipulation which admitted that complete protection was not offered by the product, but the respondent denied that such representations had been made. In finding against the respondent, the Commission looked to the effect of the representation, whether in print or televised, and made no attempt to distinguish on the grounds of the medium involved.
predicted as a natural consequence of presently existing and generally accepted principles?

The first significant decision dealing with televised demonstrations occurred in 1959 when the Commission moved against an automobile polish manufacturer who had been advertising his product in dramatic fashion. A filmed demonstration showed the following: The respondent’s polish was applied to an automobile which was then covered with gasoline. The gasoline was ignited and after a few seconds the flame was doused with water, leaving the surface of the automobile as shiny as before. The commentary accompanying this demonstration emphasized the protective qualities of the wax under what was called a “hot to cold” test.

The Commission charged that although the respondent was representing his wax to be heat and cold resistant, the demonstration given as proof was in fact no proof of the claim. The hearing examiner felt it was not the Commission’s function to determine what the demonstration did or did not prove, but only the truth or falsity of the quality claimed. Therefore, since the FTC had not challenged the qualities themselves, he concluded that no issue had been raised.

On appeal the Commission pointed out that section 5 contained no such limitation. A complaint which charges only that a demonstration does not prove what it is represented as proving is sufficient, regardless of whether or not the product fulfills its claims. In arriving at this decision analogy was made to misrepresentations by way of false indorsements, which do not go to the question of the ultimate quality of the product, but which are nonetheless misrepresentations because they induce purchases based on the consumer’s belief that such indorsements have been given. “The law is well settled,” the Commission said, “that the public is entitled to buy what it thinks it is buying, in this case, a product which has been subjected to a test which demonstrates that it imparts a finish which is both heat and cold resistant.”

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62 Id. at 3. The Commission’s motives, in moving against an advertiser, are not confined to the protection of purchasers but are also concerned with competitors’ business interests.

In the Matter of Eversharp, Inc., No. 7811, FTC, Sept. 3, 1960. The respondent attempted to prove the safety of its razor by drawing it and then a competitor’s razor, which was no longer in production, across the face of a boxing glove. Whereas the respondent’s razor did not damage the surface, the competitor’s left in its wake a slash the length of the stroke. The complaint alleged that the demonstration “has the tendency and capacity to unduly frighten and alarm prospective purchasers of competitive razors with respect to consequences which may result from the use of ... competitive razors. ...”
On turning to the merits the Commission found the evidence insufficient to support the complaint. However, soon after this action was dismissed the same line of reasoning was invoked in a later case with more success.

A cigarette manufacturer attempted to prove that the filter used in his product absorbed and retained more tars and nicotine than filters used by other cigarettes currently on the market. The televised demonstration involved two test tubes with filters lodged in each, one being the respondent's and the other made by a competitor. A dark fluid was slowly poured into each tube; the result was that the competitor's filter became supersaturated before the respondent's, so that the fluid began to "run through" and deposit in the bottom of the test tube.

The complaint charged that the filter test did not prove the filter's effectiveness against tars and nicotine, and was therefore a misrepresentation. On hearing, an agreement containing a consent order was entered into and the respondent ceased its demonstration without appeal. Thus, a rule previously developed in a matter ultimately dismissed for lack of evidence, was invoked a year later to entice a consent agreement.

The foregoing rulings were all in effect when the "sandpaper" case came before the Commission. The controversy involved the following: An announcer claimed that he had a shaving cream for men with really heavy beards, beards tough as sandpaper, and that because of its superior moistening quality his product would actually allow sandpaper to be shaved clean. As proof

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64 Accord, In the Matter of Standard Brands, Inc., No. 7737, FTC, June 1, 1960. A producer of oleomargarine was charged with representing that "moisture drops" appearing on its product and visible to viewers, which were added to the margarine prior to televising, proved its product tasted more like butter than competitive margarines.

The Commission's expanding interpretation of section 5 has also resulted in a broadening of the scope of its orders. In Standard Brands the order prohibited references to moisture drops only; in Brown & Williamson Tobacco Corp., supra note 63, all deceptive representations regarding the effectiveness of its filter were prohibited; and in In the Matter of Aluminum Co. of America, No. 7735, FTC, March 3, 1961 (involving a televised comparison of the respondent's aluminum foil after a period of use and that of a competitor), the order was to refrain from any untruthful statement or representation regarding either its own or its competitors' products.

In this connection the Supreme Court has said: "Commission orders are not designed to punish for past transactions, but are . . . a means for preventing 'illegal practices in the future.' If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled. . . ." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). See also Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946).
of this claim he offered a demonstration. The announcer spread a quantity of shaving cream onto a surface which he represented to be sandpaper but which was instead plexiglass covered with a moderately adhesive layer of sand. Seconds later he used an ordinary razor to whisk a clean swath across the mock-up and again referred to this demonstration as proof that his product would shave the sand from sandpaper, and was therefore equally effective on the heaviest beard.

The Commission conceded that if the product was effective on sandpaper it would likewise be effective on a tough beard. It further assumed, contrary to its ultimate finding, that the product was as effective a moistening agent as claimed. The critical issue was then presented: May a televised commercial utilize a test or demonstration to dramatize a quality the product actually possesses if the test or demonstration is simulated without the knowledge of the viewer?

This issue is more incisive than those presented in either the "cigarette filter" or "automobile polish" cases. In those matters the question extended only to whether or not the tests would prove the qualities claimed. Here, the Commission momentarily assumed the quality alleged and the validity of a sandpaper test as proof. Its ultimate concern was whether or not a test otherwise valid as proof of a claim is rendered deceptive by a substitution of material.

In finding the use of a mock-up to be deceptive, the Commission pointed out that the very purpose of representing the demonstration as a test was to convince any skeptics among the viewing audience who, without seeing, would not believe. The respondent knew that, without such visible proof, a significant number of viewers would not have been induced to buy. The Commission's reply was as follows:

The difference between telling and not telling the truth could, in this instance at least, have been the difference between an effective and ineffective "sell." In such circumstances, the claim of "harmless exaggeration" is rather hollow.\footnote{Colgate-Palmolive Co., 3 CCH TRADE REG. REP. ¶15643, at 20481 (FTC Dec. 29, 1961).}

The precise principle promulgated by the Commission is present in the variety of cases which hold that an advertiser cannot rely on dishonest testimonials,\footnote{In Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir.), cert. denied, 364 U.S. 883 (1960), the petitioner was engaged in the manufacture and sale of electric cooker-fryers. His appliance used a small Westinghouse brand thermostat. It was alleged and found that petitioner was unfair and deceptive in predominantly displaying a Good Housekeeping Guaranty Seal which had not been awarded his product, and equally deceptive in displaying} imply a false source or origin for
his product, or fail to disclose that his product, although as good as new, is in fact reprocessed. "The vice assailed in these cases is the use of a falsification of fact, extrinsic to the objective value of the product, to sell that product, whether or not it may deserve to be bought on its own merits." 

It is fairly apparent that had the viewer merely been told that the shaving cream would shave sandpaper, or that the demonstration was a mock-up and did not in fact prove what it purported to prove, the inducive effect would have been diminished. The viewer's motivation turns on the belief that he has witnessed an actual demonstration and not something less. Regardless of the product's ultimate quality, a sale results which would not have consummated had there been no misrepresentation. Thus, the basic question to be asked is: Would the viewer have hesitated in buying had he known the truth? If the answer is affirmative, as the Commission found above, then the test is deceptive within section 5.

Of the three main defenses relied on in the "sandpaper" case, two apply particularly to television. First, the respondent the name Westinghouse so as to imply that the entire appliance was a product of that manufacturer. See also Lighthouse Rug Co. v. FTC, 35 F.2d 163 (7th Cir. 1929) and Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941) for the proposition that the use of labels or trade names in a way which tends to mislead is within the act's prohibition.

In United States Navy Weekly, Inc. v. FTC, 207 F.2d 17 (D.C. Cir. 1953) the court sustained the finding of a misrepresentative and deceptive tendency in the use of petitioner's name for an unofficial and privately owned publication. Nor would the court accept, in the alternative, use of a statement such as "Not owned by the Government" appended to the title.

In FTC v. Algoma Lumber Co., 291 U.S. 67, 77-78 (1934), the Supreme Court reiterated its belief that substitution is unfair, even if equivalent. The respondent lumber company sold western yellow pine under the trade name of California white pine, a wood of different origin and higher quality. Although the facts were otherwise, the Court assumed that both woods were of equal value and practical use. Mr. Justice Cardozo said: "Saving to the consumer does not obliterate the prejudice. 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. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others." Id. at 78. See Mohawk Ref. Corp. v. FTC, 263 F.2d 818 (3d Cir.), cert. denied, 361 U.S. 814 (1959).

Colgate-Palmolive Co., supra note 65, at 20480-81.

"Perhaps some consumers will be content with a product purchased in response to such a deceptive 'come-on,' but that is hardly legal justification for it. It could not alone, for example, for the injury to a competing manufacturer whose product might have fared better had respondents adhered to honest and fair advertising practices." Id. at 20481.
claimed that limitations imposed by the nature of the medium made mock-ups necessary, i.e., sandpaper does not photograph realistically. The Commission summarily dismissed that contention, stating it was "patent nonsense" for an advertiser to think that he could take liberties with the truth, while sponsors employing other forms, such as newspapers or personal interviews, must be truthful. In effect, the second defense was that if all mock-ups are to be considered unlawful the practical consequences would be crushing to the entire television industry. This defense was characterized by the Commission as a parade-of-horrors argument.

The Commission's disposition of the latter argument has been criticized in some circles for lack of clarity, but a perusal of the decision would seem to obviate this criticism. There is no fault to be found with a false street setting in a western drama, nor is there any objection to having the hero pour tea from a whiskey bottle. Here there is no attempt to sell either the backdrop or the brand of whiskey used by the hero. Even further, it is not objectionable per se during a coffee commercial to pan across a breakfast table incidentally showing as steaming coffee that which is really wine. If the view were a close-up, however, and the announcer were to emphasize the full-bodied flavor, deep color and rich appearance, this would constitute a deception. The question is one of degree and emphasis. In the latter case the sponsor would be attempting to demonstrate the virtues of his product by substituting an essential—rather than an insignificant—element of the commercial. "The difference in all these cases is the time-honored distinction between a misstatement of truth that is material to the inducement of a sale and one that is not." 72

In rejecting the respondent's remaining defense of puffing, the Commission cited several standard definitions, and defined puffing as a representation which must be exclusive of mis-statements of material fact. But it appears from a reading of those authorities that several might have been cited with equal force by the respondent. The real key, it would seem, lies in the Commission's conception of exactly what is meant by "the high duty of preventing public deception," with which it considers itself charged. 74

Set among the previously evolved principles which today govern the application of section 5, the "sandpaper" rule appears justifiable.

73 See, for example, Gulf Oil Corp. v. FTC, 150 F.2d 106 (5th Cir. 1945), that puffing is a reference to an expression of opinion not intended as a representation of fact. Prosser, Torts § 90 (2d ed. 1955).
74 Colgate-Palmolive Co., supra note 72, at 20479.
The doctrine of *caveat emptor* no longer applies\(^\text{76}\) and the protections afforded by the act extend to "the ignorant, the unthinking and the credulous..."\(^\text{78}\) There is no requirement that the Commission sample public opinion in determining what meaning a representation conveys to the public.\(^\text{77}\) If it is found to be ambiguous the presumption is that the most deceptive meaning is conveyed to the buyer\(^\text{78}\)—although the seller be unaware,\(^\text{79}\) or the purchaser aware,\(^\text{80}\) that the representation is false. Since a showing of fraud is not essential,\(^\text{81}\) good faith is no defense;\(^\text{82}\) since tendency to deceive is the test,\(^\text{83}\) no actual deception is necessary.\(^\text{84}\) Literal truth is no defense\(^\text{85}\) in such situations, and there may even be an affirmative duty to speak when silence might be deceptive.\(^\text{86}\)

**Conclusion**

If most early federal courts tended to deal severely with the Commission's efforts to undertake what it conceived to be its administrative duty, later cases have taken a more sympathetic view. To what extent this trend is attributable to statutory mandate,\(^\text{87}\) a growing acceptance of administrative agencies and

\(^{75}\) National Silver Co. v. FTC, 88 F.2d 425 (2d Cir. 1937).

\(^{76}\) See Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942).

\(^{77}\) E. E. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955).

\(^{78}\) United States v. 95 Barrels of Vinegar, 265 U.S. 438 (1924); Rhodes Pharmacal Co. v. FTC, *supra* note 77.

\(^{79}\) Gimbel Bros. v. FTC, 116 F.2d 578 (2d Cir. 1941).

\(^{80}\) FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922). In FTC v. Algoma Lumber Co., 291 U.S. 67 (1934), the Court said that it would be possible for a misrepresentation, repeated long enough, to cause a secondary meaning to attach, which, once it became as firmly rooted as the primary, would not fall within the act's prohibitions. But until the secondary meaning is as secure in the mind of the public as the original, "each new transaction...is a repetition of the wrong." *Id.* at 80.

\(^{81}\) FTC v. Algoma Lumber Co., *supra* note 80, at 81.

\(^{82}\) See Feil v. FTC, 285 F.2d 879 (9th Cir. 1960).

\(^{83}\) FTC v. Hires Turner Glass Co., 81 F.2d 362 (3d Cir. 1935).

\(^{84}\) *Ibid.*; Feil v. FTC, *supra* note 82.

\(^{85}\) Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943); Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

\(^{86}\) Mary Muffet, Inc. v. FTC, 194 F.2d 504 (2d Cir. 1952), requiring a manufacturer of rayon goods to label them to prevent their being retailed as silk goods; L. Heller & Son v. FTC, 191 F.2d 954 (7th Cir. 1951), prohibiting the sale of imported goods until labeled to indicate their foreign origin.

\(^{87}\) Federal Administrative Procedure Act of 1946, 60 Stat. 237, 246, 5 U.S.C. §§ 1001, 1010 (1958), which provides that an agency's factual determinations will not be set aside unless there is a lack of substantial evidence, discernible from the record as a whole, to support such determinations.
NOTES

their quasi-judicial function, or a belated realization of the broader purposes behind the FTCA, is difficult to judge. Whatever the reason, the judiciary has shown a certain empathy with the Commission to the extent that the above general rules have become crystallized during recent years.

The new ruling appears to be nothing more than an express acknowledgement of the fact that the consumer does rely on tests and demonstrations, whether or not he has a traditional legal right to do so. It is a realistic rule which admits to the frailties of human nature and recognizes that the passage of the FTCA was prompted by a similar admission. Certainly the advertiser is aware of consumer motivation. If he were not, there would have been little need for legislation. Is it therefore unreasonable to warn an advertiser, who exploits the consumer's reliance on tests and demonstrations, that he shall be no more deceitful in presenting the proof which induces the sale than in alleging the quality itself?

ORGANIZATIONAL AND RECOGNITION PICKETING:

PERMISSIBLE ACTIVITY UNDER THE LANDRUM-GRIFFIN AMENDMENTS

The Labor Management Relations Act [hereinafter referred to as the Act] insures to employees "the right to self-organization . . . [and] to bargain collectively through representatives of their own choosing . . . and to refrain from any or all such activities . . . ." To further secure these rights, the Act was amended in 1959, and several new unfair labor practices, restricting certain union activities, were incorporated therein. One of the new provisions, Section 8(b)(7)(C) of the

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