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An Objective Approach to Detecting and Correcting Deceptive Advertising

Richard A. Mann*

Metin Gurol**

I. Introduction

Advertising plays an important role in the capitalist economic system and its various modified versions. That role is to provide meaningful information about products to consumers so that they can make rational choices among competing products. To the extent that it performs this role, advertising is functioning properly; to the extent that it does not, it is malfunctioning. Deceptive advertising is an outstanding example of this malfunctioning because it provides misinformation rather than information to the consumers. It should be prevented because it is harmful not only to consumers, but also to honest businessmen, advertising effectiveness, and the public image of marketing in general.

The Federal Trade Commission's (FTC) regulation of advertising represents the most significant form of governmental control in this area.¹ Broadly speaking, this control consists of two major phases: (1) detecting and establishing the existence of deceptive advertising, and (2) fashioning remedies designed to deter and correct abuses. The FTC has approached neither of these phases with anything remotely resembling an objective methodology.²

This article is intended to describe such an approach and document its application to the facts of one of the most—if not the most—significant deceptive advertising cases: *Warner-Lambert Co. v. FTC*.³ Before doing so, a brief over-

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1 When considerations of health or safety are not directly involved, and the fraud is not so blatant that criminal sanctions can be sought, the FTC is virtually the sole effective protector of defrauded consumers in this area of the law. Section 5 of the FTC Act, conferring jurisdiction over "unfair or deceptive acts or practices in commerce . . ." and Section 12, dealing with the false advertisement of food, drugs, devices, and cosmetics, constitute an exceptionally broad grant of power in the FTC to deal with deceptive advertising. State advertising laws, private damage actions, and competition among advertisers are not now practical alternatives.

Report of the American Bar Association Commission to Study the Federal Trade Commission, 40 (1969).

2 Given the general tendency of the various affected groups (e.g., advertisers, government officials, consumers, and commentators) to disagree on sensitive issues such as deceptive advertising, it is interesting to note the widespread agreement that consumers' understanding of allegedly deceptive advertisement should be objectively assessed. See Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559 (1969) (written by a law professor); Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KAN. L. REV. 625 (1969) (written by a marketing professor); Jones, *The FTC's Need for Science Research*, Proceedings, 2nd Annual Conference, Association for Consumer Research 1 (1971) (written by a government official); Dillon, *How the FTC Stacks the Deck*, Paper Presented at the 1973 Annual Meeting of the American Association of Advertising Agencies (1973) (written by a president of an advertising agency). See note 130 *infra*.

3 *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978).

view of the Commission's methods of detecting and proving deceptive advertising will be provided by way of background. Then the article will examine in some detail the history of and the authority for the FTC's controversial use of corrective advertising. Finally, an objective test—one that can be used not only to detect deceptive advertising but also to determine when corrective advertising has accomplished its purpose—will be presented.

II. Detecting and Proving Deceptive Advertising

The determination of the presence of deceptive advertising⁴ by the FTC and the courts usually involves four substantive questions.⁵ First, what consumer intelligence level should be used as the standard for evaluating the representation made by the advertisement. Second, what standards should be used in determining the representation actually made by the advertisement. Third, what method should be employed to ascertain the truth or falsity of the advertisement's representation. Finally, assuming a false representation, what degree of materiality should be required before action is taken. These questions will be briefly discussed⁶ in light of the methods employed by the Commission to detect and determine the existence of proscribed deceptive advertising.

In order to determine the deceptiveness of any advertisement, the relevant level of consumer intelligence must first be selected. In the early cases, the standard commonly used was whether the advertisement would be likely to deceive the "average purchaser."⁷ In 1937, however, the Supreme Court in *FTC v. Standard Education Society*⁸ lowered the standard, holding:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its

4 With one exception, there is no general statutory definition of deceptive advertising: Congress preferred to leave the application and interpretation of the term to the Federal Trade Commission, subject to review by the courts. This exception is § 15(a)(1) of the Wheeler-Lea Amendments to the FTC Act of 1914, (Federal Trade Commission Act § 15, 15 U.S.C. § 41 (1970)) which defines the term "false advertising" for the purpose of § 12 (15 U.S.C. § 52 (1970)) (prohibiting any "false advertisement . . . for the purpose of inducing . . . the purchase of foods, drugs, devices, or cosmetics") as:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, [or under such advertisement,] or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug.

5 Gellhorn, *supra* note 2, at 561.

6 It is not the authors' intent to discuss these matters in any detail nor with any degree of comprehensiveness, but rather to merely provide the reader with sufficient background for the proposals that are made within. For a fuller discussion, see Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964) [hereinafter cited as Millstein]; *Developments in Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967); Gellhorn, *supra* note 2.

7 *Ostermoor and Co. v. F.T.C.*, 16 F.2d 962 (2d Cir. 1927).

8 302 U.S. 112 (1937).

power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.⁹

After this decision, the Commission lowered its intelligence standard. The new standard was reflected in *Aronberg v. FTC*:¹⁰ "The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous—who, in making purchases, do not stop to analyze but too often are governed by appearances and general impression."¹¹

This approach was carried to its extreme in *Gelb v. FTC*¹² where the FTC prohibited a claim that a hair product "could color hair permanently." When appealed, the Commission's order was affirmed, the court stating:

It seems scarcely possible that any user of the preparation could be so credulous as to suppose that hair not yet grown out would be colored by an application of the preparation to the head. But the Commission has construed the advertisement as so representing it, and so construed it is false. One witness was found who by dint of much prodding was finally induced to testify "that you would think 'permanent' means you would never need to bother having it dyed again," although she herself knew better. Since the Act is for the protection of the trusting as well as suspicious, as stated in *FTC v. Standard Education Society*, . . . we think the order must be sustained on this point.¹³

According to one commentator, the *Gelb* decision "indeed represents the ultimate in literal construction of an advertisement: if anyone of any intelligence level could find and believe a misleading connotation, the advertiser apparently must be prepared to defend that connotation."¹⁴ The Commission, however, has not always been successful in its use of the lowest standard of intelligence. There have been reversals from time to time; but the courts generally have been quite tolerant of the low intelligence level used by the FTC.¹⁵

Once the relevant level of consumer intelligence has been selected, the meaning of the advertisement must be ascertained. The Commission has adopted a number of ground rules¹⁶ which it applies to the advertisement by relying either upon its own views of the meaning of evidence introduced either by itself or by the respondent-advertiser. Such evidence has included dictionary definitions, consumer testimony, expert witnesses, and consumer surveys.¹⁷ To date,

9 *Id.* at 116.

10 132 F.2d 165 (7th Cir. 1942).

11 *Id.* at 167.

12 144 F.2d 580 (2d Cir. 1944).

13 *Id.* at 582.

14 Millstein, *supra* note 6, at 460. See also 80 HARV. L. REV. 1005 (1967), *supra* note 6, at 1041.

15 Millstein, *supra* note 6, at 460 n.93.

16 These ground rules are discussed in Millstein, *supra* note 6, at 465-70. See also 80 HARV. L. REV. 1005 (1967), *supra* note 6, at 1043-51.

17 See Millstein, *supra* note 6, at 476-78; Gellhorn, *supra* note 2, at 564-67.

however, the use of consumer surveys has been infrequent.¹⁸ Generally, the FTC has neither the funds, manpower, time nor desire to conduct consumer surveys.¹⁹ This reluctance might be due in part to the possibility that a survey done by its staff could be rejected by a court as not credible.²⁰ Instead, the FTC prefers to use the findings of the respondent's survey as evidence to prove its own point. For example, in *Rhodes Pharmacal Co. v. FTC*,²¹ the respondent's survey was introduced to show that 91% of 300 surveyed consumers were not misled by advertisements of Imdrin, a palliative for arthritis or rheumatism. The Commission relied on the evidence that 9% of those questioned were misled in proving the deceptive nature of the respondent's advertisement.

Surveys conducted by a respondent, such as in *Rhodes*, are rarely beneficial to that party. These surveys are suspect because of their vested interest and entail a risk of non-use or counter-use by the Commission that must be balanced against their cost.²² Non-use generally results from some impropriety in the survey. In one case,²³ a survey of over two thousand "independent tobacco experts" was made in order to prove that this group preferred Luckies two to one. Over one thousand were in fact reported to be smoking the brand, but it was discovered that at least one hundred of the four hundred questioned smoked other brands as well as Luckies and that many had received gratuitous cigarettes from the company.

After a representation is shown to be false, the next (and last) step is to determine whether it is "material" or not. The FTC Act has been interpreted to bar only material untruths in advertising—those capable of affecting purchasing decisions.²⁴ The courts have been critical of FTC decisions when the advertisement, although false, does not appear likely to result in injury to the public. As one commentator explained:

"Public injury" does not mean that the consumer must actually suffer damage, or that it must be shown that goods purchased are unequal to the value expended. Rather, "public injury" results if the advertisement has a tendency to induce action (such as the purchase itself) detrimental to the consumer that might not otherwise have been taken. If such action could not have been induced by the claim (even though false), there is no "public injury." This requirement comports with the expressed provision of Section 15 of the FTC Act, as amended, that the advertisement must be misleading in a material respect to be actionable.²⁵

Nonetheless, the Commission has been ready to find that almost any falsehood

18 Millstein, *supra* note 6, at 478. Since the publication of Millstein's article, there has been a slight and gradual acceptance of consumer surveys by the FTC. See, e.g., note 123 *infra*; Brandt & Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception*, 41 J. MKTING. 54 (1977); Hunt, *What About Marketing Research and the Law at the Federal Trade Commission*, 1975 Combined Proceedings of American Marketing Association 85 (1975).

19 Bernacchi, *Advertising and Its Discretionary Control by the FTC: A Need for Empirically Based Criteria*, 52 J. URB. L. 223, 249 (1974) [hereinafter cited as Bernacchi].

20 Allen B. Wrisley Co. v. FTC, 113 F.2d 437 (7th Cir. 1940).

21 208 F.2d 382 (7th Cir. 1954), *rev'd. on other grounds*, 348 U.S. 940 (1955).

22 Bernacchi, *supra* note 19 at 249.

23 American Tobacco Co. v. FTC, 47 F.T.C. 1393, 1403 (1951).

24 80 HARV. L. REV. 1005 (1967), *supra* note 6, at 1056 n. 105.

25 Millstein, *supra* note 6, at 485 (emphasis in original) (footnotes omitted).

might affect purchasing decisions on the basis that advertisements are designed for that very purpose.²⁶ A number of commentators have taken exception to this approach; they have maintained that the FTC should be required to show that the falsehood could affect the actions of buyers.²⁷

So far it has been seen that objective approaches to detecting and proving deceptive advertising have generally been eschewed by the FTC. As mentioned above,²⁸ this subjective approach taken by the Commission has been criticized by numerous and diverse commentators. One of these²⁹ has set forth a proposal that a regularized procedure be established by FTC rule that encourages or requires the use of "nonpartisan" surveys to establish consumer understanding and to prove or disprove consumer deception. By including sufficient numbers in the universe of those questioned, a valid subsample can be drawn to reflect the relevant group. One of the factors³⁰ to be considered in determining the relevant group is the appropriate intelligence level. Gellhorn suggests that "deception of a sufficient number of consumers will satisfy the 'public interest' or 'materiality' requirements."³¹ As is discussed within,³² this article proposes that the measuring instrument should incorporate "materiality" through a "salience score" that would measure the importance of an advertising claim in affecting a purchase decision. The appropriate use of nonpartisan surveys can provide an objective means of addressing the four substantive questions³³ involved in all deceptive advertising cases.

III. Corrective Advertising

A. *Need for Corrective Advertising*

Once the FTC has proven that there has been deceptive advertising, it traditionally employs the cease and desist order as its primary remedy.³⁴ There

26 80 HARV. L. REV. 1005 (1967), *supra* note 6, at 1056, n. 108.

27 *See, e.g., id.*; Millstein, *supra* note 6, at 487; Armstrong, Kendall & Russ, *Applications of Consumer Information Processing Research to Public Policy Issues*, 2 COM. RESEARCH 232 (1975).

28 *See* note 2 *supra*.

29 Gellhorn, *supra* note 2, at 567-72.

30 Gellhorn suggests the sample might be limited to those (1) who were reached by the advertisement, (2) to whom it was directed, (3) who might be reached by the ad, (4) who the advertisement reached who also purchased the product, or (5) most likely to be deceived as a result of background, training, or experience who are also included in the group who might be reached. *Id.* at 570.

31 *Id.* at 571.

32 *See* text accompanying notes 157-70 *infra*.

33 *See* text accompanying note 5 *supra*.

34 *See, e.g., Note, Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971) [hereinafter cited as Note—Mich. L. Rev.]. The original grant of authority to the FTC did not specifically mandate the agency to address deceptive advertising but was quite general: "[u]nfair methods of competition in commerce are hereby declared unlawful." Act of September 26, 1914, ch. 311 § 5, 38 Stat. 719 (1914). The FTC nevertheless assumed the role of regulating advertising but encountered a substantial restriction upon its ability to do so when the Supreme Court held that the FTC could prohibit deceptive advertising only if it injured competition without regard to any demonstrated harm to consumers. *Fed. Trade Comm. Co. v. Raladam*, 283 U.S. 643 (1931). In 1938 Congress enacted the Wheeler-Lea Act which amended section 5 of the FTC Act to read: "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111 (amending 15 U.S.C. § 45(a)(1)(1934)). This amendment was designed to authorize the FTC to protect the consumer who may be injured by an unfair trade practice. H.R. REP. No. 1613, 75th Cong., 1st Sess. 3 (1938).

are, however, at least two fundamental inadequacies of this remedy that have brought about the FTC's use of corrective advertising. The first is the so-called "delay profits":

In a classic example of administrative ineptitude, the Commission required sixteen years to compel the respondent in *Carter Products, Inc. v. FTC* to drop the misleading reference to the liver in "Carter's Little Liver Pills." Such extreme cases may be rare, but delays of from three to five years between the issuance of a complaint and final issuance of a cease and desist order are common. The deceptive advertiser thus continues his campaign with impunity, taking advantage of every dilatory procedural tactic, and reaping additional profits from his wrong. By the time the order has become final, the particular campaign has probably been squeezed dry, if not already discarded in favor of a fresh one. Hence the guilty party loses nothing but attorneys' fees—and may gain far more.³⁵

This phenomenon completely deprives cease and desist orders of any deterrent effect.

Second, the traditional remedies do nothing to eliminate the false impression created by the deceptive advertising that persists after the ad has ceased.³⁶ The FTC's own standard for imposing corrective advertising explains the nature of this inadequacy:

If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.³⁷

Several solutions—other than corrective advertising—to the delay profit problem have been advanced, including private lawsuits for damages or injunctions, counter-advertising to expose the deception, and boycotts.³⁸ To date these have generally proved ineffective. Another type of solution would be to broaden the injunctive power of the FTC. By so doing, the Commission could shorten the time period during which the violator enjoyed the benefits of the delay profit. This, however, would solve only some of the current problems of delay for it would address only the most blatant forms of deception while entailing some delay so that consumers and competitors would still lack adequate protection³⁹

³⁵ Note, *Corrective Advertising Orders of the Federal Trade Commission*, 85 Harv. L. Rev. 477, 482-83 (1971) [hereinafter cited as Note—HARV. L. REV.].

³⁶ Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1, 17 (1973) [hereinafter cited as Thain].

³⁷ See 562 F.2d at 762.

³⁸ For a discussion of these alternative solutions see Note—HARV. L. REV., *supra* note 35, at 484-87.

³⁹ *Id.* at 486, 487.

None of the traditional remedies would seem to have any effect in solving the problem of the persisting misconceptions instilled by deceptive advertising campaigns. The FTC, therefore, looked to new solutions, and since 1970, has filed a series of complaints proposing corrective advertising orders and accepted a number of consent orders incorporating corrective messages.

Corrective advertising, most simply stated, is advertising designed to inform consumers that previous advertising by the company was deceptive.⁴⁰ As such it is a variant, or extension, of affirmative disclosure,⁴¹ although there are a number of significant differences between the two. First, affirmative disclosure is required only where the failure to reveal certain facts in current advertisements may mislead the consumers, whereas corrective advertising is intended to counteract abuses arising from past advertisements. Thus, corrective advertising may be required even after the company has ceased running the deceptive ad. Second, while affirmative disclosure does not make reference to past advertisements, corrective ads typically do so in order to eradicate their residual effects. Finally, affirmative disclosure orders have no time limit in that the order bars the company from publishing any ad that fails to clearly disclose the required information while at the same time the FTC has determined that silence *per se* is deceptive. On the other hand, corrective advertising orders usually specify a time period during which no ad can be run without the FTC approved corrective message.⁴²

B. Development of Corrective Advertising

The first time that the Federal Trade Commission considered the remedy of the corrective advertising order was in *Campbell Soup Company*.⁴³ In that case, a group of law students (Students Opposing Unfair Practices or "SOUP")

40 See Note—MICH. L. REV., *supra* note 34, at 374. Professor Thain writes:

Corrective advertising orders postulate that, in certain circumstances, an advertising campaign will affect consumer behavior beyond the life of the campaign itself. Thus, the traditional Commission cease and desist orders will be ineffective in completely eliminating the deception. A more forceful order, one which brings to light or corrects the prior deception is necessary. For example, a misleading claim for a product may create an impression in the consumer's mind about that product. Thereafter, successive advertisements, even if they do not contain the misleading claims, may trigger a conscious or subconscious remembrance of the de-[sic] at the time of repurchase. Indeed, the actual deceptive claim need not be remembered; as long as the favorable impression of the product based upon the deceptive claim is retained and acted upon, the initial deception continues to influence the consumer's behavior. A primary purpose, therefore, of corrective advertising orders is to alert the consumer that he has been operating on erroneous information so that his future practices are not influenced by the deceptive advertisements.

Thain, *supra* note 36, at 17-18.

41 562 F.2d at 759 (discussed at text accompanying note 113 *infra*); Note, *Corrective Advertising—The New Response to Consumer Deception*, 72 COLUM. L. REV. 415, 419 (1972) [hereinafter cited as Note—COLUM. L. REV.]; Note—MICH. L. REV., *supra* note 34, at 381.

Affirmative disclosure is based on the concern that insufficient information has been supplied in the advertising. The company is, therefore, required to disclose in its advertising some of the deficiencies or limitations of its product or service so that the consumer may be aware of the negative as well as the positive attributes. Such disclosure may be necessary where safety hazards are involved, or where performance limitations exist that may not be apparent to the consumer.

Legal Developments in Marketing, 36 J. MKTING. 68 (Oct. 1972).

42 Note—COLUM. L. REV., *supra* note 41, at 419.

43 *Campbell Soup Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261.

attempted to intervene after the FTC had issued a cease and desist order against Campbell Soup Company from engaging in the deceptive advertising practice of placing marbles in their soup in order to give a richer appearance to the soup. The intervenors asked that the Commission issue an order

requiring the respondent who has falsely advertised to affirmatively state that it has used a specific method of advertising in the past which the Commission charges as [*sic*] or has been found misleading. . . . The provision would also stipulate that the disclosure must be included in current advertising for a period of time equal to the time in which the deceptive advertisements were publicized and be conspicuously displayed.⁴⁴

The majority of the Commission denied SOUP's request and accepted the proposed consent order, which did not contain a corrective advertising order.⁴⁵

In the seventeen major⁴⁶ corrective advertising cases brought since *Campbell Soup*, the terms of the corrective advertising sought by the FTC have varied considerably with respect to two aspects: the required disclosure and exposure. The terms of the final order⁴⁷ have frequently differed from those framed by the complaint.⁴⁸ Much of the variation has resulted from an attempt to tailor the corrective ad to fit the particular needs of the individual case.⁴⁹ Some of the deviations, however, appear to reflect changing trends in the approach of the staff at the FTC.

From these cases there appear to have been two different approaches taken by the FTC in framing the disclosure terms of corrective advertisements. The first approach parallels that proposed in the intervention petition of SOUP⁵⁰ and in its essentials continued until the complaint against Amstar.⁵¹ The proposed corrective advertisement in the complaint against Standard Oil of California⁵² illustrates this first approach.

In addition to prohibiting the alleged misrepresentation, the proposed order in the complaint would require that any gasoline advertising by Standard for the next year clearly and conspicuously disclose that the FTC has found that the company's previous advertising for Chevron with F-310

44 Brief for Intervenor, Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261.

45 Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261 at 21,421.

46 Excluded from this count are cases of a predominately local nature (*e.g.*, Hair Replacement Centers of Flushing, Inc., 86 F.T.C. 640 (1975)), or those that are more affirmative disclosure than corrective cases (*e.g.*, C.E.B. Products, Inc., 85 F.T.C. 565 (1975)), or merely public notification (*e.g.*, STP Corp., [1978] 3 TRADE REG. REP. (CCH) ¶ 21,390).

47 With one exception, all cases in which a final order containing corrective advertising has presently been obtained ended in a negotiated consent order. A final order with corrective advertising provisions has resulted from litigation in only one case: Warner-Lambert v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1575 (1978). For a discussion of this case see text accompanying notes 86-129 *infra*.

48 In two cases, the corrective advertisement was proposed by an intervenor—SOUP. Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261; Firestone Tire & Rubber Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,773.

49 Thain, *supra* note 36, at 8.

50 Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261.

51 Amstar Corp. [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,696 at 21,742.

52 [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,789.

contained false, misleading, and deceptive statements, representations and demonstrations and the products in fact did not reduce air pollution. . . .⁵³

What is common to all eight of these proposed orders is the requirement of a statement to the effect that the FTC had found (or alleged) particular representations and/or demonstrations deceptive coupled with a restatement of these representations.

The *Amstar*⁵⁴ and *Warner-Lambert*⁵⁵ cases signaled a transition to a different approach. In the *Amstar* case, the FTC complaint called for a second type of disclosure: "Contrary to previous advertising the products do not have the alleged attributed qualities."⁵⁶ The complaint, however, did not entirely abandon the original approach, for it retained as an alternative: "If record facts show such disclosure is inadequate to protect the public or competitors, the Commission may require Amstar to devote at least 25% of each advertisement for the next year to a clear and conspicuous disclosure that the FTC has found that they have been falsely advertised."⁵⁷ The complaint issued against Warner-Lambert followed the original pattern, but was modified on November 25, 1974 by the administrative law judge to require the second type of disclosure.⁵⁸ Following these two cases, all of the complaints in the major cases sought the second type of disclosure in the corrective advertisements, with the single exception of *Wasem's*,⁵⁹ in which the FTC obtained a consent order that provided for disclosure that combined the elements of both types.⁶⁰

The second respect in which the corrective advertising orders sought by the FTC have varied is the amount of exposure required for the specified disclosure. Exposure consists of two components—density and duration—and the orders proposed by the FTC have differed as to both. There have been essentially three different density formulas employed. The one most often utilized⁶¹ calls for not

53 [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,352 at 21,485.

54 *Amstar Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,696.

55 *FTC v. Warner-Lambert*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,838.

56 *Amstar Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,696 at 21,742.

57 *Id.*

58 *Warner-Lambert*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,776 at 20,636.

59 *Wasem's Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,536.

60 The required disclosure was:

This advertisement is run pursuant to an order of the Federal Trade Commission. I have previously been advertising Wasem's Super B Vitamins and have made various claims which are erroneous or misleading. Contrary to what I have told you previously Super B will not make you feel better nor make you better to live with nor work better on the job. There is no need for most people to supplement their diet with vitamins or minerals. Excess dosages over the recommended daily adult requirements of most vitamins will be flushed through the body and be of no benefit whatsoever. Contrary to my previous ads, neither the Food and Drug Administration nor the Federal Trade Commission nor anyone else has recommended Super B or approved our prior claims

Id. at 20,468.

61 *Wasem's Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,536 at 20,468; *Chemway Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,400 at 21,521; *Ocean Spray Cranberries, Inc.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,477 at 21,556; *ITT Continental Baking Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,539 at 21,614; *American Home Products Corp.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,673 at 21,721; *Warner-Lambert*, [1970-1973 Transfer Binder]

less than 25 percent of print space and not less than 25 percent of broadcast time to be devoted to the corrective message for the time period specified in the order. The second most frequently⁶² employed density provision requires the clear and conspicuous disclosure of the corrective message in all advertisements for the time period specified in the order. This was the density sought by SOUP in the first corrective advertising case. Finally, in some cases,⁶³ the FTC has sought a density that is really a variant of the first: 25 percent of advertising expenditures for each medium in each market in the same time periods as other advertising.

In another component of exposure, the duration, the FTC⁶⁴ has, with few exceptions, called for all advertising to cease and desist for one year unless the required disclosure at the prescribed density was included. The first deviation from this occurred in the "analgesic cases"⁶⁵ in which the FTC called for two years, the same duration that the administrative law judge called for in his modification of the order in *Warner-Lambert*.⁶⁶ The second deviation arose in the *Sugar Information* case⁶⁷ where the complaint called for at least one corrective advertisement to be run in each magazine in which the questioned advertising had previously appeared.

The FTC's success in obtaining final orders incorporating their proposed corrective advertising has been somewhat less than complete. In fact, the FTC failed to obtain a corrective advertising order in the first five cases brought and could only secure such relief in two⁶⁸ of its first eight cases. Since then, presumably by virtue of better case selection, the FTC has enjoyed far greater success, managing to obtain an order for a corrective ad of some sort in all but one case⁶⁹ it has brought.

The FTC's failures to obtain the proposed corrective advertising order have occurred in one of two ways. In some instances, the administrative law judge (or the commissioners) deciding the case refused to incorporate corrective

TRADE REG. REP. (CCH) ¶ 19,838 at 21,859; Sun Oil Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,856 at 21,872; Shangri-La Ind., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,080 at 22,051.

62 Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261 at 21,423; Firestone Tire & Rubber Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,373 at 21,500; Standard Oil of California, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,352 at 21,485; Sterling Drug, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,925 at 21,937.

63 Amstar Corp., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,696 at 21,742; American Home Products Corp., Sterling Drug, Inc., and Bristol-Myers Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,962 at 21,984.

64 In two cases corrective advertising was sought not by the FTC but by an intervenor. In Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261, SOUP, the intervenor, proposed that corrective advertising be run for the same period of time that the challenged ads had run.

65 American Home Products Corp., Sterling Drug, Inc., and Bristol-Myers Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,962 at 21,984.

66 Warner-Lambert Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,776 at 20,636.

67 Sugar Information, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,857 at 21,872.

68 Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,051 at 22,028; ITT Continental Baking Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,780 at 21,817 (final consent order to cease and desist concerning Profile).

69 Sun Oil Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,704 at 20,579. At present no final order has been entered in the "analgesic cases."

advertising into the final order. These decisions have been predicated upon two different bases. The first—failure of proof of the alleged deceptive advertising—was employed in only one case.⁷⁰ In the remaining cases decided adversely by either an administrative law judge⁷¹ or the FTC,⁷² the second basis was used; it was found that although deceptive advertising had been proved, the circumstances did not require the issuance of an order for corrective advertising. The other way in which the FTC staff has failed to win a corrective advertising order has arisen by the FTC's entering into consent orders not containing such a term. This occurred in two cases.⁷³

In the cases in which the FTC did succeed in obtaining a final order providing for corrective advertising, all but one⁷⁴ of them involved a consent decree. In some instances, however, the consent decrees reflected a modification of the proposed corrective ad. Of the seven cases resulting in a consent order, three⁷⁵ of them involved a modification of the terms of disclosure while one⁷⁶ changed the density of the exposure. All of the modifications resulted in milder forms of corrective advertisements. For example, in the *Ocean Spray*⁷⁷ case, the FTC had sought an order requiring the company to disclose that the FTC has alleged that the company had falsely described its cranberry beverage as a juice and had falsely described the beverage's nutritional content.⁷⁸ The final consent order required only that the company's advertising contain the following provision:

If you're wondering what some of our earlier advertising meant when we said Ocean Spray Cranberry Juice Cocktail has more food energy than orange juice or tomato juice, let us make it clear: we didn't mean vitamins and minerals. Food energy means calories. Nothing more.

Food energy is important at breakfast since many of us may not get enough calories, or food energy, to get off to a good start. Ocean Spray

70 Coca-Cola Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,470 at 20,391.

71 Sun Oil Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,704 at 20,579.

72 Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,261 at 21,424; Firestone Tire & Rubber Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,112 at 22,086; Standard Oil of California, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,789 at 20,647, 20,658; ITT Continental Baking Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,464 at 20,382-83 (final order to dismiss concerning Wonder and Hostess).

73 Chemway Corp., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,709 at 21,751; American Home Products, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,129 at 22,120.

74 562 F.2d 749.

75 Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,981 at 21,993; ITT Continental Baking Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,681 at 21,728; Sterling Drug, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,655 at 20,539.

76 ITT Continental Baking Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,681 at 21,728. The proposed order would require that at least 25 percent of each advertisement for the following year contain the corrective message while the consent order required that for one year after final order at least 25 percent of expenditures (excluding production costs) for Profile advertising for each media in each market be devoted to FTC approved ads.

77 Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,477.

78 *Id.* at 21,556.

Cranberry Juice Cocktail helps because it contains more food energy than most other breakfast drinks.

And Ocean Spray Cranberry Juice Cocktail gives you and your family Vitamin C plus a great wake-up taste. It's . . . the other breakfast drink.⁷⁹

Finally, in *Warner-Lambert*,⁸⁰ the FTC obtained a court order that modified the terms of disclosure, density, and duration of the corrective advertisement as proposed by the FTC. In the most recent case, *American Home Products*,⁸¹ there has not yet been a final order.

C. Legality of Corrective Advertising

As has been seen, the FTC has sought corrective advertising in some seventeen cases and obtained orders in ten cases. Yet, until very recently, the courts had not considered the question of the FTC's authority to order corrective advertising. The Commission had already asserted on several occasions that it has the authority to impose corrective advertising⁸² and the commentators generally have been in agreement.⁸³ The FTC's authority to utilize corrective advertising was upheld in *Warner-Lambert*⁸⁴ decided by the Court of Appeals for the District of Columbia.⁸⁵ Due to the significance of the case and the importance of corrective advertising to the objective approach advocated in this article, the circuit court's opinion will receive close attention.

On June 27, 1972 the FTC issued a complaint⁸⁶ against Warner-Lambert charging that it had violated section 5 (a) (1) of the Federal Trade Commission Act⁸⁷ by misrepresenting the efficacy of Listerine against the common cold. Ever since Listerine's introduction to the market in 1879 it had been represented as being beneficial in certain aspects for colds, cold symptoms, and sore throats. Following the complaint, hearings were held before an administrative law judge who on November 25, 1974 issued an initial decision sustaining the allegations of the complaint. Warner-Lambert appealed to the Commission. On December 9, 1975 the Commission issued its decision⁸⁸ essentially affirming the administrative law judge and ordering Warner-Lambert to:

(1) cease and desist from representing that Listerine will cure colds or sore throats, prevent colds or sore throats, or that users of Listerine will have fewer colds than non-users;

79 Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,981 at 21,993.

80 562 F.2d 749.

81 American Home Products Corp., Sterling Drug, Inc., and Bristol-Meyers Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,263.

82 Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 694 (1977).

83 *Id.* at 696; Thain, *supra* note 36, at 20; Note—COLUM. L. REV., *supra* note 41, at 424; Note, *The Federal Trade Commission and the Corrective Advertising Order*, 6 U.S.F.L. REV. 367, 382 (1972).

84 562 F.2d 749.

85 The United States Supreme Court denied certiorari. 98 S. Ct. 1575 (1978).

86 Warner-Lambert Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,045 at 22,026.

87 15 U.S.C. § 45(a)(1) (1970) (amended 1975).

88 Warner-Lambert Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,066 at 20,926, 86 F.T.C. 1398 (1975).

(2) cease and desist from representing that Listerine is a treatment for, or will lessen the severity of, colds or sore throats; that it will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds; or that the ability of Listerine to kill germs is of medical significance in the treatment of colds or sore throats or their symptoms;

(3) cease and desist from disseminating any advertisement for Listerine unless it is clearly and conspicuously disclosed in each such advertisement, in the exact language below, that: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." This requirement extends only to the next ten million dollars of Listerine advertising.⁸⁹

Warner-Lambert (the petitioner) sought review of this order, and on August 2, 1977, the United States Court of Appeals for the District of Columbia Circuit handed down its decision⁹⁰ in an opinion written by Judge Wright. On April 3, 1978 the U.S. Supreme Court denied *certiorari*.⁹¹ Warner-Lambert had argued before the circuit court for a reversal of the order based upon three grounds. The first was that the Commission's conclusion that Listerine is not beneficial for colds or sore throats is unsupported by the evidence. The court stated that the Commission's findings of fact must be sustained if they are supported by substantial evidence on the record viewed as a whole.⁹² After noting that the hearings before the administrative law judge had covered over four months and had produced an evidentiary record consisting of some 4,000 pages and testimony from 46 witnesses,⁹³ the court reviewed the evidence and concluded that not only had full consideration been given to studies submitted by Warner-Lambert, but also the findings of the administrative law judge were supported by substantial evidence.⁹⁴ In its review of the evidence, the court discussed at greater length the petitioner's argument that the FTC's findings differed from those of the Food and Drug Administration. The FDA study resulted from an expert panel appointed in 1972 to study all over-the-counter cough, cold, allergy, bronchodilator, and anti-asthmatic products. The panel's report was published⁹⁵ after the FTC issued its order against Listerine. The report had

89 562 F.2d at 753. The full text of the order may be found at Warner-Lambert Co. v. FTC, 86 F.T.C. 1398, 1513-15 (1975).

90 562 F.2d 749. Amicus curiae briefs were filed on behalf of The Association of National Advertisers, Inc. and The American Advertising Federation, both supporting Warner-Lambert's petition for reversal of the FTC's order.

91 See note 85 *supra*.

92 562 F.2d at 753 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)).

93 562 F.2d at 752.

94 The court found the evidence to support the following findings made by the Commission: (a) that the ingredients of Listerine are not present in sufficient quantities to have any therapeutic effect; (b) that in the process of gargling it is impossible for Listerine to reach the critical areas of the body in medically significant concentration; (c) that even if significant quantities of the active ingredients of Listerine were to reach the critical sites where cold viruses enter and infect the body, they could not interfere with the activities of the virus because they could not penetrate the tissue cells; (d) that the results of a clinical study conducted by Warner-Lambert should be discounted because of the study's design and execution rendered its results unreliable; (e) that the ability of Listerine to kill germs by the millions on contact is of no medical significance in the treatment of colds or sore throats because colds are caused by viruses; and (f) that Listerine has no significant beneficial effect on the symptoms of sore throat. *Id.* at 753-54.

95 41 Fed. Reg. 38312 (1976).

not been adopted by the Commissioner of the FDA, and the FTC refused to reopen its proceedings to consider the report. The report placed each ingredient of Listerine in Category III, which is defined as "the available data are insufficient to classify such condition under either [Category I, generally recognized as safe and effective] or [Category II, not generally recognized as safe and effective] and for which further testing is therefore required."⁹⁶

The court reasoned that since the FDA study was not based upon any data not considered by the FTC, nor did the study consider the extensive record developed in the FTC hearings, the conclusion reached by the FDA that there was insufficient evidence to classify Listerine as effective or ineffective was not necessarily inconsistent with the FTC's conclusion that Warner-Lambert's advertising was deceptive. The court⁹⁷ concluded that the FTC did not err in refusing to reopen its proceedings and that the limited findings of the FDA did not establish that the FTC's findings were wrong.

The second basis of the petitioner's argument was that even if the advertising claims made in the past were false, the portion of the FTC's order requiring corrective advertising exceeded the Commission's statutory power.⁹⁸ The court first examined the legislative grant of authority to the FTC and found that it, if read literally, authorized the Commission to issue cease and desist orders against violators and did not expressly mention any other remedies. Relying on *Pan American World Airways, Inc. v. United States*,⁹⁹ the court held that the modern view was that the Commission had the power to shape remedies beyond the simple cease and desist order. It then turned its attention to the crucial issue of whether a corrective advertising order is within the range of permissible remedies. The various briefs submitted to the court advanced three arguments for the proposition that the order for corrective advertising was not within the FTC's power: (1) the legislative history, (2) conflicts with the first amendment, and (3) absence of judicial approval.

Turning first to the legislative history of the 1914 Federal Trade Commis-

96 21 CFR § 330.10(a)(5)(iii) (1976).

97 The dissenting judge agreed with the majority that there was sufficient evidence in the record to support an order requiring Warner-Lambert to cease and desist from advertising Listerine as a remedy for colds and sore throats. 562 F.2d at 764 (Robb, J., dissenting).

98 Judge Robb dissented to this part of the court's opinion. *Id.*

99 371 U.S. 296 (1963). The dissent argued that this case taken in the context of its facts does not support the court's conclusion:

In the *Pan American* case the court considered the power of the Civil Aeronautics Board under section 411 of the Civil Aeronautics Act of 1958, 49 U.S.C. § 1381, to order an air carrier to cease and desist from "unfair . . . practices or unfair methods of competition." The court held that the Board's jurisdiction over unfair practices and unfair methods of competition, together with its power under the Act to regulate air carriers, and to deal with consolidations, mergers, interlocking relations, pooling arrangements, etc., 49 U.S.C. §§ 1378, 1379, and its authority to enforce the Clayton Act as it is applicable to air carriers, 15 U.S.C. § 21, empower the Board to order divestiture when a combination between carriers violates the antitrust laws and hinders the Board's restructuring of routes. Considered in the light of the specific and extensive statutory underpinning upon which the court based this decision it is a far cry from a holding that the power to order divestiture was derived only from the authority to issue cease and desist orders, as the majority opinion suggests. Certainly it does not follow from this case that the power of the Federal Trade Commission to order corrective advertising can be derived from its authority to issue cease and desist orders, standing alone.

562 F.2d at 766-767 (Robb, J., dissenting).

sion Act¹⁰⁰ and the Wheeler-Lea amendments to it in 1938,¹⁰¹ the court summarily concluded that the fact that at these two times Congress did not choose to authorize such remedies as criminal penalties, treble damages, or civil penalties was not dispositive of the corrective advertising question. More attention was given to the 1975 amendments to the Act¹⁰² which authorized the Commission to bring suit in a U.S. District Court to redress injury to consumers resulting from a deceptive act or practice. One of the types of relief authorized to be granted is public notification respecting the deceptive act or practice. The petitioners argued that the congressional grant of this power to order public notification to a court establishes that the Commission does not have that power. The court rejected this argument on several grounds. First, it noted that public notification was broader than corrective advertising.¹⁰³ Second, it distinguished the public notification contemplated by the amendment from corrective advertising upon the basis that the former is directed at past consumers while the latter is designed to protect future consumers. Finally, the court observed that this contention of the petitioner conflicted with the Congressional intent expressed in the amendment: "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."¹⁰⁴ These three propositions led the court to conclude that "this legislative history cannot be said to remove corrective advertising from the class of permissible remedies."¹⁰⁵

100 Ch. 311, 38 Stat. 717 (1914).

101 Ch. 49, 52 Stat. 111 (1938).

102 The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (codified in scattered sections of 15 U.S.C.) in relevant part states:

If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45 (a) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or any court of competent jurisdiction of a state. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

(b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

103 The implication of this statement would appear to be that since public notification is more inclusive than corrective advertising, then those forms of public notification not included in corrective advertising would represent an extension of the arguably already existent powers of the FTC. The dissent attacks this attempt by the majority to distinguish public notification and corrective advertising by taking one of the examples of public notification given by the majority ("requiring the defendant to run special advertisements reporting the FTC finding) and noting that according to the FTC the example is also corrective advertising. 562 F.2d at 766 n.2 (Robb, J., dissenting). Since corrective advertising is a subset of public notification this is not surprising. The majority provides other examples of public notification (advertisements advising consumers of the availability of a refund or the posting of notices in the defendant's place of business) that are *not* corrective advertisements. *Id.* at 757 n. 36.

104 15 U.S.C. § 57b(e) (1970). The dissent argued that this language simply preserved the existing power of the FTC and that question was not answered by either the amendment or the Committee's report. 562 F.2d at 766 (Robb, J., dissenting).

105 562 F.2d at 758.

The court next addressed the first amendment issue by first noting that this amendment requires that the corrective advertising order be no more restrictive than necessary¹⁰⁶ and then deferred discussion of this question until later in the opinion.¹⁰⁷ The court then turned to the more fundamental first amendment issue, namely, the recent Supreme Court decision¹⁰⁸ extending first amendment protection to commercial advertising rendered corrective advertising unconstitutional. The court quickly disposed of this assertion by finding that the Supreme Court expressly noted that the first amendment does not prevent governmental regulation of false and misleading advertisement.¹⁰⁹ The court found further support for this position:

In a footnote the Court went on to delineate several differences between commercial speech and other forms which may suggest "that a different degree of protection is necessary." For example, the Court said, they "may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive."¹¹⁰

The court ruled that this prescient statement foresaw the issue of corrective advertising and therefore was dispositive of the first amendment issue.¹¹¹

The court devoted considerably more time to the question whether there was any previous judicial authority for corrective advertising. The immediate necessity for the court to have done so was presented by the petitioner's argument that the late emergence of corrective advertising was itself evidence that it is beyond the Commission's authority. The court rejected this argument on two counts. First, the court stated that an agency's failure to assert a power over a period of years is not proof that the agency lacks such a power.¹¹² Second, the court held that the remedy was not "such an innovation. The label may be newly coined, but the concept is well established. It is simply that under certain cir-

106 The court cited *United States v. Nat'l Society of Professional Engineers*, 555 F.2d 978, 984 (D.C. Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

107 The court addressed the issue when it examined the appropriateness of the remedy. 562 F.2d at 758. See text accompanying notes 120-28 *infra*.

108 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The court of appeals also cited *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

109 The court quoted the following statement from *Virginia State Board of Pharmacy*: "[The First Amendment], as we construe it today, does not prohibit the state from insuring that the stream of commercial information flow[s] cleanly as well as freely." 425 U.S. at 772.

110 562 F.2d at 758 (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 771-72 n. 24).

111 The dissenting opinion did not discuss the First Amendment issue at all.

112 The court cited *United States v. Morton Salt Co.*, 338 U.S. 632, 647-48 (1950); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693-94 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). It would seem that this should have sufficed to dispose of the lack of prior use argument, but the court proceeded to attempt to find positive judicial recognition of corrective advertising. It may be that the court engaged in this pursuit because earlier in its opinion it had relied upon the statement of legislative intent: "Nothing in this section shall be construed to affect any authority of the Commission under any provision of law." See note 104 *supra*. This assertion probably sent the court scurrying for some "other provision of law." Arguably, it could have viewed the question of the Commission's authority as one of first impression and ruled that the proper interpretation of the various legislative grants was that corrective advertising was within the realm of appropriate remedies.

cumstances an advertiser may be required to make affirmative disclosure of unfavorable facts."¹¹³

The court then sought to find judicial precedent for corrective advertising in the several FTC orders for affirmative disclosure that were approved on appeal over objections that they exceeded the Commission's statutory authority.¹¹⁴ Two cases in particular were discussed and merit mention because they formed the principal bridge for the analogy drawn by the court between affirmative disclosure and corrective advertising as well as representing the focal point in the difference in opinion between the majority and the dissent.

The first case¹¹⁵ involved the Royal Baking Powder Company which for 60 years had stressed in its advertising that its product was superior because it was made with cream of tartar rather than phosphate. Rising costs forced the company to switch to phosphate; at the same time, it carefully removed all mention of cream of tartar from its labels and advertisements, but kept the same format of its labels. In addition, the new advertisements no longer mentioned phosphate nor the change in the product. The Second Circuit upheld the Commission's order requiring the company to make affirmative disclosure.¹¹⁶

In the second case,¹¹⁷ the Waltham Watch Company of Massachusetts, which had become well known for its fine clocks since 1849, after ceasing the manufacture of clocks transferred its trademarks, good will, and the trade-name "Waltham" to a successor corporation. This corporation began importing clocks from Europe for resale in the United States, and advertising them as "products of Waltham Company since 1850," "a famous 150-year-old company." The FTC's order that the company disclose that the clocks were not made by the old Waltham Company and that they were imported was upheld by the Seventh Circuit.¹¹⁸

The court then used these two cases as precedent for the existence of authority in the FTC to order corrective advertising:

It appears to us that the orders in *Royal* and *Waltham* were the same

¹¹³ 562 F.2d at 759.

¹¹⁴ The court cited *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967). In addition, it dealt with *Alberty v. FTC*, 182 F.2d 36 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 818 (1950) in the following fashion:

In *Alberty v. FTC* this court set aside an order similar to the one upheld in *J. B. Williams Co. v. FTC*. The precise holding of *Alberty* is disputed. Several courts have stated that it held only that the Commission must make an express finding that failure to make disclosure is misleading before it can require such disclosure. *Feil v. FTC*; *Ward Laboratories, Inc. v. FTC*; *Keele Hair & Scalp Specialists, Inc. v. FTC*. To the extent that *Alberty* may have held that the Commission lacked power to order corrective advertising, it has never been followed. The characterization of the required disclosure as "additional, interesting, and perhaps useful, information" may or may not have been accurate in *Alberty*, but it grossly understates the case at hand. The disclosure that Listerine does not relieve colds is essential information to correct a widely held, mistaken belief which was cultivated by petitioner's past advertising.

562 F.2d at 759 n. 52 (citations omitted).

¹¹⁵ *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922).

¹¹⁶ 281 F. at 753.

¹¹⁷ *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963), *reh. denied*, 375 U.S. 998 (1964).

¹¹⁸ *Id.* at 32.

kind of remedy the Commission has ordered here. Like Royal and Waltham, Listerine has built up over a period of many years a widespread reputation. When it was ascertained that the reputation no longer applied to the product, it was necessary to take action to correct it. Here, as in *Royal* and *Waltham*, it is the accumulated impact of *past* advertising that necessitates disclosure in *future* advertising. To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising—an impression which is now known to be false—would be unfair and deceptive.¹¹⁹

The last issue addressed by the court was the appropriateness of the remedy actually applied to Warner-Lambert. After modifying the FTC's order to delete the phrase "Contrary to prior advertising," the court alluded to the circumscribed role allowed the reviewing court by the Supreme Court:

The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment, and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.¹²⁰

The court then examined the standard utilized by the Commission¹²¹ and summarized it as dictating two factual inquiries: "(1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases?"¹²² The court found that there had been substantial evidence in

119 562 F.2d at 761 (emphasis in original) (footnotes omitted). The court added in a footnote:

In *Royal* and *Waltham* the advertising claims that had given rise to the products' reputations were concededly true when made, but because the products themselves had changed that reputation was no longer deserved. . . . But the result here is the same as in the earlier cases—like *Royal* baking powder or *Waltham* watches, Listerine continues to enjoy a reputation it does not deserve, and consumers therefore would be deceived if they were to make purchases in reliance upon that reputation.

Id. at 761 n. 58.

The dissent disagreed with this conclusion:

In those cases advertisements falsely represented that the products offered for sale were the same as the products, well-known to the public, which had been offered in the past. The Commission's orders simply required these false representations to be corrected in future advertisements using the same or similar format or copy. In the present case, however, when Warner-Lambert has ceased and desisted from advertising Listerine as a remedy for colds and sore throats there will be nothing to correct in the text of the Listerine advertisements. Any "corrective statement" will relate solely to past advertising.

Id. at 768 (Robb, J., dissenting).

120 *Id.* at 762 (quoting from *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)).

121 See text accompanying note 37 *supra*. The dissent objected to this standard:

The theory of the majority is that whenever "advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about [a] product" and "this belief [may] linger on after the false advertising ceases," corrective advertising may be ordered. As the majority apparently concedes, this test would apply to almost any advertisement which is the subject of a cease and desist order. I cannot accept this concept. I reject the proposition that the after-effects of advertising which has been discontinued pursuant to a cease and desist order can thus expand the Commission's statutory power to prevent future illegal practices. . . . In my opinion such an expansion must be made by the Congress, not by this court.

562 F.2d at 68 (Robb, J., dissenting).

122 *Id.* at 762.

support of the need for corrective advertising in the "Product Q" survey data and the expert testimony interpreting them.¹²³

With the exception of the "confessional preamble," the court also upheld the specific disclosure required: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity."¹²⁴ The court ordered the deletion of the phrase "Contrary to prior advertising" because it felt that it was not needed¹²⁵ to call attention to the corrective message that was to follow and this case was not egregious enough to warrant its use for humiliating the advertiser.¹²⁶

Finally, the court affirmed¹²⁷ the duration of the required disclosure which would continue until a sum had been expended on Listerine advertising equal to the average annual advertising budget for the period of April 1962 to March 1972.¹²⁸ This would last about one year if Warner-Lambert continues to advertise as it normally does. The court agreed with the Commission that a duration of a fixed time would not be as effective, since Warner-Lambert could evade the order by not advertising at all.

Accordingly, the court affirmed the order as modified.¹²⁹

IV. An Objective Approach

The FTC has taken a subjective approach to the detection and correction

123 According to the court:

The Commission used the results of a series of market surveys know as "Product Q" reports on the "Mouthwash Market." The surveys were conducted by petitioner for its own purposes from 1963 to 1971. According to petitioner's own advertising agency, "Product Q is ideally suited to provide guidance in such vital areas as . . . [h]ow successful are the current advertising campaigns of different brands on awareness, recall, attitudes and sales?" The surveys showed that about 70% of the consumers questioned recalled "effective for colds and sore throats" as a main theme of Listerine advertising. During the summer, when no cold claims had been broadcast for about six months, the percentage fell to only 64%; i.e., the recall of cold claims after six months of silence was very substantial. The surveys also showed that about 60% of consumers questioned believed Listerine was "one of the best" mouthwashes for the quality "effective against colds and sore throats." (citations omitted).

The Commission also relied on the testimony of two experts in the field of consumer marketing surveys. Dr. Bass testified that cold efficacy belief levels would continue at about 60% for two years after colds advertising ceased and would remain high after five years. Dr. Rossi testified that cold efficacy beliefs would decline at no greater a rate than 5% per year. (citations omitted).

Id. at 762-63 n. 65.

124 *Id.* at 763.

125 *Id.*

126 *Id.*

127 *Id.* at 764. In a footnote, the court stated: "We express no view on the question whether an order intended to humiliate the wrongdoer would be so punitive as to be outside the Commission's proper authority." *Id.* at 763, n. 69.

128 See FTC's order at note 89 *supra*.

129 The dissent took the court to task for not considering all the terms of the order:

Section III of the order forbids any advertisements for Listerine without the corrective statement. Yet it is considered that Listerine is effective as a mouthwash and breath freshener, and it appears that in recent years much of the greater part of Warner-Lambert's advertising budget for Listerine has been spent in promoting these uses of the preparation. Thus the Commission and the majority would forbid the publication of truthful advertisements of Listerine's effectiveness unless coupled with a disclaimer relating to uses advertised in the past. I cannot believe that the statute contemplates such a remedy, which goes far beyond the prevention of "illegal practices in the future."

562 F.2d at 768 (Robb, J., dissenting).

of deceptive advertising. Although the use of a more objective approach has received wide advocacy,¹³⁰ there is not yet a widely accepted method for so doing.¹³¹ In order to help fill this gap, a study¹³² was conducted that sought to measure the presence of deceptive advertising, its residual effects, the effectiveness of corrective advertising, and the "side effects" of such remedial measures.

More specifically, this study was designed to provide empirical insight into five areas of inquiry:

1. Detecting the effects of a potentially deceptive advertisement.
2. The effectiveness of supplying "objective information"¹³³ in the eradication of the residual effects of a deceptive advertisement.
3. The comparative effectiveness of supplying "objective information" from different sources (*i.e.*, advertiser versus FTC) in the eradication of the residual effects of a deceptive advertisement.
4. The effect of the passage of time upon deceptive and objective information.

¹³⁰ See note 2 *supra*. Others advocating such an approach include D. Aaker, *Deceptive Advertising*, CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST 137 (D. Aaker and G. Day ed. 1974); Armstrong, Kendall, & Russ, *Applications of Consumer Information Processing Research to Public Policy Issues*, 2 COM. RESEARCH 232 (1975) [hereinafter cited as Armstrong]; Gardner, *Deception in Advertising: A Conceptual Approach*, 39 J. MKTING. 40 (1975); Jacoby & Small, *The FDA Approach to Defining Misleading Advertising*, 39 J. MKTING. 65 (1975); Preston, *A Comment on "Defining Misleading Advertising"* and "Deception in Advertising," 40 J. MKTING. 54 (1976); Rosch, *Marketing Research and the Legal Requirements of Advertising*, 39 J. MKTING. 69 (1975); Bernacchi, *supra* note 19.

¹³¹ Researchers who have tried to measure advertising deception used one of two principal approaches. One approach involved displaying certain ads to subjects and asking them if the ads were deceptive. For example, Haefner, *The Perception of Deception in Television Advertising*, An Exploratory Investigation (1972) (unpublished Ph.D. dissertation in University of Minnesota library) discovered that the "ratings" of the subjects did not agree with the unofficial ratings of "deceptive and non-deceptive" made by the FTC attorney with respect to the same ads. This approach is logically deficient because if a consumer judges an advertisement to be deceptive he is not deceived himself. The second approach was based on measuring brand attribute beliefs of consumers. The researchers (Kuehl & Dyer, *Brand Belief Measures in Deceptive and Corrective Advertising: An Experimental Assessment*, Proceedings: 1976 Educator's Conference 373 (1976) and *Applications of the Normative Belief Technique for Measuring the Effectiveness of Deceptive and Corrective Advertisements*, 4 ADVANCES IN CONSUMER RESEARCH 204 (W. Perreault, Jr. ed. 1977)) who used Gardner's, "normative belief technique" (see note 130 *supra*) experienced difficulty in operationalizing it and came to realize that what they were measuring was not necessarily deception. Armstrong's "Salient Deception Score" (see note 130 *supra*) seems to be the only approach so far developed that actually measures deception. See note 144 *infra*.

¹³² This study chose to use the Listerine ad involved in *Warner-Lambert v. FTC*, 562 F.2d 749 for a variety of reasons. One of these is that it is the only corrective advertising case to go to the courts. This study is more fully described in Guroi, *Deception in Advertising: A Review of Past and Current FTC Practice and an Experimental Evaluation of a New Approach for Detecting Deception and a New Approach for Eradicating its Effects* (1977) (an unpublished Ph.D. dissertation in University of North Carolina Library).

¹³³ It is important to distinguish between "persuasive information" and "objective information." Persuasive information attempts to convince an audience of a certain aspect, *i.e.* one side of a story. An example of persuasive information would be a company sponsored advertisement trying to convince consumers that Geritol is an omnipotent tiredness remedy for women, while a corrective advertisement would be one stating that: "The producers of Geritol were found guilty of trying to mislead the public by presenting Geritol as an omnipotent tiredness remedy, although there is no basis for such a claim." An objective information message would be a two-sided message stating both the positive and negative attributes. Objective information related to Geritol might be: "Geritol possesses a nutritive ingredient in the form of iron. If an individual who suffers from iron deficiency used this preparation, he or she may find them beneficial. However, tiredness may not be a symptom of iron deficiency, nor is iron deficiency generally accompanied by tiredness symptoms."

5. The effect of deceptive and objective information on advertiser and FTC images.

A. *Unique Aspects of Study*

In this study of deceptive and remedial (corrective) advertising, a repeated measures experimental design was used. This experiment has incorporated a number of improvements over previous experiments in the deceptive/remedial advertising area. The method used to measure deception and correction is a more sensitized version of the technique used by Armstrong, Kendall, and Russ¹³⁴ which appears to be the only approach devised yet which actually measures advertising deception. In addition, the repeated measures design used is composed essentially of three "before-and-after with control" designs, which is one of the best true experimental designs.¹³⁵

Unlike many of the previous experiments in corrective advertising which used unfamiliar brands, this experiment used Listerine, a well known brand, purchased currently or in the past by 61 percent of the subjects. Although television commercials have been used frequently by the FTC in corrective advertising cases, this is the first experiment using a TV commercial film. (Others used either print or audio messages.) Moreover, the film used for the deceptive advertising treatment was professionally duplicated from the FTC's Listerine case file.¹³⁶

134 Armstrong, *supra* note 130. According to the model used in this study, "a consumer is considered to be deceived by a *false* claim if he *perceives* it and *believes* it. Such a deception, however, does little harm unless it is *salient*—unless it affects the consumer's decision to buy the product." Armstrong, *supra* note 130, at 235 (emphasis added).

135 Campbell and Stanley discuss sixteen experimental designs, but consider only three of them "true experimental designs." The design used in this study ("Pretest/Posttest with Control Group") is the first "true experimental design" they discuss, in which discussion they emphasize the neat way in which it controls for the sources of internal invalidity. *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1963).

136 The television commercial used in this study is entitled "School Bus" and makes all three claims found to be false by the FTC (*i.e.*, Listerine will ameliorate, prevent and cure colds and sore throats). It was professionally duplicated from the FTC files and is nearly impossible for a nonprofessional to distinguish it from the original. The text of the film is:

SCHOOL BUS (60 Seconds)

[It is raining. Two mothers start talking. One mother has just escorted her children to the school bus, the other (Muriel) is checking the mailbox.]

1st Mother Muriel, where is Dave and Sue?

2nd Mother Oh, down with a cold again.

1st Mother Again?

2nd Mother Oh, guess your family always seems fine.

1st Mother I got a theory.

2nd Mother A theory? Nothing can prevent colds.

1st Mother You can help. Let's get out of the rain. [They go inside the house.]

1st Mother Muriel, I make sure they have plenty of rest, and I watch their diet.

2nd Mother Uhu!

1st Mother Then I have them gargle twice a day with Listerine.

2nd Mother Listerine antiseptic?

1st Mother Uhu, I think we've cut down on colds and those we catch, don't seem to last as long.

2nd Mother Sure seems to work for your family.

1st Mother Yes it does.

2nd Mother Well, I'll try it.

Male Voice: During the cold catching season for fewer colds, milder colds, more people gargle with Listerine than any other oral antiseptic. Listerine.
[Music]

In corrective advertising experiments researchers have realized recently that they should be using "beliefs" instead of "affects," but they have overlooked the "salience" aspect of beliefs. This is the first remedial advertising study which measures "saliences" along with brand attribute beliefs.¹³⁷ Previous experiments in remedial advertising have been cross-sectional,¹³⁸ thereby failing to pay appropriate attention to the time dimension. This is the first study to investigate the persistence effects of both the deceptive and the remedial messages. Experiments dealing with a public policy issue concerning carryover effects of residual deceptive beliefs should also measure the persistence effect of the remedial messages themselves.

This is one of the first times two-sided objective information messages which give objective information about both negative and positive attributes of a product have been used to eradicate the residual effects of deceptive advertisements.¹³⁹ At the same time, this experiment also assessed the effects of two-sided objective information messages on company and FTC images.

B. Research Methodology

The subjects used in this experiment were 134 students enrolled at the University of North Carolina at Chapel Hill. They were randomly divided into four groups. A repeated-measures experimental design was used. Group I filled out a questionnaire (M₁) measuring the importance and beliefs about various product claims, then watched a potentially deceptive advertisement film (T₁), filled out

137 See discussion of "materiality" at text accompanying notes 24-27 *supra*.

138 A cross-sectional design uses information from a one-time survey or from a single period's observations. See TULL & HAWKINS, *MARKETING RESEARCH* 578 (1976).

139 The objective, two-sided information films used in this experiment for eradicating the residual effects of the deceptive claims in the Listerine ad were professionally produced especially for this experiment. Two films were produced—one for the company source and the other for the FTC source. The objective information message from the company source was as follows:

Hello, I am Walter Hughes (fictitious name), representing Warner-Lambert Company, makers of Listerine.

Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats.

Listerine is an antiseptic which kills germs on contact. It is effective for general oral hygiene, bad breath, minor cuts, scratches, insect bites and infectious dandruff. But it is not effective against colds and cold symptoms, because colds are caused by viruses and Listerine does not kill viruses.

The first paragraph of this message identifies the source of the message. The second paragraph is from the final order of the FTC on the Listerine cases, specifying the negative attributes of the product. See note 89 *supra*. This paragraph includes the "confessional preamble" "contrary to prior advertising" because the study was conducted before the circuit court announced its decision excising this phrase. See text accompanying notes 124-126 *supra*. In the last paragraph, the first two sentences state the positive attributes of Listerine as presented on the label of Listerine bottles. The final sentence explains the reasoning behind the negative attributes mentioned above and is aimed at eradicating any residual effects that might still exist in the minds of consumers due to the exposure to the deceptive advertisement or previous beliefs. The message from the FTC source is similar except for the beginning: "Hello, I am Walter Hughes of the Federal Trade Commission. The Federal Trade Commission has found that contrary to. . ."

In both instances the messages are not only objective—the FTC has medical evidence to support the negative claims and Warner-Lambert has medical evidence to support the positive claims—but also two-sided—three negative and six positive claims are made.

a second questionnaire (M_2), watched a two-sided objective information film about the product in the deceptive advertisement from the company source (T_2), and then filled out a third questionnaire (M_3). Six weeks later, they filled out a fourth questionnaire (M_4). Group II did the same except T_2 was a two-sided objective information film from the FTC source. Group III was similar to I and II, except T_2 was an irrelevant advertisement (a dummy film). Group IV had both T_1 and T_2 as dummy films. This was the control group for detecting effects of repeat measurements. (See Figure 1 for experimental design).

The potentially deceptive films were the "Listerine" advertisements¹⁴⁰ and were included with two other advertisements (a "Ronco Noodles" ad and a "GAC Finance Company" ad). The questions about Listerine were included among questions about the other two advertisements in order to prevent the subjects from realizing that the main interest was the Listerine advertisement.

In order to assess the effects of deceptive and two-sided objective information messages on the company and the FTC images, subjects filled out semantic differential scales¹⁴¹ during the second (M_2) and third (M_3) measurements.

The main dependent variable in this experiment was the "Salient Deception Score" (SDS). This measure was a modified version of the technique used by Armstrong, Kendall, and Russ.¹⁴² An SDS was calculated for each false claim by first multiplying the "belief score" of every subject by that subject's "salience score" (importance of that claim in affecting that subject's decision to buy the product), and then calculating the mean SDS score for the whole group.¹⁴³ An additive model was used in which the mean SDS's of the claims were added to find an SDS for the whole advertisement.¹⁴⁴ In addition, the effects of objective information messages on the company and FTC images were tested with a series of semantic differential scales.

C. Findings

Analysis of the data¹⁴⁵ gathered by using the research methodology described

¹⁴⁰ See note 136 *supra*.

¹⁴¹ In order to determine the effects of objective information messages on the company and the FTC images a series of semantic differential scales containing attributes underlying a firm's and an agency image were employed. The set of pairs of antonyms, the extremes of each pair being separated by seven (assumed) equal intervals, related to powerfulness, warmth, deliberateness, modernness, successfulness, outgoingness, and trustworthiness. The first four attributes were chosen from an example in GREEN & TULL, RESEARCH FOR MARKETING DECISIONS 194 (3d. ed. 1975). The last three came from Dyer, An Experimental Evaluation of the Federal Trade Commission's Corrective Advertising Remedy at 143 (1972) (unpublished Ph.D. dissertation in University of Maryland Library). Scores were assigned to the scale on 7, 6, 5, 4, 3, 2, 1 basis with 7 being the positive extreme.

¹⁴² Armstrong, *supra* note 130.

¹⁴³ The SDS scores were calculated using a one-to-sixteen scale. Each subject indicated his belief in each claim as definitely true, probably true, probably false or definitely false. These were coded 4, 3, 2, and 1, respectively. Each subject indicated the importance of each claim in his decision to purchase the product as very important, moderately important, slightly important or not at all important. These were coded 4, 3, 2, and 1, respectively. Since the SDS is a product of these, it can range from 1 (1 x 1) to 16 (4 x 4).

¹⁴⁴ Since there were three false claims in the Listerine ad, the SDS score for the whole ad could range from 3(1 + 1 + 1) to 48 (16 + 16 + 16).

¹⁴⁵ In this study a single dependent variable (SDS) was measured four times on the same subjects. Generally, such data are analyzed with a univariate analysis of variance which has provision for correlated or repeated measurement. See, e.g., WINER, STATISTICAL PRINCIPLES

above yielded several interesting findings.

1. The technique used to generate the SDS seems to detect deception quite accurately.
2. The Listerine advertisement was found to be deceptive based upon the changes in consumers' reported beliefs and saliences with regard to the three product claims.¹⁴⁶ (See Figure 2). This finding is consistent with the conclusion of the administrative law judge,¹⁴⁷ the FTC¹⁴⁸ and the District of Columbia Circuit.¹⁴⁹
3. The kind of remedial message used (two-sided, objective information messages which state both the negative and positive attributes of the product) was highly effective in eradicating the residual effects of deception.¹⁵⁰ (See Figure 2).
4. The data indicates that there was no significant difference¹⁵¹ in effectiveness between supplying the objective information message from the company or the FTC source. This held true both right after the message¹⁵² and over a six-week period.¹⁵³ (See Figure 2.)
5. The company source, two-sided objective messages caused changes in the negative direction with respect to some attributes and in the positive direction with respect to other attributes. Overall, however, there appeared to be no damage to the company's image.¹⁵⁴ (See Figure 3).
6. On the other hand, the changes in the company images indicated that FTC source messages will likely damage the image of the company.¹⁵⁵ (See Figure 4.)

V. Conclusions

The FTC should adopt an objective approach in detecting and correcting deceptive advertising. Consumer surveys, although gaining somewhat greater recognition and use,¹⁵⁶ have not been fully, nor appropriately, utilized by the FTC for the purpose of providing such an objective approach. The findings in

IN EXPERIMENTAL DESIGN 261-308, 514-603 (2d. ed. 1971). But in addition to the usual assumptions concerning normality and homogeneity of variance within cells, Winer stresses that repeated-measures analyses also require the assumption of homogeneity of covariances (*i.e.*, correlations) between repeated assessments.

For repeated measures, such as those in this study, it is recommended that use be made of multivariate techniques that make no covariance assumptions and provide exact probability statements. McCall & Appelbaum, *Bias in the Analysis of Repeated-Measures Designs: Some Alternative Approaches*, 44 CHILD DEVELOPMENT 401 (1973); KIRK, EXPERIMENTAL DESIGN: PROCEDURES FOR THE BEHAVIORAL SCIENCES 143-44 (1968). These recommendations were followed and multivariate analysis of variance was utilized to analyze the data.

146 Probability of this outcome occurring by chance is less than .001 (*i.e.*, $p < .001$).

147 Warner-Lambert Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,776.

148 Warner-Lambert Co., 86 F.T.C. 1398 (1975).

149 562 F.2d 749.

150 $p < .001$.

151 Significant in the statistical sense. In order to determine whether results have any statistical significance, it is useful to measure the extent to which the results could occur by chance. This is expressed as a probability. The lower the probability, the more statistically significant are the results. In social science research, levels of .05 or .01 are typically used as cutoffs for statistical significance. See SNEDECOR & COCHRAN, STATISTICAL METHODS 28-30 (6th ed. 1967).

152 $p < .283$.

153 $p < .597$.

154 The overall change in company image had a probability of random occurrence of .009 ($p < .009$). Note that this is very close to the cutoff for statistical significance.

155 The damage to the company's overall reputation was statistically significant. ($p < .001$).

156 See note 18 *supra*.

FIGURE 1

Experimental Design

	M ₁	T ₁	M ₂	T ₂	M ₃	T ₃	M ₄
Group I	M ₁₁	Deceptive Ad	Image Measures	Two-sided objective information (company)	Image Measures	6-week period	M ₁₄
			M ₁₂		M ₁₃		
Group II	M ₂₁	Deceptive Ad	Image Measures	Two-sided objective information (FTC)	Image Measures	6-week period	M ₂₄
			M ₂₂		M ₂₃		
Group III	M ₃₁	Deceptive Ad	Image Measures	Irrelevant Ad	Image Measures	6-week period	M ₃₄
			M ₃₂		M ₃₃		
Group IV	M ₄₁	Irrelevant Ad	Image Measures	Irrelevant Ad	Image Measures	6-week period	M ₄₄
			M ₄₂		M ₄₃		

FIGURE .2

ADDITIVE MODEL FOR ALL FOUR MEASURES

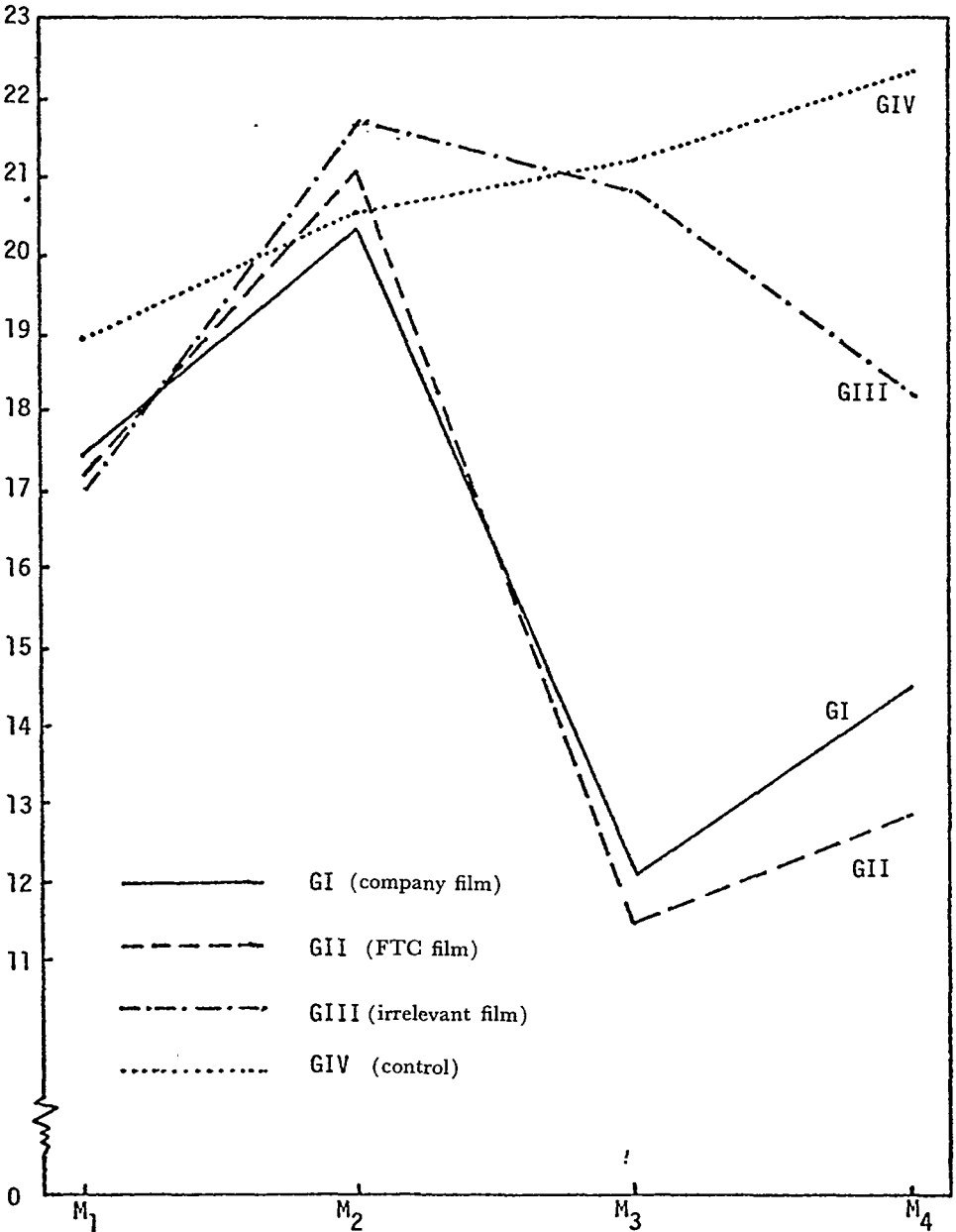


FIGURE 3
Group I (Company Source)

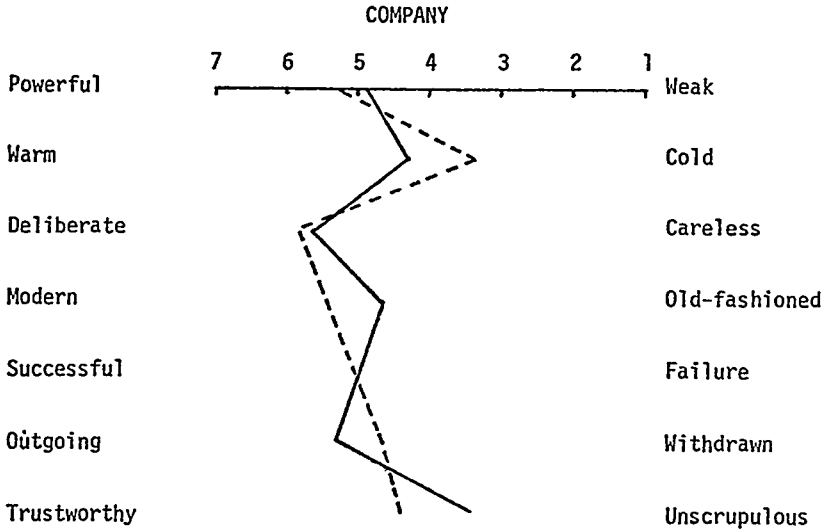
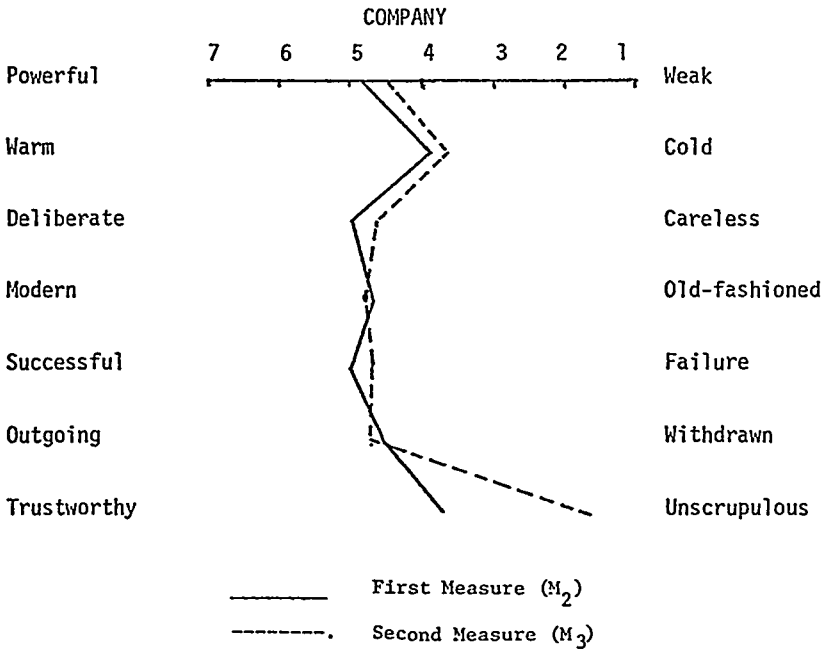


FIGURE 4
Group II (FTC Source)



the study¹⁵⁷ described above suggest a number of ways in which the FTC (and the advertisers¹⁵⁸) can employ consumer surveys to better address the problems presented by deceptive advertising and the need for corrective advertising.

The first way in which surveys may be used by the FTC is in its case selection. By measuring the Salient Deception Score of a relevant group,¹⁵⁹ the FTC could make a better informed and more objective determination of the deceptiveness of any suspected advertisement. This procedure requires the FTC to establish a threshold SDS score for various products or product categories beyond which an advertisement is considered deceptive.¹⁶⁰ It also requires the expenditure of money to conduct the survey, but it is entirely conceivable that the improvement in case selection, and consequent reduction in litigation expenses, could offset this cost. Moreover, the existence of such objective proof of deceptiveness could bring about more consent orders by discouraging advertisers from litigating.

If the matter proceeded to the administrative law judge, then proof of the four elements of deceptive advertising would be required.¹⁶¹ As discussed above,¹⁶² the use of a sufficiently broad sample will permit the extraction of a subsample that coincides with the relevant group and the appropriate intelligence level. Since the SDS score takes into consideration the meaning of the advertisement, its falsity, and its materiality, the remaining three issues can be dealt with simultaneously by establishing the threshold SDS score.

Secondly, consumer surveys could be used to select those deceptive advertising cases that required corrective advertising. The FTC's current standard for imposing corrective advertising requires a finding that "a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertisement ceases. . . ."¹⁶³ This finding could be readily made by measuring the SDS score after an appropriate period of time had elapsed to determine whether there were

157 It should be noted that this experiment (as do all experiments) has several limitations. Two of these merit mention. First, since this was an experiment, the conditions were somewhat unrealistic. The subjects were exposed to the message only once and under forced exposure conditions (*i.e.*, in a dark room with a TV commercial seen on a movie screen). They did not have the opportunity to utilize selective exposure to the messages which is common under normal conditions. In the real world, they would have had a chance to watch a commercial many times over the years, but in the experiment, forced exposure was necessarily employed in order to assess the effects of deceptive and remedial messages without unduly diluting the effects of these treatments. One possible way to improve this experiment would be to use the videotape of an actual TV program and to show the deceptive and remedial ads during the commercial breaks. Were the subjects to view such a tape on TV screens, the experiments would likely be more natural and realistic. Second, the subjects in this experiment were all college students; it is not certain that nonstudents would respond in the same manner.

158 Advertisers can use the methods proposed within during their copy-testing procedures to identify potentially deceptive ads.

159 See text accompanying notes 29-30 *supra*.

160 The scope and significance of the possible harm would effect the level at which the threshold of prohibited deception is established. As the Commission gains experience using this method, these limits could and should be revised. See Gellhorn, *supra* note 5, at 570-72. See also Gerlach, *The Consumer's Mind: A Preliminary Inquiry into the Emerging Problems of Consumer Evidence and the Law*, MKTING. SCIENCE INSTITUTE 4-5 (1972) for a discussion of how the FTC should develop these standards.

161 See text accompanying notes 4-33 *supra*.

162 See text accompanying notes 29-30 *supra*.

163 Quoted in 562 F.2d 749. See text accompanying note 37 *supra*.

any residual effects of the advertisement.¹⁶⁴

If corrective advertising were indicated, the results of this study have implications for the terms of the corrective advertisement with respect to both disclosure and exposure. This study provides strong support for the use of two-sided, objective remedial messages.¹⁶⁵ In fact, the advertiser could be allowed to participate in the determination of the message, especially for the positive claims. What is crucial is that both the positive and negative claims are objective and supported by scientific evidence.

The experiment also indicates that there was no significant difference in effectiveness between supplying objective information from the company or the FTC.¹⁶⁶ Given the absence of any source effect and the additional finding that use of the FTC source tended to damage the company's image, the FTC should use a company source, objective message unless it intends for the corrective ad to be punitive¹⁶⁷ as well as remedial.

With respect to the exposure terms of the corrective advertisement, the SDS measure could be used to introduce some rationality to determining the time duration of corrective advertisements. Presently, the Commission arbitrarily chooses some time period¹⁶⁸ or dollar amount of advertising.¹⁶⁹ The study indicates that the SDS scores can be used to detect correction as well as deception. Therefore, the exposure term could require the corrective advertisements to be run until the residual deception is eradicated, as measured by the SDS score.¹⁷⁰

Finally, the systematic use of the SDS measure over time can provide the FTC with the means of assessing the effectiveness of the many facets of its attempts to eliminate deceptive advertising.

To conclude, the FTC's use of an objective approach (entailing consumer surveys designed to yield SDS's) to detect and correct deceptive advertising would result in a significant improvement in the agency's regulation of advertising and, consequently, better protect consumers, honest businessmen, advertising effectiveness, and the public image of marketing in general.

164 Given the usual delay involved in the FTC's actions, the measured SDS would in most cases reflect the residual effects, so no additional survey would be required. See text accompanying note 35 *supra*.

165 See text accompanying note 150 *supra*.

166 This is contrary to predictions made without empirical evidence that in government information programs the prospects for effectiveness are likely to decrease to the extent that "neutrality is preserved." See Wilkie, *Applying Attitude Research in Public Policy*, MKTING. SCIENCE INSTITUTE (1975).

167 The District of Columbia Circuit's opinion does not preclude the punitive use of corrective advertising. The court stated:

We believe the preamble "Contrary to prior advertising" is not necessary. It can serve only two purposes: either to attract attention that a correction follows or to humiliate the advertiser. The Commission claims only the first purpose for it, and this we think is obviated by the other terms of the order. The second purpose, if it were intended, might be called for in an egregious case of deliberate deception, but this is not one. While we do not decide whether petitioner proffered its cold claims in good faith or bad, the record compiled could support a finding of good faith. On these facts, the confessional preamble to the disclosure is not warranted.

562 F.2d at 763. The court added in a footnote that "[w]e express no view on the question whether an order intended to humiliate the wrongdoer would be so punitive as to be outside the Commission's proper authority." *Id.* at n. 69.

168 See text accompanying notes 64-67 *supra*.

169 See text accompanying note 89 *supra*.

170 The advertiser subject to the corrective ad order would have sufficient monetary incentive to finance the independent, nonpartisan surveys required by this procedure.