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W.H. Ramsay Lewis

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# INFOMERCIALS, DECEPTIVE ADVERTISING AND THE FEDERAL TRADE COMMISSION

## I. Introduction

"Infomercials"<sup>1</sup> are a new form of television advertising based on program-length, direct response marketing. A typical infomercial presentation takes the form of a half hour talk show program devoted exclusively to the product being marketed, accompanied by toll-free telephone numbers to order the product.<sup>2</sup> Often, the program is enhanced with celebrity guests, a studio audience and demonstrations of the product.

Recently, there has been growing concern among consumers, broadcasters and the Federal Trade Commission ("FTC" or "the Commission") that infomercials may be a form of deceptive advertising.<sup>3</sup> Complaints about infomercials range from objections to the hard sell tactics,<sup>4</sup> to the apprehension that products will not work for buyers at home as well as they have on television.<sup>5</sup> The greatest fear is that the public will mistake the paid advertisement with its paid endorsements and pre-arranged demonstrations for an actual, objective talk show.<sup>6</sup> These problems are further complicated by the talk-show magazine style format of the programs and current requirements of only minimal identification of the paid nature of the program. There is also a high likelihood that a rapidly spoken script or a briefly flashed disclaimer will fail to disclose all necessary information to the consumer. Despite these complaints, the FTC has only taken action against a few obviously deceptive advertisements. In addition, no guidelines or rules have been issued.

In order to understand this new and potent addition to the advertiser's arsenal, it is necessary to understand the nature of deceptive

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1. Generally, "[i]nfomercials" are "advertisements presented in the guise of a talk-show format." *FTC v. California Pacific Research, Inc.*, 1991-2 Trade Cases CCH ¶ 69,564 (D.C. Nev. 1991). Infomercials were first developed by corporations in efforts to expand into the cable TV markets, where air-time is generally cheaper thus allowing for longer advertisements. See *Investing in Cable TV: Only For The Super Rich*, UPI, Mar. 9, 1982, available in Lexis, Nexis library, UPI file.

2. For examples of infomercials, refer to the television guide under "paid programming". In any given week there are usually up to ten half hour infomercial segments per day.

3. See Joanne Lipman, *'Infomercial' Makers Try to Clean Up Act*, WALL ST. J., Mar. 4, 1991, at B3.

4. Mary Beth Grover, *Step Right Up Ladies and Gentlemen*, FORBES, Oct. 15, 1990, at 43.

5. *Id.*

6. *Id.*

television advertising as well as the powers of the public's watchdog, the FTC. Part II of this Note delves into the history and powers of the FTC. Part III examines the stance that the FTC has assumed regarding deceptive advertising. Part IV analyzes the new infomercial format. Part V applies FTC guidelines to the infomercial format and concludes that infomercials are precariously close to violating commonly held standards for deceptive advertising. As a form of deceptive advertising, infomercials must be altered to forewarn the unwary consumer, and Part VI proposes solutions for the infomercial industry to help prevent further deception.

## II. History of the FTC and Scope of Powers

### A. The Origins of FTC Powers

The FTC was originally established in 1914 by the Federal Trade Commission Act (the "Act").<sup>7</sup> The Commission was not formed to monitor advertising, but was established to enforce antitrust regulations in the wake of the judicial proclamation of the "rule of reason".<sup>8</sup> While the FTC was "seen as an agency to champion congressional antitrust concern," the Commission itself decided that its function was also to be the enforcer of honesty in advertising.<sup>9</sup> The terms of the Act specified that "unfair methods of competition are hereby declared unlawful."<sup>10</sup> The Commission construed the scope of these terms to include the responsibilities of preventing false advertising. Although the role of advertisement enforcer was not necessarily intended by Congress, the prevailing opinion is that it was "a fortuitous by-product" of the terms of the Act.<sup>11</sup> Thus, from the first cease and desist orders, the FTC pursued false advertising under authority of the Act.<sup>12</sup>

The courts, on the other hand, were not entirely persuaded that the Act granted unequivocal jurisdiction over false advertising. Because the Act specified that unfair "competition" was the standard for jurisdiction, the question arose whether injury to competition was a prerequisite to FTC action. In 1931, the Supreme Court faced the issue

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7. 15 U.S.C. § 41 (1992) (effective Sept. 26, 1914).

8. See *Standard Oil v. United States*, 221 U.S. 1, 60 (1911). The Antitrust Act of 1890 should be construed in the light of reason and as such prohibits all activities which amount to an unreasonable restraint on interstate trade.

9. GEORGE J. ALEXANDER, *HONESTY AND COMPETITION* 1 (1967).

10. 15 U.S.C. § 45 (1992).

11. EARL W. KINTNER, *A PRIMER ON THE LAW OF DECEPTIVE PRACTICES* 56 (1978).

12. The first orders were directed against false advertising. See ALEXANDER, *supra* note 9, at 1.

in *FTC v. Raladam Co.*<sup>13</sup> The Court held that proof of an adverse effect upon competition was a necessary prerequisite to any FTC action against false advertising, thereby stripping the FTC of much of its power.<sup>14</sup> Congress reacted by reinforcing the FTC's enforcement powers over false advertising claims with the Wheeler-Lea Amendments to the FTC Act.<sup>15</sup>

The Wheeler-Lea Amendments<sup>16</sup> changed the wording of the FTC's jurisdictional grant. Whereas the FTC could previously attack "unfair methods of competition,"<sup>17</sup> it was now granted authority to interdict "unfair or deceptive acts or practices in commerce."<sup>18</sup> The FTC could now "center its attention on the direct *protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor."<sup>19</sup> The Supreme Court, in *FTC v. Sperry & Hutchinson Co.*, construed the Amendments to provide power to the FTC to regulate deceptive advertising.<sup>20</sup> The Court held that section 5 of the FTC Act empowers the FTC to define unfair practices regardless of any actual violation of the letter of the law and regardless of any effect on competition.<sup>21</sup> In its quest for fairness in advertising, the Commission may, "like a court of equity, consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."<sup>22</sup>

The FTC's powers were further broadened in 1975 by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.<sup>23</sup> The Act confirmed the FTC's ability to promulgate rules and regulations concerning unfair and deceptive practices.<sup>24</sup> Additionally, the Act authorized the Commission to bring civil actions in federal court for certain violations of the rules, without any prior cease and desist orders.<sup>25</sup> The Commission can also bring civil actions on behalf of injured consumers. The breadth of the FTC's powers was also enhanced by further additions to section 5: "unfair methods of competition in *or affecting* commerce and unfair or deceptive acts or practices

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13. 283 U.S. 643 (1931).

14. *Id.* at 649.

15. Wheeler-Lea Act, Pub. L. No. 447, 52 Stat. 111 (1938).

16. *Id.*

17. 15 U.S.C. § 45 (1992).

18. Wheeler-Lea Act, Pub. L. No. 447.

19. *Pep Boys—Manny, Moe & Jack v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941).

20. 405 U.S. 233 (1972).

21. *Id.*

22. *Id.* at 244.

23. Pub. L. No. 93-637, 88 Stat. 2193 (1975).

24. H.R. CONF. REP. No. 1906, 93rd Cong., 2d Session 31 (1974).

25. Pub. L. No. 93-637, 88 Stat. 2193 (1975).

in or affecting commerce are hereby declared unlawful."<sup>26</sup> With this increase in the jurisdiction of the FTC to include even those practices which merely affect commerce, Congress granted the Commission the broadest of powers to deal with deceptive practices.<sup>27</sup>

## B. FTC Practice

The FTC may implement its goals by several methods. The most often employed tool is the cease and desist order obtained by hearing or consent decree. The order enjoins violative activity and prevents future violations. The only limit on the scope of the FTC's powers is that the relief must be reasonably related to the unlawful practices.<sup>28</sup> This limit is not burdensome however, and courts have upheld broad orders applicable to all products of one manufacturer, reasoning that a narrower order directed at only one product would simply permit the manufacturer to shift its deceptive practices to other items.<sup>29</sup> Orders restricting general methods of practice have also been upheld.<sup>30</sup> The Supreme Court has stated that the Commission "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."<sup>31</sup>

The Commission is also authorized to require affirmative disclosure to correct deceptive practices.<sup>32</sup> The FTC may require such disclosure "to protect customers from their own ignorance and improvidence."<sup>33</sup> For example, in *National Commission on Egg Nutrition v. FTC*, the Commission required conspicuously printed information regarding the correlation between cholesterol and heart disease if the egg industry printed its own interpretation of the correlation.<sup>34</sup> Sub-

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26. 15 U.S.C. § 45 (1992).

27. See *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The only limits are procedural.

28. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

29. *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 223 (2d Cir. 1976) (holding an FTC order applying to "all products" manufactured by defendant not to be overly broad).

30. *Consumer Prods. of Am., Inc. v. FTC*, 400 F.2d 930, 933 (3d Cir. 1968) (barring all methods of defendant's deceptive sale practices by FTC order).

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

32. *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967) (requiring the manufacturer of Geritol to disclose that claimed property of relieving tiredness would only occur if the symptom was caused by iron deficiency). See *Warner Lambert Co. v. FTC*, 86 F.T.C. 1398 (1975), modified and enforced, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

33. KINTNER, *supra* note 11, at 75.

34. 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

sequently, the courts "have accorded the Commission wide latitude in ordering advertisers to make disclosures which limit or counteract affirmative advertising claims."<sup>35</sup> However, there are some limits to this power. The Commission may not compel advertising for purely informational reasons.<sup>36</sup>

Similar to the affirmative disclosure power is the power to require deceivers to air remedial advertising. The FTC may force manufacturers to air new advertising in order to correct any residual beliefs the public may maintain, even after discontinuation of the deceptive practice.<sup>37</sup> For example, the FTC required the makers of Listerine mouthwash to advertise that the product did not prevent colds as had been advertised and believed by consumers for over a half century.<sup>38</sup> Similarly, the Commission required the STP Corporation to publish an "FTC Notice" in several national publications regarding FTC violations.<sup>39</sup> STP was required to spend \$200,000 on the advertising campaign.<sup>40</sup>

The FTC also has powers to help manufacturers avoid violations of the Act. The FTC often gives advisory opinions regarding specific activities.<sup>41</sup> Of a more general nature, since 1955, the FTC has created Trade Practice Guides pursuant to Trade Practice Conferences in order to establish nonviolative practices in many types of industry.<sup>42</sup> Accepted examples are the Guides Against Deceptive Pricing<sup>43</sup> and the Guides Against Bait Advertising.<sup>44</sup> Although the Guides are not binding in future litigation, they are generally followed as an indicator of the FTC's intentions.

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35. *American Home Prods. Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1983).

36. *Alberty v. FTC*, 182 F.2d 36, 38-39 (D.C. Cir.), *cert. denied*, 340 U.S. 818 (1950) ("The Commission is not given general charter to police the expenditure of the public's money or generally to do whatever is considered by it to be good and beneficial." The court held that the FTC acted beyond its powers). The opinion has been criticized heavily and radically limited. See *Warner Lambert*, 562 F.2d at 759.

37. See *Warner Lambert Co. v. FTC*, 86 F.T.C. 1398 (1975), *modified and enforced*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Grolier Inc. v. FTC*, 699 F.2d 983 (9th Cir.) (requiring mandatory disclosure to prospective book purchasers) *cert. denied*, 464 U.S. 891 (1983); *Encyclopedia, Inc. v. FTC*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980) (same).

38. *Warner Lambert Co. v. FTC*, 86 F.T.C. 1398 (1975), *modified and enforced*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

39. STP Corp., 3 Trade Reg. Rep. (CCH) ¶ 21,390 (1978).

40. *Id.*

41. William D. Dixon, *Federal Trade Commission Advisory Opinions*, 18 ADMIN. L. REV. 67 (1965).

42. See Sumner S. Kittelle & Elmer Mostow, *A Review of the Trade Practice Conferences of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 427 (1940).

43. 16 C.F.R. § 233 (1992).

44. 16 C.F.R. § 238 (1992).

The FTC issues binding guidelines in the form of the Trade Regulation Rules.<sup>45</sup> The FTC has authority to issue substantive rules which define unfair or deceptive acts or practices and which “may include requirements prescribed for the purpose of preventing such acts or practices.”<sup>46</sup> An example of the Trade Regulation Rules is the rule requiring a cooling-off period for door-to-door sales.<sup>47</sup> The power to bind many constituents engaged in many activities by one Rule is yet another formidable power held by the Commission. Furthermore, all FTC powers may be enforced by civil and criminal sanctions.<sup>48</sup>

### III. The FTC and Advertising

#### A. FTC Action Upon Advertising

The FTC is required to act “in the public interest.”<sup>49</sup> Although this requirement was once a possible defense against FTC attack, it has since been relaxed to such a degree that it is no longer a limitation on the Commission.<sup>50</sup> Generally, the Commission is considered the best judge of public interest when the interest is determined by public injury.<sup>51</sup> The Commission has declared sufficient “public interest” to take action upon a finding of only one dissatisfied customer, “before the customer suffered any more pecuniary loss than the price of a postage stamp.”<sup>52</sup> Another example of the FTC’s broad interpretation of the term “public interest” is found in *Book-of-the-Month Club, Inc.*<sup>53</sup> In that case, public interest was found where less than one percent of the club’s customers—only thirteen people—were affected by the deceptive use of the term “free.”<sup>54</sup> Thus, the FTC may act “in the public interest” when even the slightest number of the public is deceived.

After a finding of a need to act in the public interest, the FTC must find that the advertisement’s representation related to a material factor in the consumer’s decision to purchase. The FTC may infer this

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45. *E.g.*, 15 U.S.C. § 57(a), 88 Stat. 2193.

46. *Id.*

47. 16 C.F.R. § 429.1 (1992).

48. 15 U.S.C. § 50, § 54.

49. 15 U.S.C. § 45(b).

50. *Bear Hill Mfg. Co. v. FTC*, 89 F.2d 67, 68 (2d Cir. 1938) (holding the likelihood of injury to the public to be a sufficient public interest).

51. *See Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961).

52. *Id.* at 873.

53. 48 F.T.C. 1297 (1952), *enforced*, 202 F.2d 486 (2d Cir.), *cert. dismissed*, 346 U.S. 883 (1953).

54. *Id.*

materiality of deception,<sup>55</sup> and as with the involvement of public interest, the requirement has been relaxed. The FTC has inferred material deception based on subjective interpretations of the consumer's expectations.<sup>56</sup> For example, in *Leonard F. Porter Inc.*, the FTC inferred the materiality of representations regarding the origins of manufactured souvenirs which were identical to native Alaskan, handcrafted souvenirs.<sup>57</sup> Materiality existed because any misrepresentation as to the superior native Alaskan origin was likely to induce purchase.<sup>58</sup> Even subjective interpretations of emotional responses to advertising may support materiality.<sup>59</sup> In *Book-of-the-Month Club, Inc.*, the materiality of the deception was based on the emotional, avaricious response to the term "free", rather than on any objective response which could be interpreted rationally.<sup>60</sup>

Not only may subjectivity play a role in determining deception, but there is no requirement that someone actually be deceived. A mere tendency to deceive is sufficient to mandate FTC interdiction.<sup>61</sup> Stated one court: "it is not necessary . . . to find that actual deception resulted. It is sufficient to find that the natural and probable result of the challenged practice is to cause one to do that which he would not otherwise do."<sup>62</sup> In this area, the FTC is given complete leeway. Facts evidencing actual deception of the public need not be shown by the FTC.<sup>63</sup> Representations merely having a "capacity to deceive" are unlawful.<sup>64</sup> The only exception to the rule is an allowance for good old-fashioned sales "puffing".<sup>65</sup>

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55. *FTC v. Colgate Palmolive Co.*, 380 U.S. 374 (1965).

56. *Id.* at 391.

57. 88 F.T.C. 546 (1976).

58. *Id.* at 628.

59. It is the reaction of the group to whom the advertisement is directed that is dispositive of the issue. *American Home Prods. v. Johnson & Johnson*, 577 F.2d 160, 165-66 (2d Cir. 1978).

60. 48 F.T.C. 1297 (1952).

61. *Trans World Accounts, Inc. v. FTC* 594 F.2d 212, 214 (9th Cir. 1979).

62. *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943) (*citing* *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158 (3d Cir. 1941)); *Brown Fence & Wire v. FTC*, 64 F.2d 934 (6th Cir. 1933).

63. *See* *Doherty, Clifford, Steers & Shenfield v. FTC* 392 F.2d 921, 925 (6th Cir. 1968) ("The Commission is permitted to draw reasonable inferences from the evidence and its findings are conclusive if supported by substantial evidence"). *See also* *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

64. *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944) (FTC produced no deceived consumers as witnesses). *See also* *FTC v. Colgate-Palmolive*, 380 U.S. 374, 391-92 (1965) (finding that a public survey is not needed to determine that the ad may mislead).

65. *Ostermooer & Co. v. FTC*, 16 F.2d 962 (2d Cir. 1927) (holding mattress filling expanded out of opened end was proper puffing); *Kidder Oil Co. v. FTC*, 117 F.2d 892



Thus, the FTC may restrain practices which might only deceive the most credulous consumers.<sup>66</sup> Regardless, the Commission need not prove the existence of these gullible people. The courts have upheld the validity of this goal.<sup>67</sup> Hence, the FTC is the guardian of the ignorant, unthinking and credulous,<sup>68</sup> the defender of "Mortimer Snerds"<sup>69</sup> and the protector of "wayfaring men, though fools."<sup>70</sup> This victim of deception may not read all that he should, and may merely grab a general impression.<sup>71</sup> He has a very short attention span.<sup>72</sup> This is not a reasonable man.<sup>73</sup> Because of the hypothetical ignorance of those the FTC seeks to protect, a potential deceiver cannot claim the defense that any person in his or her right mind would not be deceived by the advertisement.<sup>74</sup> This argument has been rejected by the FTC as without merit.<sup>75</sup> The important criterion is the net impression which the advertisement makes to the public, and while some may realize the falsity of the claims, there are others who will not; the FTC may insist on "the most literal truthfulness in advertisements" for that very reason.<sup>76</sup> "Laws are made to protect the trusting as well as the suspicious."<sup>77</sup>

The standard set by the FTC is so high that it is often impossible to overcome, even if the advertisement is truthful, or is believed to be truthful. Literal truthfulness of the advertisement is not enough to

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(7th Cir. 1941) (holding motor oil described as "perfect" is proper puffing). *But see* FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937) (concluding that a representation that an encyclopedia was free, even though it required a ten year extension service costing the same price as the encyclopedia, is not reasonable puffing).

66. *See* Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961) (FTC must protect the least sophisticated reader).

67. *Standard Oil Co. of California v. FTC* 577 F.2d 653, 657 (9th Cir. 1978).

68. *Id.*

69. *Independent Directory Corp.*, 47 F.T.C. 13, 31 (1950) (Commissioner L.B. Mason, dissenting).

70. *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940), *cert. denied*, 312 U.S. 682 (1941) (Judge Augustus Hand stated that the FTC may protect those of whom the prophet Isaiah spoke: "the wayfaring men, though fools, shall not err therein").

71. *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied*, 423 U.S. 827 (1975).

72. *Book of the Month Club, Inc.*, 48 F.T.C., 1297 (1952). This is a particular disadvantage when watching TV.

73. WILLIAM PROSSER, *TORTS* 738 (3d ed. 1964). The reasonable man is skeptical.

74. *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944). *See also* *Gelb v. FTC*, 144 F.2d 580, 583 (2d Cir. 1944) (J. Clark, dissenting) (the argument is "a defense repudiated every time it has been offered on appellate review").

75. 143 F.2d 676; 144 F.2d 580.

76. 143 F.2d 676; 144 F.2d 580.

77. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

escape FTC scrutiny and a finding of illegality in some instances.<sup>78</sup>

A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation. . . . The buying public does not weigh each word in an advertisement or representation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser.<sup>79</sup>

Furthermore, knowledge that the ad is false is unimportant to a determination of illegality.<sup>80</sup> This is because no benefits from the misrepresentation may be maintained by the deceiver, no matter how innocent the misrepresentation.<sup>81</sup> Thus, the overall impression of the ad is just as important to a determination of deceptive representation as the individual words, regardless of the intentions and beliefs of the perpetrator of the deception.<sup>82</sup>

The FTC has also looked at the message as a whole when an advertisement has communicated meaning by ambiguity and innuendo rather than by the words' actual meanings. Therefore, an ad laden with innuendo which can be read between the lines may be just as deceptive as one with expressly deceptive terms.<sup>83</sup> Ambiguity may also constitute deception. The prohibition against ambiguity is exemplified by the Commission's attacks on the word "cure" and substitution of "relief" as more appropriate.<sup>84</sup> When there is no known cure for an ailment, pharmaceutical firms may not say that their product is such, but they *may* claim their product offers relief.<sup>85</sup> Similarly, in *Gelb v. FTC*, the FTC barred Clairol from describing a new hair dye as "permanent."<sup>86</sup> The deception lies in both the product's inability to alter the color of new hair as it grows, as well as the product's inability to dye hair permanently. One witness testified that although the ad said the product was permanent, she knew that this did not mean she would never have to use a dye again.<sup>87</sup> The FTC, invoking

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78. *Kalwajty v. FTC*, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

79. *Id.* at 656.

80. *D.D.D. Corp. v. FTC*, 125 F.2d 679, 682 (7th Cir. 1942).

81. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

82. *See Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942).

83. *Personal Drug Co.*, 50 F.T.C. 828 (1954) (advertising abortifacient by innuendo).

84. *See Walker Medicine Co. v. FTC*, 18 F.T.C. 16 (1933); *Warner Lambert Co. v. FTC*, 86 F.T.C. 1398 (1975), *modified and enforced*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

85. *Id.*

86. 144 F.2d 580, 582 (2d Cir. 1944).

87. *Id.* at 582.

its duty under *Standard Education*<sup>88</sup> to protect the ignorant as well as the skeptical, held that because the advertisement was ambiguous, it was also deceptive.<sup>89</sup> The FTC therefore will act in the public interest to stop material deception, ambiguity, innuendo and other statements which may deceive even if only the most ignorant would be deceived.<sup>90</sup>

The FTC is also empowered by section 5 of the Federal Trade Commission Act to proceed against "unfair" practices.<sup>91</sup> In recent years, the FTC has broadened the scope of its power under the unfairness provision of section 5.<sup>92</sup> An activity may be found to be unfair pursuant to section 5 if: "(1) . . . the practice, without necessarily having been . . . considered unlawful, offends public policy as it has been established by statutes, the common law, . . . or other established concept of unfairness; (2) . . . it is immoral, unethical, oppressive, or unscrupulous; [and] (3) . . . it causes substantial injury. . . ."<sup>93</sup> If a suspect activity oversteps these parameters, the activity may violate the section 5 ban on unfairness, even though deception is not involved. The FTC, therefore, is vested with broad discretion to attack new and innovative practices which are not proscribed by statute or common law.<sup>94</sup> This power overlaps and extends FTC power beyond the interception of deceptive acts to include those acts which are purely unfair to the consumer.

With the many restrictions placed on advertisers by the FTC, these advertisers are faced with the task of presenting honest and understandable information supported by concrete evidence. The Commission will seek to protect even the most ignorant and credulous consumer, so the advertiser must be extremely cautious as to the meaning of his message. Literal truth and belief in the truth of the claim do not affect the Commission's determination of the illegality of the ad. Furthermore, double meaning, no matter how remote, may create illegality. These tenets apply to the realm of television advertising with equal force, although that medium has also presented the Commission with unique problems.

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88. 302 U.S. 112 (1937).

89. 144 F.2d at 582.

90. See *supra* notes 66-77.

91. 15 U.S.C. § 45(b).

92. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

93. *Id.* at 244-45 n.5.

94. *All State Industries*, 75 F.T.C. 465 (1969), *enforced*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

## B. FTC Action Upon Television Advertising

With the presence of televisions in almost every home in America, the television advertisement is an especially powerful tool in the hands of marketers.<sup>95</sup> The vast impact of TV advertisements, combined with the heightened possibility of misrepresentation because of the audio-visual nature of the medium, incite the special concern of the FTC. In particular, the Commission has required, as in other forms of advertising, that the representations in television ads equal the message to be conveyed about the product.<sup>96</sup> For example, to demonstrate the invisible protection of a toothpaste, an announcer stood behind a plastic shield while a tennis ball was thrown at him which bounced off harmlessly.<sup>97</sup> The demonstration was found to be deceptive because such complete protection as was implied by the demonstration was impossible.<sup>98</sup> The FTC concluded that the representation therefore conveyed a message that was not true.<sup>99</sup>

Similarly, when the Ford Motor Company, in a comparison to highway guard rails, demonstrated the strength of guard rails on a Ford LTD by lifting the car by its rails with a crane, the Commission found the ad to be deceptive.<sup>100</sup> The Commission reasoned that the highway rails have horizontal strength, whereas the car's rails have vertical strength, therefore the comparison and demonstration were inapposite and deceptive.<sup>101</sup> If the demonstration does not show anything at all, the ad will be deceptive as well. In another Ford case, a car was shown to be less noisy than riding in a glider. The Commission halted the ad, finding that neither was actually very quiet and the comparison only proved that the car was the quieter of the two.<sup>102</sup> Thus, the representations made by demonstrations on television advertisements must actually and accurately reflect the capabilities of the claim to be proved.

This requirement has led to problems specific to the creation of TV ads which often entail the use of mock-ups.<sup>103</sup> Mock-ups are necessary when making television advertisements because of the problem-

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95. See *infra* note 170.

96. Colgate-Palmolive Co., 58 F.T.C. 422 (1961).

97. *Id.*

98. *Id.*

99. *Id.* at 431.

100. Ford Motor Co., 84 F.T.C. 729, 731 (1974), *aff'd*, 547 F.2d 954 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977).

101. *Id.* at 732.

102. *Id.* at 733.

103. See Note, *Illusion or Deception: The Use of "Props" and "Mock-Ups" in Television Advertising*, 72 YALE L.J. 145 (1962). See generally VANCE PACKARD, *THE HIDDEN PERSUADERS* (1975).

atic nature of the video medium. For example, mashed potatoes must be substituted for ice cream because of the hot lights used on the sets, soap is added to beer to give it froth and glycerine is sprayed on soda cans to create a frosty appearance. Similarly, special lighting may be necessary to create correct color on video. However, the FTC has determined that there are limits to what advertisement producers may mock-up.<sup>104</sup> One infamous example of an improper mock-up involved Campbell's mock-up of its soup.<sup>105</sup> Marbles were added to the bowl of soup in the commercial to make it appear more filled with solids, which would normally sink. Campbell's agreed in a consent order to stop showing the deceptive ad.<sup>106</sup>

The Supreme Court dealt with the mock-up issue in *Colgate Palmolive Co. v. FTC*.<sup>107</sup> Colgate's commercial depicted a shaving cream which was so moist that after application, a razor could shave sand off sandpaper.<sup>108</sup> The FTC claimed that the ad was deceptive because the feat would actually require several minutes soaking.<sup>109</sup> Furthermore, the ad was accomplished by mock-up with sand sprinkled on plexiglass because the producers said real sandpaper would only look like plain paper.<sup>110</sup> The Court held that such actions were deceptive misrepresentations regardless of the product's capabilities to perform the feat because the use of a mock-up alone will dupe an unknowing public.<sup>111</sup> Thus, the TV ad maker may not use mock-ups and must be especially careful that a product demonstration is exactly that, an actual demonstration.<sup>112</sup> All of these FTC standards are equally applicable to the new infomercial genre.

#### IV. Infomercials

Infomercials, or "paid programming," are the latest twist in advertising and represent another way in which advertisers have managed to package their messages. The infomercial format was developed as

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104. *FTC v. Colgate Palmolive Co.*, 380 U.S. 374 (1965).

105. *Campbell Soup Co.*, 77 F.T.C. 664 (1970).

106. *Id.* at 676.

107. 380 U.S. 374 (1965).

108. *Id.* at 376.

109. *Id.*

110. *Id.* at 376-77.

111. *Id.* at 377.

112. Needless to say *Colgate-Palmolive* was met with hatred by ad makers. As one stated, "with this precedent upheld by the courts, *creative* advertising, *imaginative* advertising, *mind-stimulating* advertising, is gone for good." *Printer's Ink*, Feb. 2, 1962, at 57, cited in *A New Antitoxin to Advertising Artifice-Television Advertising and the Federal Trade Commission*, 37 NOTRE DAME L. REV. 524 (1962). However, infomercials have proved this self-depreciating ad man wrong.

a method of creating an audience for half hour commercials. While no one would knowingly sit down and watch a half hour commercial, advertisers ingeniously realized that the public would watch a half hour commercial masquerading as a talk show. Advertisers also realized the tremendous financial savings to be made by purchasing half hour blocks of late night time as compared to thirty second prime time slots.<sup>113</sup> Although they are a practical and innovative method of advertising, infomercials "have been regarded as a seamy underside of the advertising business."<sup>114</sup> Even television stations have grown to dislike the format which has substantially bolstered their own revenues.<sup>115</sup> Ironically, ninety percent of the same independent stations that do not approve of the format, carry infomercial programming, and it is considered a growing trend.<sup>116</sup>

Examples of the infomercial species can be found on TV at almost any time, but they are more prevalent late at night.<sup>117</sup> Among some of the products promoted are miracle diets,<sup>118</sup> balding cures,<sup>119</sup> makeup,<sup>120</sup> car wax,<sup>121</sup> tooth whiteners,<sup>122</sup> high-fiber diet cookies,<sup>123</sup> stain removers,<sup>124</sup> exercise machines<sup>125</sup> and a cellulite-reducing seaweed gel.<sup>126</sup> The miracle product is typically given center stage throughout the program. Because the show is often modelled after a talk show, the "host" gives demonstrations of the product with the "guests", all to the clapping and cheering of the audience.<sup>127</sup> Usually, the product is endorsed by people and celebrities who report that they

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113. *Advertising's Amazing Discovery*, L.A. TIMES, Mar. 18, 1991, TV Times, at 13.

114. Joanne Lipman, *'Infomercial' Makers Try to Clean Up Act*, WALL ST. J., Mar. 4, 1991, at B3.

115. Steve Brennan, *Stations Accused of Selling Out to Lure of Infomercial Revenue*, HOLLYWOOD REPORTER, Jan. 16, 1991, at 4. National Association of Television Program Executives hold seminar entitled "Paid Programming: The Money We Hate To Make".

116. *Id.*

117. Examples can be found in the TV guide listed as "paid programming".

118. *Weight-Reduction Plan Marketers Resolve FTC Deception Allegations*, Antitrust & Trade Reg. Rep. (BNA), Oct. 31, 1991, at 546.

119. Mark Gill, *Splitting Hairs*, L.A. TIMES, Nov. 10, 1991, Magazine, at 19.

120. Sharon Edelson, *Switching Channels; Cosmetics and Beauty Product Infomercials*, WOMAN'S WEAR DAILY, Nov. 1, 1991, at 14.

121. Gary Straus, *Infomercial Firm Bouncing Back*, USA TODAY, Aug. 6, 1991, Money, at 8.

122. *Id.*

123. Barbara Woller, *Infomercials Draw Regular Attention*, GANNET NEWS SERVICE, Feb. 15, 1991.

124. *Id.*

125. *Id.*

126. Paul M. Alberta, *Synchrional Hit with FTC Action*, DM NEWS, Nov. 4, 1991, at 3.

127. Richard Zoglin, *Its Amazing. Call Now*, TIME MAG., June 17, 1991, Video, at 71.

have used the product with complete success.<sup>128</sup> The infomercial format emulates typical talk shows in every possible manner.

Other features of the infomercial add to the appearance of an actual talk show. The infomercial, an advertisement itself, takes regular breaks throughout the show for "advertisements". Often, these are advertisements for the same product featured in the infomercial accompanied by the purchase information for the product. In one version of the infomercial show *Amazing Breakthroughs*, the "commercial" breaks were comprised of sections of the rest of the show spliced together with narration and the purchase information. The consumer sees an advertisement within an advertisement, all pitching the same product in a self-referencing circle. Another feature of infomercials which adds to the appearance of an actual talk show is the running of credits at the end of the show. Typical commercial advertisements do not have credits which would waste precious and expensive air time.

There are several problems with the format as it now exists, some novel, and some as old as advertising itself. Foremost, is whether the product is a legitimate product in the first place. Cures for impotence and hair loss and a miracle diet have been enjoined altogether.<sup>129</sup> Said the director of the FTC's Bureau of Consumer Protection: "There's nothing unique about infomercials . . . it's the same people who have been con artists for [sixty] years taking advantage of a new medium."<sup>130</sup> Another primary concern related to whether the product will work at all is whether it will work for the purchaser as well as it has for the endorsers on the show. There is also the concern regarding full disclosure to the consumer. The viewer may miss information that is rapidly spoken or flashed on the screen. Further complaints have been aired concerning the hard-sell tactics of the shows, and the misleading statements of the often paid endorsers.<sup>131</sup> All of these problems are compounded by the format in which they are presented. If the shows were not stylized so conspicuously like talk shows, the viewers would probably not be as prone to misinterpret the information presented.

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128. *Id.*

129. *In re Twin Star Prods., Inc.*, No. C 3307 (FTC Oct. 2, 1990) (decision and order). See *FTC v. California Pacific Research Inc.*, No. CV-N-88-602, 1991 U.S. Dist. LEXIS 12967 at \*14 (N.D. Nev. Aug. 27, 1991).

130. Barbara Woller, *This ad brought to you by . . .*, GANNETT WESTCHESTER NEWSPAPERS, Feb. 11, 1991, at C3.

131. This author was told by an FTC spokesperson that all of these problems and complaints about infomercials have been voiced to the FTC by consumers and congressmen alike.

In reaction to the press that has recently surrounded the infomercial format,<sup>132</sup> the producers of infomercials have formed the National Infomercial Marketing Association ("NIMA" or "Association") to address some of the problems with the format.<sup>133</sup> The Association guidelines suggest that infomercials should both tell the truth and identify themselves.<sup>134</sup> The proposed guidelines require that infomercials be identified as paid advertising at the beginning and end of programs, and whenever an 800-telephone number is flashed on the screen.<sup>135</sup> However, this attempt at self regulation is no more than adherence to recent FTC decisions regarding certain infomercials.<sup>136</sup> Although NIMA proposes to require NIMA-certified programs to comply with their formats, the only power of compliance they can effect would be expulsion from the Association, and notification of the FTC.<sup>137</sup> Despite actual impotence to handle the problem, NIMA claims that "the objective is to weed out the unscrupulous producers of infomercials whose only ability to sell products comes from deceptive claims."<sup>138</sup> However, it is clear that the problems with the format are substantial enough that there is a need for FTC intervention despite NIMA's efforts. Infomercials must be brought into compliance with the FTC guidelines that have already been shaped by prior decisions regarding standard forms of television advertisements.

### V. Application of FTC Standards to Infomercials

Given the various FTC decisions regarding television advertising mentioned in Part III, *supra*, and the description of infomercials in Part IV, *supra*, one can come to several conclusions about the issues involved in the current trend towards infomercial marketing. Although the FTC has only acted against certain violators,<sup>139</sup> the inescapable conclusion is that if infomercials are not actually deceptive,

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132. Stephen Barlas, *Infomercial Makers Form Group*, DM NEWS, Aug. 6, 1990, at 7.

133. *Id.*

134. Cheryl Wetzstein, *Ad-Show Makers Set Ethics Standards*, WASH. TIMES, Mar. 4, 1991, at B5.

135. *Id.*

136. Specifically, identification at the beginning and end of the program was required in *In re Twin Star Prods., Inc.*, No. C 3307, at 9 (FTC Oct. 2, 1990) (decision and order).

137. Said a NIMA spokesperson on NBC News, *A Closer Look*, Mar. 19, 1991. Indeed, a spokesperson for Rep. Norman Sisisky (D., Va.), a major advocate of infomercial restriction, said that although they are a good thing, "those guidelines can't really be enforced." WALL ST. J., Mar. 4, 1991, at B3.

138. WALL ST. J., Mar. 4, 1991, at B3.

139. To date, the FTC has taken a case by case approach to infomercials. Sherri Vazano, *TV Ads Policing Own Act*, CHI. TRIB., Nov. 23, 1990, Business, at 1.



they come extremely close to violating established standards for deceptive and unfair practices.

At the outset, the need for FTC action is present. As mentioned above, the public interest standard is a broad one,<sup>140</sup> and the FTC may intercept offenders when there is even one dissatisfied customer. Public interest is undeniably present as evidenced by the vast amount of negative press that has ensued from complaints already voiced about the infomercials.<sup>141</sup> Furthermore, there are bound to be dissatisfied customers in the public given the broad reach of the medium and the apparent success of the businesses involved in infomercial marketing.

The second issue in any determination of whether advertising is deceptive is the materiality of any deception to the consumers' decision to purchase the item advertised. Under the holdings in such cases as *Leonard F. Porter Inc.*,<sup>142</sup> the FTC may infer the materiality of deception. In the case of infomercials, materiality will be apparent in most cases. Infomercials are specifically designed to induce consumers to purchase the products showcased. It stands to reason that any deception that occurs will be material to a viewer's decision to purchase the item featured in the commercial.

Finally, infomercials are deceptive by design. Probably the most objectionable aspect of the infomercial format is the similarity of the commercial to actual objective programming. This similarity exemplifies a tendency to deceive which the FTC has acted against in other forms of advertising.<sup>143</sup> The FTC need not search the public for deceived consumers, it is enough that the probable result will be deception.<sup>144</sup> Presently, when a viewer tunes into an infomercial, he will probably not know whether the show is a paid commercial, unless he has seen the very beginning, or waits until the very end.<sup>145</sup> This is unlikely, however, given the prevalence of remote control channel

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140. See *supra* Part III.A. See also *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977). Public interest found from national broadcast of car ads and national interest in fuel economy.

141. Mary Beth Grover, *Step Right Up Ladies and Gentlemen*, FORBES, Oct. 15, 1990; Barbara Woller, *This ad brought to you by . . .*, GANNETT WESTCHESTER NEWSPAPERS, Feb. 11, 1991, at C3; Richard Zoglin, *It's Amazing, Call Now*, TIME MAG., June 17, 1991, Video, at 71.

142. 88 F.T.C. 546, 628 (1976). See *supra* notes 57-58.

143. See *supra* Part III.A. See also *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985). FTC need not take a survey to find public interest. *Id.*

144. *Bockenstette v. FTC*, 134 F.2d 369 (10th Cir. 1943); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944).

145. Stuart Elliot, *Chameleon Ads Mimic TV*, USA TODAY, June 12, 1989, Money, at 5B.

switching.<sup>146</sup> If the viewer does not know what the show is, the probable deception lies in the belief that the program is actual, rather than paid.

Every feature of the infomercial format is geared towards enhancing the possibility that the viewer will be deceived.<sup>147</sup> The methods incorporated by the producers betray this intent. The magazine style of the infomercial tends to deceive because only actual programs were formerly presented in such a style. The running of credits at the end of the show tends to deceive because advertisements have not previously given credits, whereas actual programming does. It is rarely clear whether the audience and endorsers are paid, further enhancing the tendency to deceive.<sup>148</sup> Another significant aspect of the infomercial format's tendency to deceive is the use of commercial-type "breaks" during the program. This feature, which is entirely novel, is obviously an attempt to make the infomercial seem more like a regular show. A viewer may not suspect such an unnecessary, and therefore unscrupulous, tactic. The very difference between the infomercial talk-show style and the "fake" commercial's traditional commercial style adds to an overwhelming tendency to deceive. In addition, since infomercials are advertisements in themselves, they must adhere to FTC requirements that the representations made on the show equal the actual capabilities of the product.<sup>149</sup> However, some infomercials have such unbelievable demonstrations, they may not even satisfy that requirement.

As has been voiced by many courts, the FTC and the law are established to protect the ignorant as well as the savvy.<sup>150</sup> Some infomercial producers have claimed the oft-tried defense that no person of ordinary intelligence would be fooled by an infomercial into thinking it was an actual talk show. They claim that American television viewers are so sophisticated that they comprehend the origin and value of every second of every program they watch.<sup>151</sup> This argument however is not a defense to FTC action. The overall impression that

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146. *Id.*

147. *See* Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 n.11 (9th Cir. 1989) ("Advertisements having the capacity to deceive are deceptive within the meaning of the FTCA; actual deception need not be shown.").

148. *See* FTC v. Inecto, Inc., 16 F.T.C. 198, 225 (2d Cir. 1935) (enjoining advertisement with paid endorsers which implied otherwise). This policy has also been incorporated into the FTC Guides on the Use of Endorsements and Testimonials in Advertising.

149. *See supra* Part III.B.

150. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944). *See supra* notes 66-77.

151. This was the statement of a NIMA spokesperson on NBC News, *A Closer Look*, Mar. 19, 1991.

the infomercial makes is that it is a talk show: the deception lies in this alone, regardless of however many people realize that it is not.<sup>152</sup> The format has attracted so much attention already because even the majority of sophisticated TV viewers have been deceived upon first encountering the genre.<sup>153</sup>

Even though infomercials may be within the letter of the law as the format does not violate any Trade Regulation Rule and there is no explicit law which prevents their production,<sup>154</sup> they may still violate the section 5 prohibition against deception. As mentioned above, the overall impression created by the advertisement is what is to be tested.<sup>155</sup> The overall impression of infomercials may fail section 5 because, as has been demonstrated, they have a strong tendency to deceive even sophisticated viewers into believing they are watching an objective show. Thus, the ambiguity inherent in the format alone may be enough to violate FTC standards, regardless of what is actually depicted in the infomercial. The format is ambiguous primarily because the viewer is left unsure as to whether it is a commercial or a program, and secondarily because even if the viewer knows it is a commercial he may read into the program the objective qualities he believes should be part of any show that looks so much like an objective show. In other words, the viewers may fool themselves into adding a believable quality to the show, even if the show is known to be an advertisement. Again, deception is highly likely.

Even if the format is not a deceptive practice, infomercials may be an unfair act or practice, regardless of the possibility for deception.<sup>156</sup> The application of the FTC's three prong test for unfairness demonstrates the infomercial's violation of section 5.<sup>157</sup> Deception of the type prevalent in infomercials offends public policy as delineated in common law, thereby violating the first prong.<sup>158</sup> Infomercials make the false representation that they are objective, a representation which the producers know to be incorrect, and which consumers rely on when making purchases.<sup>159</sup> Furthermore, the infomercial violates the

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152. *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963) ("The Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial").

153. Indeed, this writer was fooled the first time he saw one. Of course, this may or may not support the argument that they have a strong tendency to deceive.

154. *See supra* note 138. The FTC has not acted against the format, only against individual ads which would fail for other reasons regardless of format.

155. *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963).

156. *See supra* notes 91-94.

157. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

158. *See WILLIAM PROSSER, TORTS* § 105, at 685 (4th ed. 1971).

159. *See Jones v. West Side Buick Auto Co.*, 93 S.W.2d 1083 (1936) (finding misrepre-

second prong because it is unscrupulous and unethical to make a viewer believe, by the employment of all the style and characteristics of objective talk shows, that he is watching an objective talk show, when he is not. Thus, the second prong is satisfied.<sup>160</sup> Finding the substantial injury, and therefore the public interest which is necessary to complete the tripartite test, is not difficult.<sup>161</sup> The consumer who purchases as a result of the violations of the first two prongs is injured in the amount of whatever money he has spent, while under the impression that he was watching a regular TV show.

Infomercial producers are not being careful to present the clearest form of advertisement that they can. It should be recognized that clarity was never their intention. The only way to get people to watch a thirty minute commercial is to make the commercial as much like a real show as possible. Infomercials do just that; they imitate real television programming, something which they are not. The FTC has found violations of the Act by far more cautious advertisers.

Thus, the application of the FTC standards developed by case law to infomercials as they are currently presented, establishes that infomercials are either deceptive or unfair and thus should be curtailed.

## VI. Conclusion

Given the current tendencies of infomercial programming to deceive the unwary consumer, what are the actions that the FTC can take to resolve the problem? Probably the simplest way of dealing with the problem would be for the FTC to require infomercials to identify themselves as paid advertisements *at all times*.<sup>162</sup> The identification can be done by a small notice, icon or symbol, appearing throughout the infomercial.<sup>163</sup> Such an identification would alert the viewer to the fact that he or she is watching a paid advertisement, and not an objective talk show. The ad-icon should be superimposed upon

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sentation where a used car dealer turned back odometer before sale). Infomercials are a similar case. The representation that the infomercial is objective is a similar "non-representation" which is in current industry-wide use. It is false, material, and present to any buyer of infomercial merchandise. The infomercial marketers know the falsity of the deception and intend it. Finally, the viewer may reasonably rely on the appearance of the show as an objective talk show. He will be injured by the amount he has spent on the reliance.

160. See *supra* text accompanying note 93.

161. See *supra* notes 49-54 and accompanying text.

162. Consumer advocate David Horowitz has also suggested a continuous disclaimer for infomercials. NBC News, *A Closer Look*, Mar. 19, 1991.

163. This practice is already in use by a major music video channel, VH-1, which identifies itself by a small clear label in the bottom right hand corner of the screen. For lack of a better term for such a symbol, it is referred to herein as an "ad-icon" or "icon".

a corner of the television screen at all times so that those who do not see the very beginning, or end, of the infomercial will know that they are watching paid programming. This type of identification is already used in newspapers when a lengthy article-style advertisement incorporates the same typeset as the paper. Newspapers put "Paid Advertisement" at the top of the page to distinguish the ad from their own articles. Once the consumer is informed that what he or she is watching is a paid commercial, the possible violation of FTC law vanishes.

Infomercial producers will surely protest such a minor requirement as a burdensome "scarlet letter".<sup>164</sup> However, given the scope of the present deception, the remedy requiring affirmative disclosure by such a noninterfering method is hardly a scarlet letter. An ad-icon's placement on the screen would not detract from the potency of the advertisement. Nor would the icon distract from the viewing of the infomercial because of its permanent placement on the screen for the duration of the commercial. Such an icon would be appropriate and functional, without hindering the ability of the advertisement to accomplish its function: to advertise. The fears of advertisers that it subjects them to a tattoo or scarlet letter is only a function of their desire to maintain the appearance of an actual show, and thereby maintain their deception of the public. It is definitely not beyond the powers of the FTC to halt this kind of activity.<sup>165</sup> Indeed, it is the Commission's *raison d'être*.

Clearly, the FTC has the power to prescribe such a remedy under "affirmative disclosure" cases such as *Warner Lambert*.<sup>166</sup> This is exactly the type of deception that requires affirmative notice from the advertiser in order to prevent deception of the viewer. Furthermore, a simple ad-icon could be most easily accomplished by a Trade Regulation Rule binding all infomercial producers to adhere to nondeceptive practices. Although a single consent order might be enough to make NIMA members follow certain practices, as has been mentioned, NIMA cannot enforce any guidelines they espouse. Furthermore, there is always the probability that those producers who are not mem-

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164. In Nathaniel Hawthorne's *The Scarlet Letter*, Hester Prynne must wear a red letter "A" as punishment for being an adulteress. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bantam Books 1986) (1850). Certainly, if one chooses an "A" as the universal icon for advertisement, the analogy is hardly stretched. See *Invasion of the Infomercials*, N.Y. *NEWSDAY*, July 23, 1989, at 6 (rejecting proposed icon).

165. See *supra* Part II.

166. See *supra* Part II, note 38 and accompanying text. In *Warner Lambert*, the FTC required disclosure that Listerine does not cure colds, as well as a cessation of the advertising that it did cure colds. *Warner Lambert Co. v. FTC*, 86 F.T.C. 1398 (1975), *modified and enforced*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

bers of NIMA will continue to deceive by refusing to use an ad-icon. A Trade Guide would also be insufficient because it is also not binding.<sup>167</sup> A Trade Regulation Rule is therefore the most appropriate method of reaching all those involved in the industry, and of dealing with the problem in a permanent and universal manner.

Because of the existing deception and the explosive growth of the infomercial industry, the FTC should act now.<sup>168</sup> Although it is claimed that more prominent corporations are interested in the medium,<sup>169</sup> the fact that larger and more sophisticated corporations are getting involved does not mean that viewer deception would suddenly cease.<sup>170</sup> Furthermore, the bigger budgets of the larger corporations may increase the ability of the producers to accomplish their goal of duplicating real talk shows, thereby increasing the tendency to deceive.

Another reason the FTC should act is because of the vast power of the television medium. The many cases that have been tried against TV advertisers are testament to the scrutiny with which the FTC has previously investigated television advertising.<sup>171</sup> Since the TV quiz show scandals of the 1950s<sup>172</sup> the FTC has sworn: "[a]ny advertising of doubtful integrity will be investigated on a priority basis, with the scope of the investigation to reach all those responsible for the deception."<sup>173</sup> If this is indeed true, the FTC should not let its monitoring of television advertisements flag when the problems of infomercials are already rampant, and will become more prevalent as the industry grows. A cautionary message voiced thirty years ago is still relevant: "[T]he fact remains that television advertising carries powerful influence. With its ability to emphasize and re-emphasize its point both to the audio and visual senses, television's 60-second messages should be viewed with microscopic care to sift out any tendency to deceive. If for no other reason, so that 'fools shall not enter therein'."<sup>174</sup> Surely

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167. See *supra* Part II.B, notes 42-44 and accompanying text.

168. Over \$450 million was spent on infomercials in 1989. Mary Beth Grover, *Step Right Up Ladies and Gentlemen*, FORBES, Oct. 15, 1990, at 43.

169. Volvo is just one example. Paul A. Eisenstein, *Volvo's Safety First Image Stalling*, INVESTOR BUS. DAILY, Oct. 15, 1991 at 3.

170. Furthermore, just because big business is involved does not mean that deception will not be attempted, as a glance at the ranks of the companies that have already been stopped by the FTC from ongoing deception of the public will confirm. See *supra* notes 100-02 and accompanying text.

171. See *supra* Part III.B.

172. See SIDNEY W. HEAD, BROADCASTING IN AMERICA 209-11 (4th ed. 1982).

173. *A New Antitoxin to Advertising Artifice—Television Advertising and the Federal Trade Commission*, 37 NOTRE DAME L. REV. 524, 528 (1962) (quoting Earl W. Kintner, FTC Chairman).

174. *Id.* at 538.

the author of this warning never would have conceived that thirty minutes would be added to the message, and the goal would be to imitate real television shows. The need for "microscopic care"<sup>175</sup> is undiminished today. Infomercials must identify themselves to the viewer in order to avoid further public deception and injury.

*W.H. Ramsay Lewis*

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175. *Id.*