

## Linguistic Practices of the Federal Trade Commission

by D. Terence Langendoen

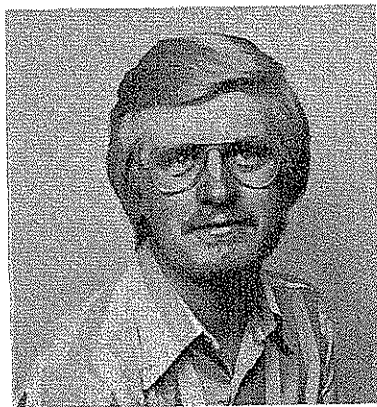
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According to the Federal Trade Commission Act of 1914, as amended 1938 and 1964, the Federal Trade Commission is an independent regulatory agency which is empowered by Congress to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce . . ." (15 U.S.C. §45 (a) (1) (1964)). Included within the scope

of its authority is the regulation of advertising<sup>1</sup> and other commercial practices involving the use of language, such as product naming and labeling. In practice, the FTC has limited its authority in false advertising cases to those which are clearly interstate in character; up to now it has not pressed its authority to regulate ads which originate in one state but which are carried in media across state lines (Alexander 1967:3; Kirkpatrick 1969:52-54), but it is probably only a matter of time now before it begins to do so.<sup>2</sup>

The first question that must be asked in connection with the problem of whether a given advertisement, product name, or product label is deceptive is: "deceptive to whom?". Justice Hugo Black, writing in 1937 for the majority of the Supreme Court in upholding a critical FTC ruling (*FTC v. Standard Education Society*), expressed the view that the law should protect those who believe everything that they read and hear:

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 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. (Quoted in Alexander 1967:7, n.46)



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George Alexander (1967:8) has put together the following composite picture of the person the FTC sees itself as protecting, based on a variety of decisions from 1930 to 1965:

General stupidity is not the only attribute of the beneficiary of FTC policy. He also has a short attention span; he does not read all that is to be read but snatches general impressions. He signs things he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid his bills. Most of all, though, he is thoroughly avaricious. Fortunately, while he is always around in substantial numbers, in his worst condition he does not represent the major portion of the consuming public.

As this caricature was intended to suggest, it is not obvious how one could possibly frame an advertisement that would properly communicate, were the FTC to insist on protecting those with all of the properties just listed. In fact, however, few advertisers up to now have felt the need to worry about this problem, because of the piecemeal way in which the FTC has operated in choosing cases to decide, and the ineffectiveness with which its decisions carry the force of law throughout the market place. Indeed, the more serious problem may well be that posed by the substantial number of "trained and experienced" persons who today regard advertising as pure bunk, and given the character of advertisements in the mass media, expect to receive very little true or useful information from them. (Cox *et al.* 1969: 15-16)

There is another aspect of the "deceptive to whom?" question that leads directly to some questions of linguistic interest. The FTC and the courts have both ruled that the dictum that a customer should always get what he asks for must be enforced, even if he has an irrational preference for one form of an item over a functionally identical or even superior one. In the words of Justice Benjamin Cardozo, writing for the majority of the Supreme Court in 1934 in upholding the Commission in the case of *FTC v. Algoma Lumber Co.*:

The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else . . . In such matters the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. (Quoted in Alexander 1967:67)

The case in question concerned the practice of labeling a particular species of yellow pine

grown in California as "California white pine." In 1934, there existed a considerable commercial preference in the East for white pine over yellow pine. When this species of yellow pine first appeared on the market in the east, it came into competition with eastern white pine. It was then sold under the label of "California white pine" to certain customers who wanted genuine white pine. Leaving aside the question of whether white pine is in fact superior to yellow pine (which it was then found to be), the FTC and the courts ruled that the use of the name "California white pine" for a variety of yellow pine was deceptive.

The "California white pine" case involved a deception which was fairly obvious to the customers being deceived. An earlier series of cases involving so-called "Philippine mahogany" involved a subtler form of deception, which had a considerably different legal outcome. "Philippine mahogany" is a species of hardwood grown in the Philippine Islands which botanically is not of the mahogany family. In a series of rulings from 1927 to 1929, the FTC prohibited the continued use of the name (on the grounds that when a customer wants mahogany, he should get wood which is botanically mahogany). The Court of Appeals upheld the Commission's decision and the Supreme Court refused to rule further on the matter. However, in 1931, the FTC reversed itself, and declared that it would only require of any company that:

. . . in its sale, description, and advertisement of the wood of the Philippine Islands which it has heretofore designated and described as 'Philippine Mahogany'. . . it will not employ the word 'Mahogany' in connection with the sale of said wood without the modifying term 'Philippine'. . . (Quoted in Alexander 1967:70, n.181)

This case is instructive for a number of reasons. First, it reveals that the FTC has no clearly defined set of standards for judging the deceptiveness of product labels of this sort. Second, it can be used here as a convenient starting-point for the consideration of two complex and interwoven linguistic issues: (1) the problem of secondary meaning and (2) the distinction between functional and literal meaning.

It could be argued that the FTC was right to reverse itself in the Philippine mahogany case because in the absence of any other accepted general name in English for this hard-

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wood of the Philippines, the name "mahogany" had secondarily come to be associated with it (just as in ordinary English "silk" has a secondary meaning which allows it to be used to refer to "corn silk"). However, against this, observe that this argument grants license to any advertiser who wishes to associate any term X (such as "mahogany") that has a positive connotation with any product Y (that may or may not have the characteristics of those items ordinarily called X) by mounting an expensive advertising campaign to identify Y as X in the public's mind. I think it is wrong and dangerous to grant this license and that the FTC must insist on rigorous standards for the determination of secondary meanings.

But even if "mahogany" does not have a secondary meaning "hardwood of Philippine origin", suppose "Philippine mahogany" is functionally equivalent to ordinary mahogany. Would that not suffice to allow the use of the name? <sup>3</sup> By itself, it does not, as we can see from Justice Cardozo's opinion quoted earlier. There must also be a lack of public interest in the distinction. Thus, if it can be shown that charcoal made from corncobs is functionally equivalent to charcoal made the ordinary way from wood, and that there is no significant public interest in the distinction between corncob-based and wood-based charcoal, then the name "charcoal" should be allowed to stand for both kinds. Such a decision was in fact reached by the FTC in 1963 in dismissing

a complaint against the Quaker Oats Co. (cf. Alexander 1967:61).

FTC treatment of the problem of functional equivalence and of functional definitions has not always been so enlightened, however. The decision in the case of the Quaker Oats Co. was exceptional; usually the FTC has refused to countenance the use of the term in standard use for a product or process to designate a functional equivalent, even where no consumer interest in the cases was apparent. The reason for this may well have been the presence of industry interest; forbidding the use of the standard term for a new product which is equivalent or even superior to the old has a distinctly anticompetitive effect.

Questions of functional equivalence arise in advertising as well as in product-naming. In the late 1950's, the Chevrolet Company mounted a campaign to push the sales of "Authorized" replacement parts for its cars by advertising that "Your Chevrolet knows the difference." The ad, however, did not mention that certain of these parts were made by independent producers who sold identical parts to independent retailers (in which case, your Chevrolet could not possibly have known the difference). A complaint was made to the FTC; it was dismissed (cf. Alexander 1967:60). Indeed, the FTC has in general refused to act on complaints against the advertisement of supposed product differences, even where it can easily be shown that the differences in

question are in name only. In other words, the FTC has tacitly given its approval to marginal differentiation of otherwise identical products.

I turn now from the question of "deceptive to whom?" to consider the principles by which the FTC has decided which words or phrases in commercial language to regulate.<sup>4</sup> In advertising in particular, there are certain key words and phrases which occur over and over again because they are felt to be potent for attracting people's attention or for disposing people favorably toward the product or brand name being advertised. Among these, such words as "free", "sale", "best", "guaranteed", "cure" have received considerable attention from the FTC; others such as "happy", "new" (on this word, cf. Cox *et al.* 1969:20-22), have not. There are two sources for this distinction. First, false-advertising sanctions are aimed at preventing deception; the misrepresentation of a product or brand that a consumer presumably already has an interest in. They do not apply to techniques of nonrational persuasion aimed at implanting the feeling of need for a particular brand or product, since the question of deception does not arise for such techniques. Second, certain aspects of "sales talk" have always been exempt from false advertising law. Before there ever was a Federal Trade Commission around to protect consumers from fraudulent salesmen, it was (and still is) possible under common law to sue for damages if one was led to purchase something under false pretenses. However, there is no remedy under common law if the purchaser relies on statements by the seller that the product is "excellent", "a good buy", "valuable", etc. (Alexander 1967: 102). Such statements, called "puffs", cannot be the basis for a misrepresentation case under common law unless they can be shown to be purported statements of fact. To some extent, the FTC continues to be bound by this restriction, although it has succeeded in narrowing somewhat the traditionally accepted notion of puffing. For example, the indiscriminate use of superlatives, dangling comparatives, and other means of establishing uniqueness or superiority without evidence has been enjoined.<sup>5</sup> And, in the case of Goodman v. FTC (1957), it was affirmed that statements made to induce purchase cannot be defended as puffing, for example, representations that a given product is "safe" (Alexander 1967:103).<sup>6</sup>

In general, however, the FTC has not been successful in clarifying the distinction between

"statements of fact" (which if deceptive are illegal) and "statements of opinion" (which are not illegal, even if deceptive). Indeed, the distinction, when applied to mass-media advertising, is dysfunctional, since all that an advertiser needs to do to convert a misleading statement of fact into a misleading statement of opinion (which is hence exempt from sanctions) is to put it in the mouth of a celebrity or "average consumer". Current FTC regulation of the use of such testimonials is shockingly lax; an advertiser is not even obliged to disclose that the endorser of his product has been paid, and if so how much.<sup>7</sup> To some extent, the fault lies not with the FTC but with the courts. In 1932, the Second Circuit Court reversed an FTC decision requiring the manufacturer of Cutex products to reveal that the socially prominent persons who endorsed those products were paid:

If the testimonials involved here represent honest beliefs of the endorsers, there is no misrepresentation concerning the product and no unfair competition is created. We have no right to assume that endorsers of commercial products falsify their statements because they have received compensation. (Quoted in Alexander 1967:179)

However, it is not to the FTC's credit that it has never challenged this ruling, especially now that the courts no longer take such a dim view of government intervention and regulation in false-advertising cases. I would suggest not only that the FTC return to the position it took in 1932, before it was overruled, but that it apply the same standards that it uses in regulating statements of fact to testimonials of all sorts. Thus if it finds statements like "X shaves closest of all" deceptive, it should equally well rule that an advertisement in which a celebrity says "X shaves me closest of all" is deceptive.

The question of whether to regulate non-rational persuasion techniques and if so how, is more difficult to answer, since it would appear that the FTC has no authority under present law to do so.<sup>8</sup> If it is agreed that these techniques should be regulated, then two avenues of attack suggest themselves. First, request Congress to pass legislation specifically authorizing the FTC to prevent the abuses of appealing to nonrational motives. This avenue should be tried, but it is obvious that it will not be easy to get such a law passed in the foreseeable future at least. The second avenue

of attack would be for the FTC to attempt to interpret current law as giving it authority in this area. The Commission could do so in the following way: the FTC currently has some authority to force advertisers to make certain disclosures about their products where it is deemed that this information is necessary if the consumer is not to be deceived about the product. The most important case to date involving this authority is a current one in which the FTC is attempting to force cigarette advertisers to disclose the tar and nicotine contents of cigarettes in their advertisements. For such disclosures to have the intended effect, they must be reasonably prominent. They cannot be prominent, however, if the bulk of the advertisement is a nonrational appeal to the individual to smoke the particular brand of cigarette being advertised. Therefore, nonrational techniques of persuasion, interfering as they do with the prevention of deception, must be regulated in the interest of preventing deception.

This tactic might just work, but unfortunately it is based on the FTC's power to force disclosure of information in advertising, and the extent of that power is moot.<sup>9</sup> Once again, part of the problem lies with the courts; after some years of vacillation by the courts, the District of Columbia Court of Appeals ruled, in the 1950 case of *Alberty v. FTC*, that the Commission's power to force disclosure of information was sharply limited:

Our dissenting judge [Judge Bazelon] says "The Act's purpose is to encourage the informative function of advertising." That view reflects clearly the difference between us. We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority. But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter . . . (Quoted in Alexander 1967:23-24)

If the FTC were to challenge the courts again today on this issue, it is not at all clear what

the outcome would be. However, since 1950, there has been specific legislation passed which mandates the disclosure of certain information in product labeling, specifically the Fair Packaging and Labeling Act and the Truth-in-Lending Act. Perhaps, as Alexander (1967:24) suggests, the FTC will be able to launch out from this base to require positive disclosures by advertisers without incurring the disapproval of the courts.

Let me conclude by pointing out that while I do recommend that the FTC should become involved in the regulation of advertising techniques of nonrational persuasion, and that it should work toward the goal of making advertising genuinely informative, I do not have any clear idea of what specifically the Commission should do to implement these recommendations. To give some idea of the complexity of the issues involved, consider the fact that people are easily deceived even by truthful disclosures. For example, we are all familiar with the "minimum daily requirements" of human beings for certain vitamins and minerals, from the disclosures of vitamin and mineral contents in certain packaged foods and food supplements. Yet how many of us have been deceived into thinking that as long as we ingest this "minimum daily requirement" we have an adequate diet?

#### NOTES

1. The Act also specifies that "It shall be unlawful . . . to disseminate . . . any false advertisement" [15 U.S.C. §52 (a) (1964)], where "[t]he term 'false advertisement' means an advertisement . . . which is misleading in a material respect . . ." [15 U.S.C. §55 (a) (1) (1964)].
2. FTC reluctance in this area purportedly is based on the 1941 Supreme Court ruling in the case of *FTC v. Bunte Bros.*, in which the Court held that the Commission has jurisdiction only over that portion of commerce that Congress had constitutional control over. It is extremely unlikely however that the courts today would find that the FTC had no power over interstate communication of the sort described above.
3. On this point, compare Commissioner Humphrey's dissent in the original FTC rulings which forbade the use of the name "Philippine Mahogany": "The contention of the majority here is that if any person of common understanding wished to buy this Philippine wood, that has all the beauty and dura-

bility of mahogany—in fact, all the best characteristics of mahogany—that it cannot be described to him so as to reach the common understanding, by calling it “Philippine Mahogany,” but in order to keep him from being deceived and so it is either Lauan, Tanguile, Almon, Batan, Apitong, Lamao, Orion, Abatang, Bagaac, Batak or Balachacan. This proposition, it seems to me, would be highly complimented by characterizing it as absurdly ludicrous.” (Quoted in Alexander 1967:69, n.177)

4. I will not go here into the way in which the use of particular words or phrases has been regulated by the FTC. In those cases that would particularly interest a semanticist, the FTC has not distinguished itself. The one word that has vexed the FTC the most has been “free”, about which Alexander (1967: 147), has this to say: “. . . the one contribution the Commission was in a position to make in its fifty-odd years of enforcement was the contribution of a certain policy—one way or the other—on the use of ‘free’. Instead, it has provided confusion and contradiction.”
5. But not consistently. For example, the FTC dismissed a complaint against the Celanese Corp. of America (1953) for advertising that Celanese fiber was “different from any type of fiber ever made”, that it was like nothing ever known, and in a class by itself. The Commission explained itself as follows: “. . . Many of the foregoing expressions may properly be considered as mere puffery, and certainly a producer should be allowed some reasonable latitude to extol his wares, as otherwise the practical and economic justification for advertising and publicity ceases to exist.” (Quoted in Alexander 1967:59-60)
6. But once again not consistently. In the case of Bristol Myers Co. (1949), the Commission dismissed a complaint against the company’s advertisement of its toothpaste as leading to brighter teeth and a more attractive smile on the grounds that it was puffery and hence unobjectionable (Alexander 1967:113).
7. In 1966, the Commission did manage to force disclosure of a blatant misrepresentation of corporate endorsement: Proctor & Gamble’s

claim that washing-machine manufacturers had approved one of its soap products by packing a box of it in each machine sold. What was left undisclosed was that the soap had been supplied free and that on occasion Proctor & Gamble would promote certain brands of washing machines in its own advertising (Alexander, 1967:179-180).

8. No instances of FTC intervention in such cases have been documented (Alexander 1967:22, n.131).
9. In fact, as Alexander (1967, passim) persuasively argues, many past FTC rulings in which deception has been found have had the effect of preventing disclosure of information.

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