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EFFECTIVE GUIDANCE THROUGH CEASE AND DESIST ORDERS: THE T-V COMMERCIAL

Even before the advent of the television commercial, regulation of false and misleading advertising represented one of the Federal Trade Commission's most expensive and time consuming tasks.¹ Additional problems have been presented to the Commission during the past fifteen years² as the infant television medium grew, if not to adulthood, at least to adolescence. The phenomenal growth of the television medium is demonstrated by the fact that in 1949 the amount spent for television advertising amounted to only about one per cent of the total spent for advertising in all media, while in 1961, television advertising accounted for thirteen per cent of all advertising expenditures.³ In 1960, suspecting that the new medium might become a juvenile delinquent if not carefully disciplined, the Federal Trade Commission gave its widest attention to eliminating deception in television commercials.⁴

Television has been described as the most effective selling tool ever developed for reaching a mass audience at low cost.⁵ In 1958 it was estimated that 48,300,000 television sets were in use,⁶ with about 25,000,000 people viewing the average network evening program.⁷ As an authoritative medium it carries considerable weight.⁸ A 1951 study showed that sixty-five per cent of the television owners interviewed con-

1. Moore, *Deceptive Trade Practices and the Federal Trade Commission*, 28 TENN. L. REV. 493, 503 (1960).

2. Commercial TV started its first full year of operation in the United States in 1946. McMAHAN, TV TAPE COMMERCIALS 11 (1960).

3. The total amount spent for television advertising in 1949 amounted to \$57,800,000, while in 1961 \$1,615,000,000 was spent on advertising in this medium, or almost thirty times as much. The amount spent for advertising in all media increased from \$5,202,200,000 in 1949 to \$11,845,000,000 in 1961, or only a little over twice as much. *Guide to Marketing for 1963*, Printer's Ink, August 31, 1962, p. 384-85.

4. 1960 FTC ANN. REP. 6

5. McMAHAN, *op. cit. supra* note 2, at 43.

6. DIRKSEN & KROEGER, ADVERTISING PRINCIPLES AND PROBLEMS 241 (1960).

7. McMAHAN, *op. cit. supra* note 2, at 43.

8. BOGERT, THE AGE OF TELEVISION 195 (1956).

sidered television the most "convincing" medium.⁹ This feeling is reflected in the willingness of local retail merchants to give television advertised brands preference on their shelves.¹⁰ The unique advantage of television as compared to other advertising media such as radio, newspapers, and magazines, is the opportunity for visual demonstration.¹¹

In some instances, however, the Federal Trade Commission felt that the visual demonstration of a product's qualities and effectiveness, especially when compared with those of a competitor's products, grossly exaggerated the merits of the advertiser's merchandise or unfairly disparaged competitors' products.¹² Under the Federal Trade Commission Act, the Commission is obligated to prevent false advertising which misleads, or has the capacity or tendency to mislead the purchasing public into buying a product, process or method in the belief it is acquiring one essentially different.¹³ Charged with this duty, the Commission in 1960

9. *Hofstra College Study in January, 1951*, as reported in BOGERT, *op. cit. supra* note 8, at 200.

10. As part of a study made in Fort Wayne, Indiana, NBC found that half the local merchants named TV as the national advertising medium that did "the best job of moving goods in a store," while newspapers, the runner-up, were named by only 17%. As a result merchants began to favor the TV advertised brands by stocking items they had not carried before, giving those brands better shelf space and putting up special displays featuring the TV brands. A CBS survey in 1954 found that 63% of the 3,100 local merchants named TV as top choice, with grocers and druggists giving TV a particularly high vote of preference. BOGERT, *op. cit. supra* note 8, at 196.

11. BOGERT, *op. cit. supra* note 8, at 194.

12. 1960 FTC ANN. REP. 53.

13. *Ford Motor Co. v. FTC*, 120 F.2d 175, 181 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941).

As originally enacted, section 5 of the FTC Act provided that "unfair methods of competition in commerce are hereby declared unlawful." 38 Stat. 719 (1914); 15 U.S.C. § 45(a) (1958). In *FTC v. Raladam*, the Supreme Court held that the Commission could not proscribe false claims where no substantial injury to competition was shown to have been occasioned by the false advertising. 283 U.S. 643 (1931). Because of public agitation to broaden the Commission's powers following the *Raladam* decision, the Wheeler-Lea Amendment was passed March 21, 1938, which amended section 5 to read: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 53 Stat. 111 (1938); 15 U.S.C. § 45(a) (1958). (Emphasis added.)

It is the duty of the FTC to protect the general public—not only the prudent but also the ignorant and unsuspecting purchaser. *H. N. Heusner & Son v. FTC*, 106 F.2d 596 (3d Cir. 1939). The Commission may insist upon the most literal truthfulness and has the discretion 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." *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir.), *cert. denied*, 312 U.S. 682 (1940). The unfair practice is misrepresentation and whatever constitutes it may be subject to corrective measures by the Commission including misleading half-truths, *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950) and garbled testimonials, *FTC v. Standard Educ. Soc'y*, 86 F.2d 692 (2d Cir. 1936), regardless of any actual intent on the part of the seller to deceive the purchaser, *FTC v. Balme*, 23 F.2d 615 (2d Cir. 1928). The important criterion is the net impression which the advertisement is likely to make upon the general populace. *Aronberg v. FTC*, 132 F.2d 163, 167 (7th Cir. 1943); *Stanley Labs., Inc. v. FTC*, 138 F.2d 388 (9th Cir. 1943); *FTC v. Standard Educ. Soc'y*, 302

issued complaints against the manufacturers of nine nationally advertised products alleging that either camera trickery had been used or essential facts had been omitted from the television portrayal of their products.¹⁴ The Commission attacked these demonstrations on the grounds that (1) the superiority claimed did not exist, and (2) the demonstration did not prove what it purported to prove.¹⁵ In most of the cases, both picture and script were challenged.¹⁶

This action by the Commission represented an attempt to correct an industry wide practice by instituting proceedings against the leading members of selected industries and their advertising agents.¹⁷ Rather than use the various voluntary compliance procedures available, the Commission chose instead to rely upon the mandatory cease and desist order as a means of securing the compliance of the other members of the industry. By a joinder of parties, by the breadth of the order and, perhaps most important, through the medium of the opinion accompanying the order and the order itself, the Commission sought to establish standards by which advertisers could gauge their conduct. Although it is as yet too early to determine the effectiveness of such an approach, an analysis of one of the nine cases instituted by the Commission in 1960, may serve to indicate the merits of the mandatory approach.

COLGATE-PALMOLIVE COMPANY'S "SANDPAPER TEST" COMMERCIAL

Among the television commercials challenged by the Commission in

U.S. 112 (1937); *Newton Tea & Spice Co. v. United States*, 288 Fed. 475, 479 (6th Cir. 1923).

14. 1960 FTC ANN. REP. 6. The cases and the alleged misrepresentation were as follows: *Aluminum Co. of America*, No. 7735, FTC (1960), (dried out ham used in comparison demonstration with competitor's foil); *Brown & Williamson Tobacco Co.*, 56 FTC 956 (1960), (filter purported to absorb more nicotine than that of competitors); *Standard Brands, Inc.*, 56 FTC 1491 (1960), (moisture added to oleo and magnified to show moistness of product); *Eversharp, Inc.*, No. 7811, FTC (1960), (razor used with boxing glove to prove safety of razor); *Colgate-Palmolive Co.*, No. 7660, FTC (1960), (coconuts bouncing off an "invisible" shield used to demonstrate protection of dental cream); *Lever Bros. Co.*, No. 7747, FTC (1960), (only fresh stains used in demonstration to show ability of toothpaste to remove smoke stains); *Colgate-Palmolive Co.*, No. 7736, FTC (1960), (plexiglass mock-up rather than sandpaper used in shaving demonstration); *Carter Products, Inc.*, No. 7943, FTC (1960), (specially prepared formula characterized as a competing lather and used to disparage competing shaving lathers); *The Mennen Co.*, No. 8146, FTC (1960), (mixture of toothpaste and shaving cream used to demonstrate under water qualities of product).

15. 2 TRADE REG. REP. ¶ 7805 ().

16. 1960 FTC ANN. REP. 6-7.

17. In creating a program of enforcement the Commission, of course, must consider the availability of men and funds. The appropriations for the year 1961-62 were \$8,009,500. The Commission with a staff of 855 at the end of the year had a backlog still fourteen months behind after completing the investigations of 904 cases, instituting 292 complaints and issuing 272 orders. 1961 FTC ANN. REP. 2-3.

1960 were three sixty-second advertisements of Colgate-Palmolive Company's "Rapid Shave."¹⁸ The complaint issued against the company and its advertising agent, Ted Bates & Company, Inc., charged that the representations in the commercials were deceptive. To the viewer each of these commercials demonstrated the effective shaving of sandpaper with a single stroke of the razor after the application of "Rapid Shave." In reality what the viewer saw, however, was not sandpaper but sand on plexiglass, termed in the trade as a "mock-up." The nature of the television medium, respondents argued, forced the simulation. Sandpaper appears on the television screen as nothing more than plain, colored paper; therefore, respondents contended, unless a mock-up was used the texture of the grain would not show and it would appear to the viewer that only plain paper was being shaved instead of sandpaper.

The Commission put to one side any question as to the truthfulness of the premise that a shaving cream which enables sandpaper to be shaved cleanly and quickly is equally effective in shaving a man's beard. Rather, the issues posed were (1) whether "Rapid Shave" could shave sandpaper in the manner depicted, and (2) whether it was deceptive to the public to conduct such a test on what was represented as sandpaper, but was actually a plexiglass mock-up.

The Commission found, that sandpaper could not be shaved within one to three minutes after application of "Rapid Shave," even with numerous heavy strokes. Indeed, soaking for an hour in the respondent's product would not permit the successful completion of the task.

From these facts the Commission concluded that the commercials were false, misleading and deceptive within the meaning of section 5 of the Federal Trade Commission Act, and that such representations had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that those representations were true. In his opinion, Commissioner Elman pointed out that the use of props in television commercials was not illegal per se. Specific examples were used to illustrate the distinction between a misstatement of truth that is material to the inducement of a sale and one that is not.¹⁹ There

18. Colgate-Palmolive Co. and Ted Bates & Co., Inc., No. 7736, FTC (1961). For a discussion of this case and its effect on the use of mock-ups see: 72 *YALE L.J.* 145 (1962).

19. *Ibid.*

No one objects to the use of papier mâché sets to represent western saloons or an actor's drinking iced tea instead of the alcoholic beverage called for by the script. The distinction between these situations and the one before us is obvious. The set designer is not attempting, through his depiction of the saloon, to sell us a saloon, nor is the actor sipping at his drink, peddling bourbon. There is a world of difference between a casual display of steaming "coffee" that is

is nothing objectionable, for example, in showing a person drinking colored water that appears to be iced tea, so long as the liquid is not presented as proof of the fine color or appearance of an advertiser's tea.

The Commission concluded, however, that

In the discharge of the Commission's obligation to preserve competition and protect the public against false, deceptive, or unfair advertising practices of the type here found to be unlawful, it is necessary to prohibit respondents, in advertising not only "Palmolive Rapid Shave" but *any other product*, from further use of representations, by picture, depictions, or demonstrations, either alone or accompanied by oral or written statements, that do not genuinely represent what they purport to represent and do not prove what they purport to prove about the quality or merits of a product. (Emphasis added.)²⁰

Accordingly, Colgate-Palmolive Company and Ted Bates & Company, Inc. were ordered not only to cease and desist from representing that pictures, depictions, or demonstrations, either alone or accompanied by oral or written statements, prove the merits of any product when such is not the case, but also to cease and desist from representing such pictures, depictions or demonstrations as genuine when in fact they are not. These prohibitions were not limited to advertisements involving "Rapid Shave" but covered any product advertised by either Colgate-Palmolive Company or its advertising agent, Ted Bates & Company, Inc.

On appeal by Colgate and Bates, the Court of Appeals for the First Circuit set aside the Commission's order.²¹ The court upheld the Commission's findings that the commercials were a material misrepresentation in that they purported to demonstrate qualities which the product did not in fact possess, *i.e.*, the ability to permit sandpaper to be shaved after an insignificant interval of soaking. On the other hand, while agreeing that there is a misrepresentation, of a sort, in any substitution

really heated red wine (again, because of television's "technical difficulties"), and a commercial showing a closeup of what is actually red wine to the accompaniment of a claim that the high quality of the sponsor's coffee is proved by its rich, dark appearance—which the viewer can verify for himself simply by looking at the "coffee" on the screen. Similarly, an announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's "whitening" qualities by pointing to the "whiteness" of his blue shirt. 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.

20. Colgate-Palmolive Co. and Ted Bates & Co., No. 7736, FTC, Dec. 29, 1961.

21. Colgate-Palmolive Co. v. FTC; Ted Bates & Co., Inc. v. FTC, 310 F.2d 89 (1st Cir. 1962).

case, the court indicated that if the artificial substance merely compensated for deficiencies in the photographic process in order to produce the exactly correct appearance, then the misrepresentation was not a material one. The court ruled that the Commission's order was so broad as to make even these latter practices illegal, and remanded the case for a new order. On February 18, 1963, the Commission issued its new order, again holding that the practice of using a sham demonstration with misleading effect is illegal.²²

COMMISSION'S ENFORCEMENT METHODS

Cease and Desist Orders

Both formal and informal procedures are employed by the Commission in enforcing the FTC Act. Although the Federal Trade Commission is not justified in relying on a mere promise to discontinue an unfair method of competition,²³ cases of lesser violations are often disposed of by accepting from the proposed respondent written assurance of discontinuance.²⁴ Such a procedure sets no precedents, applies only to particular cases, and is not publicized.²⁵ In the instant case, such a procedure would have had limited effectiveness because the rest of the industry would not have been apprised of the Commission's decision that the questioned practice constituted a material misrepresentation. A Trade Practice Conference would have placed other advertisers on notice that certain practices were questionable, but the rules promulgated by such conferences generally are mere parroting of statutory language and are not very meaningful to the average businessman who wants to know what he can and cannot do from a practical point of view.²⁶ Questions of business procedure should be effectively answered, whether by case law or by official interpretation which binds government as well as business.²⁷ The Commission has issued Guides on various aspects of advertising,²⁸

22. Commissioner Elman stated that the basis of the Commission's conclusion is that "it is unlawful for advertisers to stage television commercial demonstrations that purport to—but do not in fact, because of the undisclosed use of mock-ups or substitute material—prove visually a quality or merit claimed by a product regardless whether the product actually possesses such quality or merit." *Colgate-Palmolive Co.*, No. 7736, FTC, TRADE REG. REP. ¶ 16318 (Feb. 18, 1963).

23. *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926).

24. MOORE, *supra* note 1, at 510.

25. *Ibid.*

26. MASON, *THE LANGUAGE OF DISSENT* 291-92 (1959).

27. *Ibid.*

28. 1960 FTC ANN. REP. 7-8. Since the Guides Program got under way in 1955, the Commission had issued Guides relating to (1) cigarette advertising, (2) tire advertising, (3) deceptive pricing, (4) bait advertising, (5) deceptive advertising of guarantees, and (6) advertising allowances.

but it has consistently maintained that such guides are merely suggestions and not formal rules.²⁹

The inherent dangers of these informal processes are illustrated by Colgate-Palmolive's claim that the order is "directly contrary to the settled rule of the Commission regarding the use of 'mock-ups' prior to its decision in this case."³⁰ In making this charge, the company relied upon three informal procedures utilized by the Commission in formulating policy in this area.

First, the company asserted that for more than two and a half years prior to the complaint it had been submitting to the Commission representative samples of its advertising and television commercials, including information on the "Rapid Shave" commercials and that no objection to the commercials had been made by the Commission until the issuance of the complaint.³¹

Second, the Commission conferred with members of the Association of National Advertisers, Inc., in November, 1959, and stated that its policy concerning television technology was that the

F.T.C. recognizes a rule of reason. . . . Incidental artifice required by the nature of the medium, for somewhat heightened effects, etc., are not of concern to the Commission. . . . In general, F.T.C. is not concerned with what goes on in the act of bringing a TV picture to the screen—rather they are concerned with what the viewer sees.³²

Finally, the company cited as approving the use of mock-ups a statement of former Chairman Kintner quoted in *Advertising Age*:

We realize that it is often difficult to impart true life quality to a product when it is photographed for television.

Where the use of props does not result in a material deception, the Federal Trade Commission would have no reason to complain.

Obviously, we recognize that it is impossible to photograph ice cream properly under hot lights. If you have to use shaving cream to get the kind of head which is normal on a glass of beer, this probably would not represent a material deception unless, of course, it was carried beyond a reasonable point. If

29. Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181, 189 (1961).

30. Brief for Petitioner, pp. 5-6.

31. *Id.* at 5.

32. Brief for Respondent, pp. 12-13.

a glass goblet glistens too much, we still aren't likely to be alarmed.³³

It should be noted that there is nothing in either of these statements that conflicts with the findings of the Commission or the ruling of the court in the *Colgate* case. In the first one the Commission said that its concern is "with what the viewer sees," and Chairman Kintner stated that where the use of props does not result in a *material deception*, the Commission would have no reason to complain. In the instant case, however, the Commission found that the use of the mock-up did constitute a material deception. Nevertheless, the combination of *informal* expressions by the Commission might be interpreted by some to approve the use of mock-ups whenever technical difficulties are encountered in visually representing a product on television. The danger of relying on such tacit approval is illustrated by the litigation which ensued when Colgate used plexiglass instead of sandpaper to demonstrate the qualities of its product.

In the *Colgate* case the Commission chose to employ the formal procedure prescribed in section 5(b) of the Act and issue a cease and desist order.³⁴ There is no doubt that formal procedures are more time consuming than informal procedures. In the instant case, for example, the commercials appeared late in 1959, and the complaint was issued January 8, 1960. Hearings were held October 25, 1960, and February 16, 1961. On December 29, 1961, the Commission reversed the initial decision of the Hearing Examiner dismissing the complaint, and issued a cease and desist order. A petition to review was filed in the United States Court of Appeals for the First Circuit on March 2, 1962, and the decision in that court was handed down November 20, 1962. More than two years thus elapsed between the issuance of the original complaint and the decision by the court.³⁵ Yet if the case were settled by any of the informal methods mentioned above, and the company later stepped over the line, new proceedings would have had to be instituted and no penalty could be imposed for the violation of the original agreement.

On the other hand, cease and desist orders set standards with which

33. Advertising Age, Nov. 23, 1959, p. 1.

34. 52 Stat. 111, 15 U.S.C. § 45(b) (1938).

35. In its order, the Court of Appeals for the First Circuit stated that "the Commission's fundamental error so permeates the order that we think it best that an entirely new one be prepared. We also think it best that the Commission be the one to do so." *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962). Thus, the issues in this case may not yet be fully adjudicated, even though the Commission did issue a new order Feb. 18, 1963. *Colgate-Palmolive Co.*, No. 7736, FTC, TRADE REG. REP. ¶ 16318 (Feb. 18, 1963).

other advertisers may voluntarily comply. They are publicized and serve as notice of the proscribed action to others engaged in similar conduct. The supporting opinions of the cease and desist order are especially valuable in setting up more definite and ascertainable standards.

Colgate-Palmolive contended that since it had withdrawn the commercial upon the issuance of the complaint, the proceeding served no useful purpose.³⁶ An abandonment of a forbidden practice even before filing of the complaint, however, is no defense, especially when the order is opposed on the merits.³⁷ Moreover, Commission orders are not designed to punish for past transgressions, but to prevent illegal practices in the future.³⁸ Practices subject to the issuance of a cease and desist order are not confined to those known to be unlawful before a complaint is filed. The Commission has a duty to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.³⁹ Even if the order of the Commission is in contravention of its previously stated policy, there is no doubt that the Commission has the power to change its mind as many times as it believes inconsistency is in the public interest.⁴⁰ A contention that a complaint should be dismissed "because the Commission had not established standards delineating deceptive practices in this field before the proceeding was begun" has been held to be "so wholly lacking in merit as to require no detailed discussion."⁴¹ The Commission is charged with the protection of the public interest. The public interest should not be allowed to suffer as a result of inadvertence or mistake on the part of the Commission in the past.⁴² The Commission need not approve practices merely because they are of long standing and have not previously been held to be unfair under section 5.⁴³

Joinder of Parties.

The author of false, misleading and deceptive advertising may not furnish customers with means of misleading the public and remain insulated against responsibility for the resulting deception.⁴⁴ Inasmuch as

36. Brief for Petitioner, p. 5.

37. *FTC v. Standard Educ. Soc'y*, 86 F.2d 692 (2d Cir. 1936).

38. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

39. *FTC v. Standard Educ. Soc'y*, 86 F.2d 692 (2d Cir. 1936).

40. MASON, *THE LANGUAGE OF DISSENT* 176 (1959).

41. *National Clearance Bureau v. FTC*, 255 F.2d 102 (3d Cir. 1958).

42. *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944).

43. *Ford Motor Co. v. FTC*, 120 F.2d 175, 181 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941); *Hutchinson Chem. Corp.*, 55 FTC 1942 (1959).

44. *Irwin v. FTC*, 143 F.2d 316 (8th Cir. 1944). See also, *FTC v. Winsted Hoisery Co.*, 258 U.S. 483, 494 (1922); *cf. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

advertising agencies may be responsible in part or wholly for the false or misleading representations, the Commission has named advertising agencies as parties respondent in a number of television advertising cases.⁴⁵ There is no question but that this is a proper procedure, and the Commission has adopted this approach in cases since 1943.⁴⁶

By joining the advertising agency, Ted Bates & Company, Inc., as respondent with Colgate, the Commission attempted, as one attorney put it, "To cover the waterfront, not just one pier."⁴⁷ The court of appeals conceded that the Commission had jurisdiction and discretion to join the advertising agency where it was an active if not the prime mover behind the alleged deceptive practice. Nevertheless, the court indicated that it would require knowledge on the part of the agent of the falseness of the advertisement before the order could run as to him.⁴⁸ The court also indicated that the order would have to be limited to a specific product rather than being framed in language broad enough to cover any product advertised by any client of the agency, especially where there was no evidence of any "method" or "practice" by the agency.

In its opinion on remand the Commission reiterated its view that the agency was responsible for the preparation of the commercials and that it had full knowledge not only that the claim was false but that the "proof" offered to support it was a sham.⁴⁹ The Commission prohibited Bates from misrepresenting the qualities of Rapid Shave or other shaving creams, but not other products. It recognized that the agency might defend by showing that it neither had knowledge of the falseness of the claim nor any reason to question its truthfulness.

Breadth of Orders

In many cases the orders of the Commission have been limited to a specific misrepresentation, sometimes prescribing a definite change in the advertisement.⁵⁰ The scope of relief against use of misleading words

45. 1960 FTC ANN. REP. 54. Staz-Set, Inc., 55 FTC 1427 (1959); Keele Hair & Scalp Specialists, Inc., 55 FTC 1840 (1959); Hicks Pharmacal Co., 55 FTC 1695 (1959); Collins Hair & Scalp Experts, Inc., 54 FTC 599 (1957); Loesch Hair Experts, 54 FTC 575 (1957); Detroit Soda Prods. Co., 38 FTC 666 (1944); Trans-Pac Servs., Inc., 38 FTC 602 (1944).

46. CLARK, THE ADVERTISING SMOKE SCREEN 14 (1943).

47. Advertising Age, Jan. 15, 1962, p. 94, col. 2.

48. Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962).

49. Colgate-Palmolive Co., No. 7736, FTC, TRADE REG. REP. ¶ 16319 (Feb. 18, 1963).

50. Keele Hair & Scalp Specialists, 55 FTC 1840 (1959); Hicks Pharmacal Co., 55 FTC 1695 (1959); Staz-Set, Inc., 55 FTC 1427 (1959); Collins Hair & Scalp Experts, Inc., 54 FTC 599 (1957); Loesch Hair Experts, 54 FTC 575 (1957); Foster-Milburn Co., 51 FTC 848 (1955); Charles Antell Co., 50 FTC 543 (1953); Marlenes,

or symbols is peculiarly within the province of the Commission.⁵¹ Orders to cease and desist should, however, go no further than is reasonably necessary to correct the evil found to have been perpetrated and protect competitors and the public.⁵² If the respondent has been engaged in conduct which leads to the conviction that it will continue to violate the Act in related ways unless checked, the cease and desist order should be sufficiently inclusive to stop the practices permanently.⁵³

Admittedly, the Commission's first order in the *Colgate* case was broad. As the order was written, the advertiser and its agency were prohibited from "misrepresenting in any manner directly or by implication, the quality or merits of any product." The court set aside the order on the ground that there was no showing of any "method" or "practice" exemplified by the particular commercials, and, therefore, no basis for so broad a prohibition.⁵⁴ Although not ruling on the question, the court indicated that if mock-ups were illegal per se, then it might be appropriate to enter an order forbidding all such demonstrations en masse.⁵⁵ On remand, the Commission took the position that a broad order covering misrepresentation was not only appropriate but necessary in view of the fact that the use of misleading props in television commercials constitutes an unlawful practice if they materially misrepresent that which they seek to prove.⁵⁶ Had the Commission framed its order to cover any substitution in a commercial, there might have been some justification for one attorney's comment that "this case can set a pattern which will put even more teeth in the FTC Act than the dreaded temporary restraining order that FTC Chairman Dixon is asking for authority to issue."⁵⁷ With the limitation of the second order to the advertising of shaving creams, any possible basis for legitimate objection was removed.

Inc., 50 FTC 460 (1953); *The Miami Margarine Co.*, 47 FTC 1248 (1951); *Detroit Soda Prods. Co.*, 38 FTC 666 (1944); *Trans-Pac Servs., Inc.*, 38 FTC 602 (1944).

51. *APW Paper Co. v. FTC*, 149 F.2d 424 (2d Cir.), *aff'd*, 328 U.S. 193 (1945).

52. *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933).

53. *Eugene Dietzgen Co. v. FTC*, 142 F.2d 321 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944).

54. It should be noted, however, that *Colgate-Palmolive Company* had previously been cited by the Commission for misrepresentation in its television commercials. See *Colgate-Palmolive Co.*, No. 7660, FTC (1960), in which the bouncing of coconuts off of an "invisible" shield to demonstrate the protective nature of dental cream was held to be a misrepresentation.

55. *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962).

56. *Colgate-Palmolive Co.*, No. 7736, FTC, TRADE REG. REP. ¶ 16318 (Feb. 18, 1963).

57. *Advertising Age*, Jan. 15, 1962, p. 1, col. 4. A bill was introduced in the 1961 session of Congress by Messrs. Steed and Patman, which would amend the Federal Trade Commission Act to provide for the issuance of temporary cease and desist orders to prevent certain acts and practices pending the completion of the Commission's proceedings. H.R. 8830 and H.R. 8831, 87th Cong. 1st Sess. (1961).

Opinions

The order of the Federal Trade Commission directing one engaged in interstate commerce to cease and desist from certain unfair or deceptive practices need not chart a course of future action for those subject to the order.⁵⁸ The order may be framed in statutory language and directed at a specific violation. Nevertheless, orders which enjoin only a specific practice found to have been engaged in are subject to criticism because of the inadequate guidance they provide and the danger that new proceedings will have to be brought against closely related violations in the future. As stated by President Wilson in his message to Congress urging the creation of a Federal Trade Commission,

[B]usinessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice and the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.⁵⁹

The Commission has been criticized for adopting too narrow an approach at times.⁶⁰ The United States Supreme Court has recognized the need of the business community for more general guidance when it stated that the Commission should in the light of its own policy and the record translate the Act into a "set of guiding yardsticks."⁶¹ In the *Colgate* case the Commission's opinion served as the instrumentality for elaborating upon the practices proscribed in the order.⁶²

An advertising industry source has commented that in the *Colgate* opinion the Commission "went out of its way to outline its philosophy about television commercials, and thus may be said to have laid down

58. *Zenith Radio Corp. v. FTC*, 143 F.2d 29 (7th Cir 1944).

59. President Wilson's message to a joint session of Congress on Jan. 20, 1914, as quoted in MASON, *THE LANGUAGE OF DISSENT* 40 (1959).

60. 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* 485-86.

61. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 493-94 (1952) (dissenting opinion).

62. In 1955 the Commission decided to issue an opinion in every case, whether the result was an order to cease and desist or a dismissal. 2 DAVIS, *supra* note 63. In *Manco Watch Strap Co., Inc.*, No. 7785, FTC (March 13, 1962), the Commission again through the use of the opinion, reexamined its position as to foreign origin of goods' cases, and stated that in future cases it would take official notice of its own records to the effect that in general there is a preference for products of domestic origin, thereby relieving itself of the burden of proving that fact in each new proceeding that is brought. Thus, in the future, if a product's foreign origin has not been clearly disclosed to prospective purchasers, the burden will shift to the respondent to come forward with evidence that in the particular circumstances no substantial segment of the buying public believes or assumes that his foreign-made product, unmarked as such, is of domestic origin, or is prejudiced by his failure to disclose its foreign origin.

guidelines for those who wish to avoid its toils hereafter."⁶³ Soon after the Commission's decision three attorneys prophesied that it probably would have "extensive effects on the advertising business."⁶⁴ It was thought by some that the decision would contribute to the you-can't-take advertising-seriously image already too prevalent.⁶⁵ However that may be, many "gimmicks" previously used in television advertising were dropped as the complaints were issued. For example, in before-and-after demonstrations for detergents, whereas previously two identical garments, one soiled and the other not, neither of which had been laundered, were used, soiled clothes are now sent out to the laundry⁶⁶ before the second photograph.

It is interesting to note that in contrast to the reaction of the legal profession to the Commission's order in the *Colgate* case, advertising industry representatives did not foresee any important modification in existing commercials as a result of the decision.⁶⁷ Television writers and producers are of the opinion that by and large television commercials now meet the standards the Federal Trade Commission laid down in the

63. Advertising Age, Jan. 15, 1962, p. 20, col. 1.

64. Advertising Age, Jan. 15, 1962, p. 1, col. 4.

65. Advertising Age, Jan. 15, 1962, p. 20, col. 1. The public, however, apparently was not taking commercials too seriously before the order. It was said that about 50% of the television audience disbelieves the claims in cosmetic commercials, and only about 25% of the viewers believe the claims of cigarette advertisers. McMAHAN, *THE TELEVISION COMMERCIAL* 24-25 (1954).

66. Advertising Age, Jan. 8, 1962, p. 1, col. 4.

67. Advertising Age, Jan. 15, 1962, p. 1, col. 4. For some time the industry had realized that some advertising claims had almost reached the point of no return, but it took television to underline the problem. The viewer is getting more discriminating; he has become a pretty good judge of the "atmosphere" and quality of a commercial and judges the advertiser's product by the caliber of the presentation. Viewers are wise about photographic trickery and pride themselves on being able to spot "phoneys." They are outspoken about extravagant claims and artificiality in all its forms in television commercials. Thus, principles of advertising would dictate that commercials must be more believable; demonstrations kept simple and honest; and camera tricks and special effects avoided. There should be no implausible or unlikely claims.

As early as 1954, one book on television advertising listed the areas where the commercial must change with the times. The move should be away from such things as over-use of optical tricks; obviously paid "testimonials"; extravagant claims not substantiated; too-perfect results with the product, obviously gained through film trickery. The move should be toward believability in honest claims; believability in demonstration of product; simple, useful information; better public relations building good will and loyalty. McMAHAN, *THE TELEVISION COMMERCIAL* 6, 20, 22, 23 (1954); BOGERT, *THE AGE OF TELEVISION* 200 (1956).

As one advertising executive puts it, "With product differences becoming less discernible, advertising's primary job should be to plug the company first and the product second. The people behind the product—the company, its skills, its services, its reliability and its delivery performance—must of necessity assume greater importance in the eyes of buyers." Howard G. Sawyer, Vice President of Marketing Services of Marsettler, Rickard, Gebhardt & Reed, Chicago, as quoted in Advertising Age, May 8, 1961, p. 24, col. 4.

Colgate opinion, and improved techniques have eliminated the necessity for many of the dubious visual practices once common.⁶⁸ The important point, however, is that the industry recognizes the *Colgate* opinion as establishing a standard by which it may govern itself in the future. It would thus appear that the Commission was successful, by means of a formal cease and desist proceedings, in providing a meaningful guidepost for the advertising industry in regard to false advertising.

INTERSTATE DISSEMINATION OF ADVERTISING: JURISDICTION WHICH MUST BE EARNED

Section 5(a)(1) of the Federal Trade Commission Act declares unlawful all "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ."¹ False advertising is recognized as an unfair method, act or practice within the meaning of section 5(a)(1).² In addition, section 12 of the Act specifically makes it unlawful to disseminate in commerce any false advertisement designed to induce the purchase of foods, drugs, devices, or cosmetics.³ If a false advertisement relates to other commodities, the FTC has historically exercised jurisdiction under section 5(a)(1) where the sale is in interstate commerce. For forty-six years after the passage of the Act, however, the FTC did not attempt to assert jurisdiction over false advertising for commodities other than those mentioned in section 12 where the dissemination was interstate but the *sale* was intrastate.

68. Advertising Age, Jan. 15, 1962, p. 20, col. 1.

1. 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1958), amending 38 Stat. 719 (1914). The FTC enforces this declaration by issuing cease and desist orders as provided under 15 U.S.C. § 45(6) (1958), and promoting voluntary compliance by a variety of techniques.

2. *Lighthouse Rug Co. v. FTC*, 35 F.2d 163, 164 (7th Cir. 1929); *Silver Co. v. FTC*, 289 F. 958 (6th Cir. 1923); *Guarantee Veterinary Co. v. FTC*, 285 F. 853, 857 (2d Cir. 1922); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 310 (7th Cir. 1919).

3. 52 Stat. 114 (1938), 15 U.S.C. § 52 (1958) provides:

- (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
 - (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
 - (2) By any means, for the purpose of inducing, or which is likely to induce, directly, or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.
- (b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 (section 5(a)(1)) of this title.