

WHAT IS FALSE, DECEPTIVE OR MISLEADING ADVERTISING?

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Abstract

The answer to the question which is the title of this paper changes over time. Today's answer is provided by reviewing FTC interpretations, industry self-regulating mechanisms and the definitions and interpretations of various scholars.

Introduction

The people are annually robbed of millions of dollars by false and misleading advertisements that appear in the periodicals of the country . . . (A) toll of millions (is taken) annually from the sick, the unfortunate and the ignorant; those that are ready to try anything as a forlorn hope. (Handler, 1976. p. 22)

If you thought that the above quotation was delivered by Nader, Reagan or one among thousands of politicians or social activists within the past decade you were wrong. It was delivered in 1928 by a chairman of the FTC to representatives of 6000 publishers attending a trade practice conference. It is a reminder that false, misleading or deceptive advertising is not new. Such practices have been used since advertising originated. What is new and constantly evolving, is the legal definitions and interpretations of what constitutes false, deceptive or misleading advertising.

For the current answer to the question of what constitutes false, deceptive or misleading advertising we will examine the legal definitions and FTC interpretations, the guidelines and parameters provided by the advertising industry's self-regulatory mechanism and definitions and interpretations of marketing scholars.

The FTC and Deceptive Advertising

The government's attitude toward business during the early twentieth century was classic "laissez-faire." However, this policy resulted in numerous cases of firms driving their competitors out of business. One such example concerns John D. Rockefeller, founder of the Standard Oil Co.: . . . (He) got together with some other oilmen in the early days of his operation and worked out a deal with the railroads over which they shipped their oil. They arranged not only to get a secret rebate on the oil they shipped, but also to get a rebate on all the oil their competitors shipped. Result: they were able to undersell their competitors and drive them out of business (Kleppner, 1979, p. 13).

In order to prevent such activity, the FTC Act was approved in 1914. Section 5 declares "that unfair methods of competition in commerce are hereby declared unlawful." Section 5 states that:

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in com-

merce . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act . . . (It) shall issue . . . an order requiring such person, partnership, or corporation . . . to cease and desist from using such method of competition. (Emphasis added.)

Thus, the FTC was established. It was empowered to interpret ("be of the opinion") what was "unfair method of competition" and given the authority to issue cease and desist orders to violators. The FTC interpreted that false, misleading or deceptive advertising was also an unfair method of competition and began prosecuting firms which it felt used such advertising. However, in 1931 the Supreme Court over-ruled the decision in the FTC v. Raladam Co. case (1931, 51 S. Ct. 587, 283 U.S. 643, 75 L.Ed. 1324). It held that the commission must establish that questioned advertisements substantially injure or tends to injure the business of a competitor. This ignored completely the influence such advertising might have on the public. (Andage and Fryburger, 1975, p. 89).

Since, according to the Supreme Court, the FTC Act of 1914 only protected business competitors it was amended in 1938 by the Wheeler-Lea Amendments to aid the public. The main thrusts of these amendments were: First, to expand what was considered unlawful and second, to define the term "false advertisement." Concerning the first point, it added the expression "unfair or deceptive acts or practices," so that title 15, section 45(a) (1) now reads: "Unfair methods of competition in commerce, and unfair or deceptive acts of practices in commerce, are declared unlawful." (U.S. Code, 1963, p. 465). Second, it defined a "false advertisement" in section 55(a)(1) as:

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement 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 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 conditions as are customary or usual. (Emphasis added.) (U.S. Code, 1963. p. 735).

It is important to remember that in the Wheeler-Lea definition of "false advertisement":

1. The "material aspect" of a misleading statement is stressed and
2. A new concept is established by indicating that not only is an ad judged by what is said but also by what is not said.

A recent example of how the FTC has prosecuted a firm for making a misleading statement of a

"material respect based on what is said" is in the Listerine case (Warner-Lambert Company v. FTC, F.2d 749, C.AD.D.C.) Its copy stated Listerine was beneficial against colds or sore throats and "Kills germs by the millions on contact." This . . . was based on tests made long ago showing that Listerine killed the germs causing colds and sore throat . . . the FTC was able to prove the invalidity of the tests . . . (and) medical science found that colds (are caused by) viruses that enter through the nose and the eyes, not through the mouth . . . Warner-Lambert (was) called upon to run (corrective advertising) . . . stating that "Listerine will not help prevent colds or sore throats or lessen their severity." (Emphasis added.) (Kleppner, 1979, p. 552)

Although the Wheeler-Lea amendments stressed the "material aspect" of a misleading statement to judge "false advertisements" it left a loophole by saying that an ad is false to "the extent to which the advertisement fails to reveal facts material" (what is not said). The term "what is not said" means the impression left by what was said, seen or heard. Thus, the FTC "has progressively liberalized its interpretation of the law by placing increasing emphasis on impressions which advertisements create in the minds of consumers" (Sandage and Fryburger, 1975, p. 78). This is illustrated with excerpts from two decisions:

1. A statement may be deceptive . . . even if constituent words thereof may be literally or technically construed so as not to constitute a misrepresentation; important question being impression likely to be created by statement on prospective purchasers of maker's products. (Kalwajty v. FTC, 1956.)
2. . . . To tell less than the whole truth in an advertisement is a well known method of deception, and he who deceives by resorting to such methods cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which the deception has been accomplished. (P. Lorillard Co. v. FTC, 1950.) (Emphasis added) (U.S. Code, 1963, p. 503).

The preceding material is not intended to be a laborious law review but is necessary to show that there is no single definition of deceptive advertising. The legal definition of what constitutes deceptive advertising has evolved over many years and has been interpreted by the FTC. Ten FTC guidelines of major deceptive practices follow:

1. Misleading Statements and Unsubstantiated Claims - (Warner-Lambert Co. FTC, 1977.)
2. A Misleading Impression Created By A Statement It is deceptive to tell less than the whole truth. Even if what is said is literally true. The impression generated in the mind of the consumer is what counts. (Kalwajty v. FTC, 1956; and P. Lorillard Co. v. FTC, 1950.)
3. Lotteries In Connection with Sales Promotion - The process of selling goods by means which involve a game of chance, gift enterprise or lottery including punchboards (is deceptive and illegal--Peerless Products, Inc. v. FTC, 1960). (U.S. Code, 1963, pp. 497-8).
4. Capacity to Deceive is Criterion - The FTC can prevent use of unfair methods of competition or deceptive acts or practices if there is a likelihood (capacity) to deceive; actual deception is unnecessary; whether good or bad faith exists is immaterial (Feil v. FTC, 1960). (U.S. Code, 1963, pp. 501).

5. False Comparative Advertising - False disparagement of a competitor's goods is an unfair method of competition . . . (E.B. Muller & Co. v. FTC, 1944). (U.S. Code, 1963, p. 502).

6. Unclear Statements

A. The FTC may require advertisements to be carefully worded to protect the most ignorant and unsuspecting purchaser, and a statement in an advertisement which is totally false cannot be qualified or modified. (Progress Tailoring Co. v. FTC, 1946). (U.S. Code, 1963, p. 505).

B. Advertisements which are capable of two meanings, one of which is false, are misleading. (Rhodes Pharmacal Co. v. FTC, 1954.) (U.S. Code, 1963, p. 738).

7. Misleading Testimonials - In the use of testimonials, attributed to satisfied customers, literal truthfulness is insisted upon, and it is no excuse for a statement known to be false to be put forward as a quotation. (Moretrench v. FTC, 1942.) (U.S. Code, 1963, p. 505).

8. Misleading Use of the Term "Free" - . . . If there are any terms or conditions for getting something free, they must be stated clearly and conspicuously with the word "free" . . . (Kleppner, 1979, p. 551).

9. Misleading Television Demonstration - Demonstration of product or product performance on television must not mislead viewers. The FTC requires literal accuracy in nutritional ads, both audio and video. Exaggerations in the impression conveyed may also be misleading. Mars, makers of Milky Way candy bars, had a TV spot showing a glass of milk magically changing into a Milky Way bar. The commercial was held misleading because it gave the impression that a whole glass of milk went into a Milky Way bar. (Kleppner, 1979, p. 551)

10. "Bait and Switch" Advertising - In its classic form, this technique calls for a low-priced "leader" item to be advertised in order to generate store traffic. When the customer comes in to purchase, a salesman will try to discourage him by saying that the product is out of stock or that it is not as good in some way(s) when compared to a more expensive model. The idea is to sell a more expensive item not the lower-priced item.

The guidelines listed above are a few examples of what the FTC considers deceptive advertising practices. The FTC has prepared specific guidelines for over 175 industries. Copies of the guidelines are available for each industry. These guidelines were developed after consulting with members of the various industries and contain trade practice rules calling attention to illegal practices in each industry. (Kleppner, 1979, p. 551).

Vigorous lobbying by consumer groups resulted in the FTC initiating in 1971, an advertising substantiation program. The program requires that advertisers "substantiate advertising claims before they are made (In Re Pfizer, Inc. 1972.) In the opinion of the FTC, it is unfair and illegal to advertise an affirmative claim for a product without having a reasonable basis for making such a claim . . . (FTC rationale states) unfairness results from imposing on the consumer the unavoidable economic risk that the product may not perform as advertised . . ." (Cohen, 1980, p. 27). The reasonable basis for making such a claim has not been defined and the FTC determines it case-by-case. For examples of substantiation requirements

see a table developed and conveniently organized by Cohen, (1980, p. 29).

In the future, however, the FTC may place less emphasis on its advertising substantiation program. In a speech before the American Advertising Federation (AAF) on December 8, 1981, Miller expressed concern about the "fairness" of this program and whether it could be justified with scarce FTC resources. Miller candidly remarked that to him the advertising substantiation program:

. . . (Is) a little like having the Internal Revenue Code read that a taxpayer is guilty of tax evasion if he or she did not have the relevant "package" of receipts, notes, and other supporting evidence ready for inspection the moment the tax return was filed, even though every figure could, in fact, be documented. Not only is this a question of fairness . . . it is also a matter of resource allocation.

In 1975, the FTC adapted a protocol consisting of 29 questions which FTC personnel ask to determine if the advertising is deceptive in nature and then ranks them for investigation according to the degree of deception and injury. The 29 questions are divided into eight major divisions:

1. Consumer Interpretations of the Claim - A list is prepared of the main interpretations consumers would place on the advertisement, including those that might render the claim substantiated or unsubstantiated.
2. Scale of Deception or Lack of Substantiation - An effort is made to determine the relative proportions of consumers adhering to each of the interpretations listed.
3. Materiality-In examining materiality (the fact that the claim is likely to influence the purchase decision), the FTC attempts to determine what consumers would do in their purchase decisions if they knew the truth about the product.
4. Adequacy of Corrective Market Forces - Product claims are considered to fall into three categories representing different "qualities" relevant to information processing:
 - A. Search qualities concern claims whose truth the consumer can determine for himself prior to purchase (e.g., a claim that the refrigerator door is "bright" yellow).
 - B. Experience qualities concern attribute claims which the consumer can only assess on the basis of actual experience with the product. If the product is safe and inexpensive, the market may correct a deception when a product fails to perform as advertised (e.g., a claim that a deodorant is drier than another).
 - C. Credence qualities relate to claims a consumer cannot evaluate for himself (e.g., claims of efficiency of an OTC drug.) Because the market is least likely to correct deceptions having credence qualities, such claims are more apt to be considered in enforcement procedures.
5. Effect on Flow of Truthful Information-The FTC examines whether the standard of truth or substantiation that is applied makes it difficult to make the type of claim in question.
6. Deterrence - This consists of communicating the legal standards and determining whether enforcement action would have substantial impact on the advertising community.
7. Law Enforcement Efficiency - This examines whether another agency has or should take action with respect to the claim and the difficulties involved in litigating a case arising

from challenges to the claim.

8. Additional Considerations (Public Interest) - These considerations include the effect of the claim on a vulnerable group and/or the general public interest. (Cohen, 1980, p.28).

Chairman Miller, in his December 8, 1981, speech to the AAF, assured that the protocol will receive renewed and emphasis under (his) administration. He concluded his address by saying it is only by asking the right questions that we can hope to find appropriate answers. And it is only by basing our actions on these answers that our role in policing false and deceptive advertising can be accomplished efficiently."

Advertising Industry's Self-Regulatory Mechanism

Legal standards are not lofty ideas. In many cases, they are the lowest common denominator of standards necessary to bring two or more parties together. As noted in the previous section standards such as FTC's "Advertising Substantiation Program" and its "Deceptive and Unsubstantiated Claims Policy Protocol," may be relaxed due to the agency's dwindling resources in money and personnel. Self-regulation provides an additional system of checks and balances to help assure a competitive market place. For advertisers this self-regulation is provided through Advertising Division (NAD) of the Council of Better Business Bureau (CBBB) and its court of appeals known as the National Advertising Review Board (NARB).

The system was formed in 1971, to "help establish and maintain high standards of truth and accuracy in national advertising." (Zanot, 1980, p. 20). Basically, it works this way:

When a complainant contacts the CBBB, the Council channels the problem to the NAD where it is checked and evaluated . . . If the NAD finds that the ad violates good advertising practices, the division tries to convince the advertiser to change or alter the offending advertisement. If the advertiser refuses to change, the NAD (or the advertiser) appeals the case to the NARB). (Engel, 1980, p. 464).

The NARB verdicts are important because they establish precedents for future decisions. Although the NARB cannot legally compel advertisers to abide by their decisions, they do have some leverage for two reasons: First, they can recommend to the FTC that the case should be investigated; and second, they can inform the media used by the advertiser of their verdict. In this case, some media will not permit the advertiser to run the ads which are considered false or deceptive.

Zanot (1980, p. 26) summarized all NARB panel decisions during its first eight years and found that they could be grouped into nine guidelines and parameters:

1. Standard of Truth and Accuracy

- *Standard not exclusively the "literalness" of the ad
- *Broad and flexible understanding of concept of truth and accuracy
- *Impression more important than intent
- *Perceived point of view of reader/viewer in target audience
- *FTC approval of copy not an adequate defense

An example of what the NARB considered a misleading ad (not literally true) was Hardee's

phrase "charcoal-broiled, because the hamburgers were broiled over ceramic, not charcoal briquets." (Zanot, 1980, p. 21). In the case NARB v. Alpo in 1976, its ad was judged misleading (in overall impression) although the TV commercial's "copy" (words) was literally true. The copy reads, "Meat is good for dogs ... I feed my dogs ALPO Beef Chunks Dinner because it's meat by-products, beef and balanced nutrition." "Balanced nutrition" meant soy flour. Tests were run to determine what percentage of consumers believe that ALPO contained all meat. Results indicated that 58% (using unaided recall) believed ALPO contained all beef. "Even the prior approval of copy by the FTC has not been judged to be an acceptable standard of truth and accuracy (re: The Sugar Association and Schick cases)." (Zanot, 1980, p.21)

2. Proportion of Audience Deceived

*No clear guidelines; panel contradictory (Zanot, 1980, p. 25).

The fact that "58% of the respondents mistakenly believed Alpo to be all beef" contributed to the panel's decision that the commercial was misleading. In the case of Bold, the advertising was found not misleading even though research showed 33% of the viewers of the commercial might be misled. (Zanot 1980, p. 22). Yet, as few as 15% of those that watched Fram commercials felt that there was misrepresentation and the panel judged it to be misleading! Neither the FTC nor the NARB have determined exactly what percentage people misled by advertising constitutes deception.

3. Dangling Comparatives

*No clear guidelines, finding contradictory

*Panels have recommended that such comparisons be avoided (Zanot, 1980, p. 25).

For the slogan, "Beneficial Finance is good for more?" the panel said it was not misleading because it could be substantiated. Conversely, Spalding and Acushnet (golf equipment manufacturers) claimed "longest ball" and "maximum distance," respectively. The panel concluded that both companies' claims were misleading because they did not qualify their statements. Thus, one should avoid incomplete modifiers because there is the "capacity to deceive" using such statements.

4. Semantics

*Problems often particular to each case

*Misuse and imprecise use of words deemed misleading (Zanot, 1980, p. 22).

An example involving misleading semantics involves Carte Blanche. Their ads touted that "a lot" of hotels and restaurants will honor their credit cards but not accept American Express. The NARB judged their ads misleading" . . . because the panel did not think that less than 5 percent of establishments had honored Carte Blanche cards but not American Express justified the use of the term "a lot." (Zanot, 1980, p. 25)

5. Omission of Information

*Ad considered misleading if it omits relevant facts

The Alpo dog food example presented earlier is an example. As Zanot (1980, p. 23) explained, the NARB ruled that omitting "... a statement that the dog food contained soy flour led to the misleading impression the brand was all meat ... (Therefore), deception can occur through omission as well as through commission." (Emphasis added).

6. Testimonials

*Not misleading to use celebrities as spokesmen or presenters

*No case involving celebrity claiming use or

expertise (Zanot, 1980, p. 25).

Since 1975, the FTC and the NARB guidelines are congruent" ... when they state that endorsers need not use the product if the ad does not say or imply they do." (Zanot, 1980, p. 23).

7. Misuse of Research Data

*Data must be adequate to support claims

*Adequacy of research design behind data also a factor

*Research data presented out of context deemed deemed misleading (Zanot, 1980, p. 25).

"Nytol" sleeping tablets' ads were considered by NARB to be deceptive when they implied that competitor's products were more dangerous. The claim was based on "improper use of a study ... concerned with the treatment of drug overdoses in hospital situations and, further, the changing of some language in that study" (Zanot, 1980, p. 24). The NARB rationale concerning the Nytol case is that, "The panel believes that the use of selected portions of research or scholarly work, out of context, to advertise any brand or to support any advertised claims, may be extremely misleading...and undermine public confidence in the marketplace.

8. Comparative Advertising

*Panels favor comparative advertising with certain qualifications

*User must not imply overall superiority on basis of superiority of single product feature

*Claims must be provable under conditions of general use

*Use comparable grades of competitors' products

*Demonstrations to be fair and benefits not exaggerated (Zanot, 1980, p. 25)

Ads for Behold were considered misleading by the NARB panel because "the commercial showed the brand to be superior to 'Pledge' in cleaning oil-based stains but went beyond that to imply overall superiority." (Zanot, 1980, p. 24)

9. Puffery (also see Turk and Cooke, 1984)

*Puffery is) expansive statements allowed if not taken seriously by reader/viewer.

*Expansive statements allowed if not an integral or active selling point.

*Exaggeration deemed misleading if used in area subject to measurement.

*Consumer "leveling" of exaggeration not an adequate defense. (Zanot, 1980, p. 25)

Krackel candy bar ads used "exaggerated sound accompanying the breaking of the candy bar (but it) was not presented in a serious manner. The NARB ruling was favorable since even the youngest child would not consider (the sound--which the NARB labled as an expansive statement) one of fact." When the NARB examined G.M.'s phrase "The Mark of Excellence," it decided that the phrase "in the logo of the company did not constitute deception because it was not used as an active communication part but warned that should the phrase become active as a selling point, it would be deceptive."

From the NARB guidelines and parameters cited above, an important similarity can be seen. Like FTC decisions presented earlier, the NARB has consistently judged whether an ad was misleading or not from the consumer's perspective. If an ad had the capacity of giving a misleading impression to the recipients of the message, it was considered deceptive. Although the FTC and the NARB agreed on virtually all issues, the NARB feels obligated to impose a higher set of standards on national advertisers and agencies. This is evidenced by

the fact that even FTC approval of copy is not an adequate defense in judging what is considered to be "an acceptable standard of truth and accuracy."

How Scholars Define Deception

Unlike the FTC and NARB which must interpret and judge cases based on past precedents, those involved with investigative research either confirm present theory or explore new relationships for a better understanding of what constitutes deception. When new insights or relationships are discovered, the results can be used by regulators for redefining deception and creating new precedents thus a constant, evolutionary cycle is formed.

According to Aaker (1975, pp. 137-145), "(Deception occurs) when an advertisement is the input into the perceptual process of some audience and the output of that perceptual process (a) differs from the reality of the situation and (b) affects buying behavior to the detriment of the consumer." Aaker's definition confirms present theory by noting that deceptive or misleading advertising messages affect one's beliefs and attitudes which in turn, affects one's buying behavior.

Gardner (1975, p. 42) feels that his definition of deception is both operationally and behaviorally oriented: "If an advertisement (or advertising campaign) leaves the consumer with an impression(s) and/or belief(s) different from what would normally be expected if the consumer had reasonable knowledge, and that impression(s) and/or belief(s) is factually untrue or potentially misleading, then deception is said to exist." Further, Gardner has three categories of deception which he admits overlap. These are: an unconscionable lie, a claim-fact discrepancy and a claim-belief interaction which are defined below:

1. An Unconscionable Lie - To be classified as deceptive in this category, an advertisement would make a claim that is completely false ... (that is) the claim could not be true even if properly qualified ... For instance, a claim that an automotive carburetor device would increase gasoline mileage to over 100 m.p.g.
2. Claim-Fact Discrepancy - An ad would be classified as deceptive here if some "qualification" must be placed upon the claim for it to be properly understood and evaluated ... or if the consumer can only understand the claim if he knows the exact information on which it was based ... The former is illustrated by dandruff shampoo, which may work as claimed for people with a certain type of problem, but that problem is not the predominant dandruff-causing problem. The latter is illustrated by claims that three out of five doctors found "X". If the consumer knew what types of doctors, how many were surveyed, and what questions were asked, he would then be able to evaluate the claim accurately.
3. Claim-Belief Interaction - Deceptive advertising classified as (this type means) an advertisement or advertising campaign interacts with the accumulated attitudes and beliefs of the consumer ... as to leave a deceptive belief or attitude about the product or service being advertised, without making either explicit or implied deceptive claims. For example, suppose detergent manufacturers discovered that putting

red and blue crystals in some detergents resulted in a significant number of housewives attributing more cleaning power to those detergents ... Therefore, the simple statement that Brand X had blue crystals would be deceptive even though no claims about increased cleaning power were made.

His first example, according to the FTC, would be "misleading in a material respect." The other two examples are advertisements which "fail to reveal facts material-those that give misleading impressions. So, Gardner, confirms present theory.

Kramer (1980, p.3) categorizes four sources of information (also see Cooke, 1982, p.92) These are:

1. A hard fact is something which is known with certainty and can objectively be verified.
2. A soft fact (puffery?), is an opinion in the form of either a sentiment or judgment. An opinion is a statement accepted or supposed to be true without proof or demonstration ... Sentiment expresses one's feelings and the emotional aspect of an opinion ... Judgement stresses the cognitive role of reasoning ... in the opinion making process.
3. A false fact is a false piece of information deliberately presented as being true--a lie. Its intention is to deceive or to convey a false message or impression. (This confirms the FTC and NARB definitions of deception.)
4. A threat is an expression of an intention to inflict physical, social or economic injury ... on a person or thing.

In addition, Kramer (1980, p. 6) classifies four types of communication as:

1. Informative Information
2. Persuasive Information
3. Manipulative Information
4. Coercive Information

Hugh Kramer's four classifications of communication are important in understanding the nature of deception as used in promotion. The role of promotion as a marketing mix element is to inform and persuade. Both roles are legal. Puffery falls between persuasive information and manipulative information. When puffery is an opinion and if the receiver of the message understands that it is an opinion, then no harm can be done and puffery serves as persuasive information. However, if the receiver does not understand it is puffery and accepts the information as fact (his impression), then puffery becomes as Kramer classifies it, manipulative information. Kramer note that manipulative information consists of soft facts and false facts (which the FTC and NARB define as misleading) and is illegal. The use of coercive information is not only illegal but "criminal in nature" and represents the lowest form of ethics. Kramer's definitions and hierarchies of communication help the reader to understand promotion and how deception relates to it.

Conclusion

An attempt has been made to provide a current answer as to what constitutes false, deceptive or misleading advertising. This was done by examining legal definitions, FTC interpretations, NARB's guidelines and the work of marketing scholars. For a complete paper and references write Ernest F. Cooke, Marketing Department, Memphis State University, Memphis, TN 38152.