CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
May 2014 (1)

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The Need for Improvement in Advertising and Privacy Regulation

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I. INTRODUCTION

The FTC's consumer protection mission is closely related to the Commission's role in protecting competitive markets, because markets organize and drive our economy. Consumer protection policy can profoundly enhance the vast economic benefits of competition by strengthening the market, or it can reduce these benefits by unduly hampering the competitive process. The FTC has a special responsibility to protect and speak for the competitive process, to combat practices that harm the market, and to advocate against policies that reduce competition's benefits to consumers.

By and large, the Commission has done an excellent job in its consumer protection mission. As the agency approaches its 100th anniversary, however, there are key areas in which it is harming consumer welfare. Recognizing the Commission's generally strong performance, this article highlights some areas where improvements are needed.

II. THE COMMISSION'S RECENT APPROACH TO ADVERTISING REGULATION HARMS CONSUMER WELFARE

First, and most importantly, the Commission has lost its way in its approach to advertising regulation. For decades, the FTC recognized and promoted the central role of advertising in a market economy.[2] It challenged private restrictions on advertising, and spoke out forcefully against FDA restrictions that limited consumers' ability to learn about the relationship between diet and health. In its own enforcement activities, it recognized not only the costs of mistakenly allowing false claims to continue, but also the costs of mistakenly restricting the flow of truthful information. It recognized the difficulties of mass communication, and the reality that even most carefully crafted advertisement is likely to be misunderstood by some consumers. As former Chairman Robert Pitofsky wrote, it engaged in "a practical enterprise to ensure the existence of reliable data," rather than "a broad theoretical effort to achieve Truth."[3]

The Supreme Court has consistently held that the First Amendment does not protect deceptive speech.[4] That conclusion is straightforward when speech deceives most of those who

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[2] For a fuller discussion of these benefits *see* J. Howard Beales, Timothy J. Muris, & Robert Pitofsky, *In Defense of the Pfizer Factors*, THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION, pp. 83-108 (James C. Cooper, ed. 2013).

[3] Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 681–83 (1977).

[4] Cent. Hudson Gal & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

hear it, but it is inherently more problematic when speech accurately informs most, but misleads a few. For example, for any performance claim, roughly half of purchasers will experience results that are worse than the average, but information about the average or expected result is likely extremely valuable to consumers. If the government maintains that providing the average is deceptive because "too many" consumers believe they will actually achieve that result, consumers would lose valuable information entirely.

Virtually any communication is subject to misinterpretation, and advertising is no exception. However straightforward the message and however careful the execution, some consumers are likely to misinterpret it. In academic studies of brief communications, 20 to 30 percent of the audience misunderstood some aspect of both advertising and editorial content.[5]

To address this problem, the 1983 Deception Policy Statement focused on the meaning of an advertisement to the "average listener," or "the general populace," or the "typical buyer."[6] A footnote acknowledges that [a]n interpretation *may* be reasonable even if it is only shared by a significant minority of consumers." [7]

In the Commission's recent POM opinion,[8] the footnote swallows the standard. The most the Commission claims is that the advertisement conveys a challenged claim to "*at least* a significant minority of reasonable consumers."

The Commission relied entirely on its own reading of the advertising. When balancing protection of a minority of consumers against the interest of others who would like to learn about emerging scientific evidence, however, the need for extrinsic evidence is acute. There is no reasonable way to strike that balance without some sense of roughly how many consumers fall into each group. Moreover, it is essential to determine that the "significant minority" is greater than the 20 to 30 percent who are likely to miscomprehend *any* message. Good survey research can address precisely this question.

More fundamentally, however, what is needed is deeper appreciation of the fact that consumers who correctly interpret a message are harmed when the Commission prohibits claims that some misunderstand. The Commission's approach to "up to" claims is a case in point. Although most reasonable consumers surely understand that saving "up to" a certain amount is different from saving "at least" that amount, the FTC issued warning letters to window

[5] Regarding televised messages, *see* JACOB JACOBY ET AL., MISCOMPREHENSION OF TELEVISED COMMUNICATIONS (1980). Regarding print communications, *see* JACOB JACOBY & WAYNE D. HOYER, THE COMPREHENSION AND MISCOMPREHENSION OF PRINT COMMUNICATIONS (1987). Both studies compare advertisements with excerpts of editorial content designed to be roughly equal in length, and find no significant differences in the extent of miscomprehension.

[6] F.T.C. Policy Statement on Deception (1983) at notes 24-28, appended to Cliffdale Assoc., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm ("Deception Policy Statement).

[7] *Id.*, note 20 (emphasis added).

[8] In the Matter of POM Wonderful LLC et al., January 16, 2013, Docket Number 1344, *available at* http://www.ftc.gov/enforcement/cases-proceedings/082-3122/pom-wonderful-llc-roll-global-llc-successor-interest-roll.

manufacturers[9] asserting that the two claims are exactly the same. An "up to" claim is only allowed if all or almost all consumers experience the result.

The FTC points to a copy test showing that if an ad mentions savings of 47 percent, 22 to 28 percent of consumers say that "all or almost all" consumers will save that much, whether the claim is "save 47 percent," "save up to 47 percent," or also discloses the average savings, even though "up to" is right next to the 47 percent, in the same size type and emphasis. This is a test of how many consumers will play back the proper interpretation of numerical claims after a brief, artificial exposure. Not surprisingly, many do not. Consumers who seriously contemplate spending hundreds or thousands of dollars on new windows are likely to consider the investment more carefully than consumers who are paid $5 to participate in a mall survey.

Importantly, the survey did not find that there was a less misleading way to convey information about savings. Like the academic literature, some consumers misinterpreted all tested versions of the advertisement. Sound regulatory policy, however, cannot deny information to all consumers just because some consumers might misunderstand.

Second, the Commission is requiring excessive amounts of evidence to substantiate advertising claims. The core principle of substantiation has always recognized the uncertainty surrounding many claims, and balanced the benefits of truthful claims against the costs of false ones.

Consider, for example, Kellogg's 1984 claims for All Bran cereal about the relationship between diets high in fiber and the risk of cancer. The science, which was based largely on epidemiology rather than human clinical trials, was uncertain. Citing these uncertainties, the FDA threatened to seize All Bran as an unapproved new drug. When the FTC and the NCI defended Kellogg, the FDA changed course, launching a review of its policy.

The FTC's defense of Kellogg was based on the core notion of balancing the risks of mistakenly prohibiting truthful claims against the risk of mistakenly allowing false claims to continue. If the claim is true, insisting on clinical trials would impose substantial costs on consumers, who would lose important information about the likely relationship between fiber consumption and cancer risk. On the other hand, if the claim is false, the consequences to consumers are only giving up a better tasting cereal, or paying a little more for a higher-fiber product. Because the far more serious error is mistakenly to prohibit truthful claims, the FTC argued that Kellogg's claims were substantiated, despite the remaining uncertainty.

Unfortunately, the Commission's recent cases have departed from this principle, requiring two randomized, placebo controlled, double blind clinical trials ("RCT"s) to substantiate claims about the relationship between nutrients and disease. This more rigid standard is modeled on the FDA's drug approval process. The model itself is inappropriate for claims about diet and disease. The potentially large public health impact of mistakenly allowing dangerous drugs on the market means that more is at stake in approving new drugs than in deciding whether to allow diet and health claims. The potential consequences of mistaken

[9] *See* FTC Press Release, *FTC Warns Replacement Window Marketers to Review Marketing Materials; Energy Savings Claims Must Be Backed by Scientific Evidence*, August 29, 2012, *available a*t http://www.ftc.gov/news-events/press-releases/2012/08/ftc-warns-replacement-window-marketers-review-marketing-materials.

decisions about what to eat, or whether to take a safe dietary supplement, are not remotely comparable to the potential consequences of mistaken decisions about prescription drugs.

Congress made that judgment about dietary supplements when it enacted the Dietary Supplements and Health Education Act, which removed supplements from the rigorous requirements of the drug approval process, and allowed claims about the relationship between nutrients and the structure or function of the body if they are supported by a "reasonable basis." The FTC's recent orders threaten to reverse this Congressional decision, restoring the rigors of the drug approval process in everything but name.

The requirement for two clinical trials is excessive in most cases, and is likely to deprive consumers of valuable, truthful information. There are ways of learning about the world other than clinical trials. There are, for example, no randomized trials of parachutes, [10] but few would jump out of an airplane without one. Nor are there randomized trials establishing the adverse effects of tobacco consumption. Indeed, much of what we know about the relationship between diet and disease is based on epidemiology, not randomized trials.

Moreover, any trial takes time. As one group of authors noted, "waiting for the results of randomized trials of public health interventions can cost hundreds of lives, especially in poor countries with great need and potential to benefit. If the science is good, we should act before the trials are done."[11] "Good science" they suggest "is taking the research to the problem rather than conducting the research in the tallest ivory tower the investigator can find."[12]

Even as it builds the ivory tower ever taller, the Commission contends that nothing has changed. It defends the requirement for two clinical trials as "fencing in" relief that imposes special requirements on proven violators. Initially, there is no sound reason to require anyone to meet this higher burden to substantiate the likely truth of their claims. Rather than "fencing in" potential violations, the requirement "walls off" truthful claims that would likely prove valuable to many consumers.

Although formally limited to an individual company, the standard will likely apply more generally. It signals to others what the Commission expects. This is especially true when the Commission is also asserting the authority to obtain financial relief in cases where there is a dispute about substantiation among scientific experts.[13] Moreover, the reason the Commission offers for this requirement in its POM decision is universally true—a second test might yield a different result.

In fact, the two clinical test requirement will more likely suppress truthful claims than prevent deceptive ones. If a statistical test that finds a significant difference between two products

[10] Gordon C.S. Smith & Jill P. Pell, *Parachute Use to Prevent Death and Major Trauma Related to Gravitational Challenge: Systematic Review of Randomized Controlled Trials*, 327 B.M.J. 1459 (2003).

[11] Malcolm Potts et al., *Parachute Approach to Evidence Based Medicine*, 333 B.M.J. 701 (2006).

[12] *Id.* at 702.

[13] The Commission's use of Section 13(b) to obtain redress in substantiation cases is wrong as a matter of law, troubling as a matter of policy, and threatens to undermine the operation of the fraud program, which has proven critical to the FTC's consumer protection mission. *See* Beales & Muris, *Striking the Proper Balance: Redress Under Section 13b) of the FTC Act*, 79 ANTITRUST L. J. 1 (2013).

at the conventional 95 percent confidence level, there is a 5 percent chance that the result is due solely to the peculiarities of the particular sample, but a peculiar sample may also fail to detect a relationship that actually exists. As a practical compromise between their greater ability to detect differences and the greater costs of larger trials, sample sizes are frequently chosen to have an 80 percent chance of detecting a difference (of a specified size) if it really exists.[14] Thus, 20 percent of the time a test will fail to detect a real difference. Repeating the test will raise the probability that at least one of the two tests will fail to find a difference from 20 percent to 36 percent.[15] Requiring the second test is therefore much more likely to reject truthful claims than to detect a result that only arose in the first place because of chance.[16] Thus the requirement of two RCT's, rather than one, increases the likelihood that truthful claims will be suppressed.

Finally, in practical day-to-day decision making, knowing that precisely one clinical trial supports an important health-related claim is highly valuable to consumers. The requirement for a second clinical trial appears unnecessary to insure truthful, useful claims. The Commission should return to its traditional balancing test.

III. THE COMMISSION SHOULD RESTRICT ITS PRIVACY ENFORCEMENT ACTIONS TO PRACTICES THAT CAUSE REAL CONSUMER HARMS.

In 2001, the FTC adopted a new approach to privacy, based on the consequences of information use and misuse. Among other things, that approach led to the National Do Not Call Registry and a series of information security cases.

The consequences-based approach to privacy regulation explicitly recognizes that in an information economy, a key driver of value creation for consumers and for the economy is, not surprisingly, information. Unless there is real harm to consumers, seeking to protect privacy by restricting the flow of information threatens to destroy the value that information creates, without offering consumers anything in return.

The stakes are high. A recent study of auction markets for online advertising examined the impact of information exchange on the price that publishers receive for their advertising availabilities. The study used data from two companies that conduct online auctions, with a sample of roughly one million transactions from one company and three million from the other. It found that the exchange of information substantially increased the price of advertising. If there was any cookie at all, even one that was only one day old, the price of an impression was roughly triple the price of an impression with no cookie available. Moreover, the longer the cookie had

[14] The probability of detecting a difference that actually exists is known as the power of the test. "The ideal power for any study is considered to be 80%." K.P. Suresh & S. Chandrashekara, *Sample Size Estimation and Power Analysis for Clinical Research Studies*, 5 J. HUM. REPROD. SCI. 7 (2012), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3409926/.

[15] When there is a real difference, the chance of finding the difference statistically significant is .8. The chance of finding it significant in both tests is .8 times .8, or .64. The likelihood that both tests find a significant difference when in fact there is no difference is .05 times .05, or .0025.

[16] A second test is more likely to reject truthful claims even if the chances of failing to detect a difference are the same as the chances of mistakenly finding one. If the chance of either mistake (significance when there is no difference or failure to find significance when one exists) is 5 percent, the chance that both tests will find the difference is 90.25 percent (i.e., .95 times .95). Thus, there is almost a 10 percent chance of mistakenly rejecting a truthful claim. With only one test, there was only a 5 percent chance of mistakenly allowing a false one.

been in place, the greater the value of the impression. For one company, a cookie that was 90 days old raised the price to seven times the price without a cookie; for the other, the increase was smaller but still significant.[17]

The study also used data from Adomic to examine the extent to which different websites are dependent on advertising sales through advertising networks and online exchanges. Adomic regularly visits websites and examines the advertisements they serve to determine whether the ad is coming from the website itself or from some third party. The data reveal that smaller sites are more dependent on third-party advertising sales. Even large websites sell about half of their impressions through these channels, but smaller sites depend on third-party channels to sell roughly two thirds of their impressions.[18] Thus, impairing information exchange, with its substantial adverse impact on the price of an advertising impression, is a particular threat to the smaller websites that are a key part of making the internet the vibrant experience that we all enjoy.

Although the Commission has not abandoned the consequences-based approach to privacy entirely, and cannot, given the statutory constraints under which it operates, it has adopted a new "privacy framework" based on what the Commission views as "best practices." The framework urges "privacy by design," "simplified choice," and "greater transparency." The Commission Report recognizes that some of the practices it urges go "beyond existing legal requirements," but provides little guidance on the contours of the practices it believes are subject to challenge under the FTC Act.

More problematically, the framework seeks to expand the concept of harm. As the preliminary report noted in 2010, "for some consumers, the actual range of privacy-related harms is much wider and includes … the fear of being monitored or simply having private information 'out there.'"[19] Consumers may also feel harmed when information is used "in a manner that is contrary to their expectations," and may have "discomfort with the tracking of the online searches and browsing."[20] Some have summarized these kinds of harms as "creepiness."[21]

Injury to consumers is a necessary element of a Section 5 violation. Harms are also actionable even if they are difficult to monetize directly. Damage to a reputation or intrusion into private places are not concrete harms in the same sense as the risk of physical or economic injury, but they are real harms nonetheless, widely recognized in tort law.[22] From the beginning, the harm-based approach to privacy addressed such harms. Indeed, the Commission's first information security case was against Eli Lilly for inadvertent disclosure of sensitive information:

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[17] J. Howard Beales & Jeffrey A. Eisenach, *An Empirical Analysis of the Value of Information Sharing in the Market for Online Content*, *available at* http://www.aboutads.info/resource/fullvalueinfostudy.pdf (2014).

[18] *Id.*

[19] Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change*, 20, *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

[20] *Id.*

[21] Adam Thierer, *The Pursuit of Privacy in a World Where Information Control is Failing*, 36 HARVARD J. L. & PUBLIC POL'Y 409 (2013).

[22] Restatement (Second) of Torts §559 Defamatory Conduct Defined, §652B Intrusion Upon Seclusion, and §652D Publicity Given to Private Life.

the email addresses of a group of Prozac users.[23] Such information is sensitive because of the risk of damage to reputations.

Of course, some consumers may have subjective preferences to avoid practices they find "creepy," even without injury in the usual sense. Similarly, some have preferences for products that are kosher. I term these types of preferences subjective, because not all consumers agree that the attribute is important, and because there is no way for an outside observer to measure the magnitude of the injury if they are violated.

The Commission should protect such preferences when they are manifested in marketplace choices. A company promising "no information sharing," or no tracking, or kosher, must deliver. Critical to protecting subjective preferences, however, is the notion that consumers have made a choice based on the promise that a provider will deliver. It does not follow that because some consumers have a preference, the Commission should require all sellers to satisfy that preference. That argument is simply wrong. Assuring the accuracy of claims that a product is kosher enhances consumer sovereignty—it lets consumers choose what matters to them and what does not. Consumers who believe keeping kosher is important can do so, but they must face the cost of paying attention and finding a seller who promises to provide kosher products. Consumers who think kosher is irrelevant are not burdened in any way.

The Commission should not, however, require all sellers to satisfy such preferences. Requiring all sellers to avoid practices that some find "creepy" would impose the costs of an admittedly real preference on many who do not share it. The FTC Act is about preserving consumer choice, not about substituting the preferences of the Commissioners for those of consumers.

Moreover, for the Commission to protect such subjective preferences, they must be preferences that are actually reflected in marketplace behavior. That is the only reliable indication that these preferences are real. They cannot be sensibly inferred from survey results where consumers can express a preference without confronting the costs of satisfying it. Just as competitive markets satisfy consumer preferences for a wide range of other subjectively important characteristics, there is every reason to believe they will satisfy privacy preferences.

The modern information economy is built on data collection and analysis. Especially as the Commission examines new issues, such as the "internet of things," a focus on harm is essential. It is easy to speculate about the potential privacy problems, but regulation based on speculative problems is far more likely to chill useful innovations than it is to prevent real harms.

The principle of avoiding the most serious mistake that should be central to advertising substantiation is equally applicable to privacy regulation. Regulation or enforcement that is too stringent may reduce the risk of the particular privacy harms to which it is addressed, but it increases the risk of precluding innovations that would make everyone's life better. Too little enforcement may facilitate innovation, but it also increases the risk of real and concrete privacy harms. The question is one of balance, and should be asked about every potential privacy

[23] *See* Complaint at 3, Eli Lily and Company, No. 123214 (Jan. 18, 2004), *available at* http://www.ftc.gov/os/2002/01/lillycmp.pdf.

enforcement action. Is the more serious error failing to regulate, or is overly burdensome regulation the greater risk?

For example, when Congress and the Commission first began considering online privacy issues in the late 1990s, few would have imagined that literally billions of consumers would want to post many of the details of their personal lives online for all to see. Facebook and other social media have created tremendous value for consumers by enabling exactly that practice. Regulation based on what some might still consider "creepy" could easily have prohibited a valuable innovation.

As the defender of consumers' right to choose for themselves, the Federal Trade Commission has a special responsibility to ensure that its actions enhance competitive markets, rather than hindering their performance. In advertising regulation, it has strayed from that role. By pursuing advertising interpretations that are not reliably distinguishable from the background noise in any communication, and insisting on a standard of scientific certainty in areas where certainty does not exist, the Commission is reducing the flow of information that is essential to guide competitive markets. Its retreat from the consequences-based approach to privacy regulation threatens to substitute its own judgment that some practices are "creepy" for the preferences consumers reveal in the market. In both areas, the Commission has retreated from its historic role as a defender of consumer sovereignty.