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REMARKS OF

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FEDERAL TRADE COMMISSION

Before the

TRI-CITY AREA ADVERTISING CLUB

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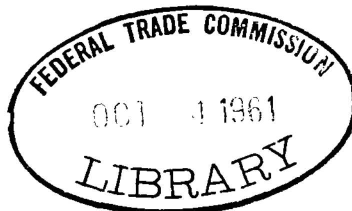
Latham, New York



Mr. Chairman, Members of the Tri-City Area Advertising Club:

I was both pleased and honored to receive the kind invitation to speak to your Club for a variety of reasons. To begin with, though I hail from the Middle West, the fortunes of my family have been closely interwoven with your great State of New York. Way back in 1908 my father ran on the Democratic ticket for vice president against one of your former late distinguished representatives in the Congress, known as Sunny Jim Sherman. The sting of my father's defeat was somewhat alleviated by the fact that some forty-seven years later I displaced your Senator Mead as a Democratic member of the Federal Trade Commission, an incident I was happy to report in my prayers to my ancestors. But I want to declare peace with New York State; therefore, it is indeed a pleasure to be here tonight.

Moreover, I am mindful that this audience is a significant cross section of those who buy, sell and create advertising in the important Capitol District area. In considering what I could say to you that might be of some value, I was struck by the high-minded objectives of your Club as stated in its Constitution:

> "To promote greater effectiveness in the use of advertising as an instrument of distribution, to foster higher standards of practice in advertising and selling, to expand recognition of advertising as a profitable business tool, to cultivate a better understanding of the economic and social value of advertising to the consuming public, and to employ the talents of the advertising people of this area for the purpose of promoting the area and worthwhile causes in it."

That statement of purpose, it seems to me, strikes a fine balance between recognition of advertising's great potential for good and recognition of the responsibility that must be borne by those who control this powerful instrument if that potential is to be realized.

Advertising has done much, both for good and for evil, to fashion the fabric of our modern society. By stimulating the consumer's desire -- that is, by creating enlightened discontent -- it is a constant spur to economic progress. Indeed it is an important factor in making the competitive system work, for, by constantly bidding for customer approval, advertising directs the country's purchasing power to the great national pool of competing products. Likewise advertising is a vital factor in fostering that freedom of choice which lies so close to the heart of our free enterprise economy. Advertising submits competing products to the approval or veto of millions of potential customers; it informs the public what is available so that it can decide what it wants to buy.

But there is another side to the coin. Advertising, in the service of the selfish, the insensitive, or the unprincipled businessman, can result in a debasement of public taste and, indeed, can abort its essential purpose by misleading and deceiving its readers.

Some extreme views have been expressed about the value of advertising. One bitter critic, Thorstein Veblen, in a book called Absentee Ownership, described the job of the advertising copywriter as the administering of "shock effects, traumatic reactions, animal orientations, forced movements, fixation of ideas, verbal intoxication ... a trading on the range of humour infirmities which blossom in devout observances and bear fruit in the psychopathic wards."

At the other end of the spectrum is the rosy view presented by Madison Avenue alumnus Bruce Barton in his biography of Christ called The Man Nobody Knows. He argued that Jesus "would be a national advertiser today ... as he was the great advertiser of his own day." He had always been "the most popular dinner guest in Jerusalem." Of His enterprise, sufficient to say that "he picked up twelve men from the bottom ranks of business and forged them into an organization that conquered the world." Jesus, according to Barton, "recognized the basic principle that all good advertising is news." And, as a copywriter, he was without equal. "Take any one of the parables, no matter which -- you will find that it exemplifies all the principles on which advertising textbooks are written.

Always a picture in the first sentence; crisp, graphic language and a message so clear that even the dullest cannot escape it." 1/

Without wholly adopting either the angelic or the diabolic view of advertising, we can recognize that its possibilities bode much for good and yet much for evil too. The stated objectives of your Club and those of the Federal Trade Commission, insofar as they relate to advertising practices, have the same general aim: both would maximize the good and minimize the evil. Indeed, you are able to go much further than the Commission, for you can focus your attention on affirmative values such as public service, education and good taste, whereas the Commission is limited to curbing misrepresentation and deceit 2/ and preventing certain concrete misuses of economic power. 3/ I am confident that many, if not most, advertisers share the high objectives expressed by this group. There have been many speeches by former Commissioners the major theme of which was pious pontification about the advertising fraternity policing itself - these speeches were all morally uplifting but really rather silly. Perhaps I belong to a more cynical school of thought. I appeal to your self-interest - for it is to your self-interest to create and to maintain public support and respect. It is against your self-interest to alienate the public confidence. So I think your relationship to the public is just as simple as that. Furthermore, if you fall down in your responsibilities to the public, we will be around and throw the book at you.

However, it must be recognized that yours is a creative and very highly competitive field. The pressure for results is great. As Dr. Samuel Johnson wrote in the Idler as long ago as 1759:

> Advertisements are now so numerous that they are very negligently perused, and it therefore becomes necessary to gain attention by magnificance of promises, and by eloquence sometimes sublime and sometimes pathetic. Promise, large promise is the soul of an advertisement. . . .

1/ Quoted in Turner, The Shocking History of Advertising (New York, 1953).

2/ Sections 5 and 12, Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

3/ Sections 2(d) and 2(e), Clayton Act, 15 U.S.C. § 13, make it illegal to grant price discriminations to purchasers in the guise of advertising or advertising allowances.

It was gross exaggerations resulting from pressure for even larger promises that eventually made it apparent, a century and a half after Dr. Johnson's complaint, that some form of Government regulation was necessary to protect the public interest from the misdeeds of some advertisers.

The Federal Trade Commission was this country's answer to the felt need. This agency originated in 1914 during Woodrow Wilson's administration. Its organic statute assigned it the "conveniently vague" task of preventing "unfair methods of competition in commerce." Congress left the exact definition of unfair methods to the Commission with the idea that its meaning would evolve through the case-to-case process of inclusion and exclusion. At the same time, Congress also passed the Clayton Act, which gave the new agency authority to declare certain types of price discrimination, exclusive dealing contracts, mergers and interlocking corporate directorships to be illegal. Subsequently, numerous other powers have been conferred on the Commission by new laws variously relating to foreign trading associations, the labeling and advertising of wool, fur and textile products and of flammable fabrics, and the cancellation of fraudulently-obtained or illegally-used trade marks. I shall not discuss the specialized tasks performed under the latter kind of laws nor shall I talk about the Commission's extensive antitrust duties under the Federal Trade Commission Act and the Clayton Act. I shall confine myself to some comments on the application of the Federal Trade Commission Act to advertising representations.

During its first twenty years the Commission proceeded to cover the skeleton of the statutory phrase "unfair methods of competition" with the flesh and blood of decisional law. Two-thirds of the three thousand "cease and desist" orders that the Commission issued during this period prohibited false or misleading advertising. An indirect effect of each one of these orders, of course, was to protect the consumer who might be victimized by the advertising. However, it is true that the Commission exercised its powers during this era with a great deal of circumspection, usually resolving all doubts in favor of the advertiser; and even then it met with repeated rebuffs from a hostile judiciary. For example, in 1931, the Supreme Court made it clear that under the laws as then

written the Commission lacked power to forbid false advertising unless such false advertising adversely affected a competitor of the advertiser. 4/

This ruling was a major blow. The Supreme Court's narrow interpretation of the Commission's powers, however, added impetus to the strong consumer movement during the 20's and 30's aimed at strengthening the Federal Trade Commission Act. The result was the Wheeler-Lea Amendments of 1938. 5/ These had a two-fold effect. First, they broadened the Commission's authority by additionally empowering it to prohibit unfair and deceptive acts and practices whether or not they had an effect on competition; secondly, in cases involving food, drugs, cosmetics and devices, the amended statute granted even stronger powers, including the right to obtain injunctions in proper cases prior to the Commission's decision on the merits. Thus, since that date, a very important part of the Commission's actual and avowed function has been the protection of consumers.

The power to secure injunctions in cases involving foods, drugs, cosmetics and devices -- an area considered particularly sensitive and specially charged with public interest -- greatly strengthened the Commission's hand. This is so because, in the ordinary course of events, the Commission is only able to issue its orders to cease and desist from a deceptive advertising practice after a full trial of the facts and a final determination that the advertising is deceptive. Over the years it became quite obvious that this power was not adequate to deal with advertising that might disasterously affect the health of many persons while the Commission was observing the niceties of its trial process. The Wheeler-Lea Amendments to the Federal Trade Commission Act, however, permitted the Commission to secure from a United States Court a preliminary injunction to prevent the questioned advertising during the proceedings. Such an injunction is secured only after the Commission has made out a showing of necessity. Experience has shown that while this power has been used rather rarely the public has benefitted greatly by its existence.

4/ Federal Trade Commission v. Raladam, 283 U.S. 683 (1941).

5/ 52 Stat. 114 (1938).

There is now pending in the Congress another bill sponsored by Congressmen Steed and Patman which would further amend the Federal Trade Commission Act to permit the Commission -- under the supervision of the Courts -- to issue temporary cease and desist orders to be effective during litigation of other types of cases. Under this bill the burden would be upon the Commission to demonstrate the public necessity for such temporary orders.

I am convinced that this proposed law is important to the public interest and should be adopted. All too often the unscrupulous advertiser, by continuing his false or deceptive advertising while availing himself of his full rights to defend against the Commission's charges, reaps the benefits of his campaign before the present processes permit the Commission to curb him. Not only the public generally, but all of his honest competitors who will not stoop to such deception, have an interest in the passage of this law.

I am sorry to see that some business spokesmen have raised objections. A recent editorial in a well-known financial paper, for example, expressed doubt that the proposed bill provided due process to those who might be enjoined under it. President Kennedy himself, however, in a letter to the Congressional Committee in charge of the bill, has endorsed the proposal. And, as for myself, I have reviewed the provision of the draft bill in its present form and can assure you it contains adequate provisions for court review and thus is not lacking in due process of law.

I would like to express my regret, however, at the basis on which the President has placed his support for this bill. His letter emphasizes that it will provide "important protection for the small business community and, indeed, for all those who are confronted by violations of the laws which seek to sustain our competitive economy." In my view this statement, perhaps inadvertently, gives the impression that this is legislation primarily for the benefit of small business and that it might only incidentally benefit the public generally. Actually, it is the general public that will be protected and the benefits to businessmen, large and small, will be incidental.

Perhaps it might be well in order to acquaint you more fully with our activity in the advertising field for me briefly to mention some of our more significant recent cases involving advertising representations.

In the food and drug field, the Commission has proceeded against a great variety of advertisers including vendors of vitamins and of products claimed to grow hair, cure alcoholism and cure the common cold. Two sellers of sedatives were charged in separate complaints with law violation in representing as safe drugs which, the Commission alleged, were dangerous when taken by some individuals. Two truss manufacturers were cited for claiming that their devices would cure hernias; and the seller of an electric vibrator for claiming that it would effectively treat diseases or abnormalities of the bones, joints, or the respiratory or digestive system. In four cases involving analgesics, the Commission issued simultaneous complaints charging misrepresentations in claims for speed of relief of Anacin, Bufferin, St. Joseph Aspirin and Bayer Aspirin. As those matters are now being heard by the Commission, it would be improper for me to comment on them.

Ten correspondence schools have been involved in recent Commission actions, including schools selling instruction purporting to prepare students for civil service jobs and for employment in the electronics and jet aircraft fields. Two others schools offered no employment, but allegedly misrepresented the standing that award of their diplomas or degrees gave the recipients.

The Commission's activities correcting automotive advertising range from matters involving whole automobiles to those concerning accessories and replacement parts. One of the largest foreign car importers agreed to the entry of an order forbidding further representations in advertising that parts and services for these automobiles were immediately available in any area of the United States when they are not so available. One of the nation's largest mail order houses was charged with making fictitious pricing and savings claims for its automobile tires. The complaint alleged that "list prices" shown in newspaper advertisements were not the company's customary retail prices but were substantially higher. A consent order approved by the Commission prohibits the advertiser from continuing the representations.

In the home products category, the advertising of a wide variety of goods, including refrigerators, house paint, sewing machines, vacuum cleaners, lawn mowers, kitchen utensils, rubber gloves, furnace repairs, food wrapping and carpets came to the Commission's attention.

In a somewhat novel approach in the area of television misrepresentations, orders were issued to stop allegedly deceptive television demonstrations used in advertising a well known dental cream, a safety razor, and a shaving cream.

A large encyclopedia publisher was ordered, after lengthy litigation, to stop selling its encyclopedia or other books, services or merchandise through deceptive pricing, savings and limited-time-only claims.

Some vendors want their customers to think that domestic products offered for sale are imported from abroad. Other vendors want to conceal the fact that their products were foreign-made. It all depends on the nature of the goods and the place where they did or did not come from. Cases in this field concerned the alleged deceptive offering of Dutch-made ski suits as Swiss, hats made in Japan of Philippine hemp as "Genuine Milan", an American automotive oil as made in Germany, using a formula developed by a German scientist, Hong Kong-made watch bands as American, and Japanese sunglasses as American.

Among the 904 investigations being conducted on June 30, 1961, were matters involving many of the largest companies in the country, and charges of using false advertisements or other deceptive practices in connection with the sale of nearly every item of consumer goods, including food, drugs, therapeutic devices, cosmetics, shoes, hats, watches, books, correspondence courses, sewing machines, electrical appliances, floor coverings, mattresses, furniture, cameras, paint, nursery products, and burial vaults. Based on past experience, we estimate that from 60% to 70% of the matters being investigated will require issuance of formal complaints or some other form of corrective action.

I should also mention that each separate violation of a Federal Trade Commission order to cease and desist subjects the respondent to a civil penalty up to $5,000. The increase in the number of civil penalty cases during the past year was 300% and there is a backlog of cases waiting to be presented to the United States District Courts.

I hope that this brief survey of the deceptive advertising cases handled within the past year gives you an idea of the kind of work we do and of its scope. As an old trial specialist in antitrust matters, my only concern is that perhaps we may have committed more of our resources to some of these various matters which I have just outlined than their public interest value deserves. At any rate I can say with calm confidence that we have not neglected you.

Now I would like to spend a few moments discussing some of our own obligations in connection with your industry. On occasion I believe we have failed to exercise sound judgment and sufficient restraint in some of our more publicized proceedings. For example, some years ago with much fanfare we launched a massive investigation covering the advertising practices in the casualty and health insurance field. The question of our jurisdiction in this area resolved upon a close interpretation of the McCarran-Ferguson Act. Instead, however, of testing the jurisdictional question by a pilot or test case, we instituted a full-blown investigation from coast to coast and filed numerous formal proceedings. The Courts finally reversed our finding of jurisdiction and most of these proceedings were, of necessity, dismissed. The result was a considerable dissipation of our limited funds and a degree of harassment to an industry. One compensating result was that to insure against Federal jurisdiction, many uniform model state federal trade statutes were enacted and the industry cleaned up its house. But I must conclude that we acted precipitously; my hindsight suggests that a more common sense administrative technique should have been employed.

Again in the recent highly publicized series of "payola" cases I believe we went further in depth than was necessary to protect the public interest. A few formal proceedings consent settled plus assurances of discontinuance of the practice as to the many others involved, plus turning the responsibility over to the Federal Communications Commission, as soon as it received added statutory sanctions, would have sufficed fully to protect the public interest. But publicity seekers and headline chasers were quick to sense the opportunity so another massive first priority investigation was launched with appropriate press releases. However, I must say that you encouraged us to become so deeply immersed in payola by the unique reaction to our investigation. The radio industry immediately became infected with a psychotic mass urge to confess. It was like an old-fashioned religious

revival with everyone bellowing at the top of their voice "I sinned too, save me by consent order." The Commission naturally was unnerved by such a disorderly procedure for usually it is like the proverbial pulling of teeth to get productive evidence from a proposed respondent. The files continued to accumulate covering practices which had been discontinued and we continued to grind out complaints. I am happy to say that we are now out of this field and I sincerely hope that we will not have to re-enter it. Do not misunderstand me, for I believe that the net result of our activity was a sound accomplishment; but I also believe that it is one which could have been achieved with far less utilization of our resources sorely needed in other important areas of our statutory responsibilities.

In addition to the formal enforcement techniques I have been discussing, I should not fail to call your attention to our consultative or cooperative method of enforcement known as our trade practice conference procedure. It has for its purpose the wholesale abandonment and elimination of unfair trade practices by industry members through education and cooperation. Often an industry, if faced with the ravages of unlawful practices, will apply to the Commission for the holding of a trade practice conference which normally will result in the promulgation of trade practice rules. Not only the industry but all other interested parties, including consumers, are invited to attend and to express their views. The end product of such conferences is a set of advisory rules tailored to the industry. There are presently about 170 industries which have such rules. Naturally businessmen ask, "What benefit can we hope to derive from the promulgation of trade practice rules?" Our experience has shown that the benefits of such rules accrue not only to an industry, but also to the consuming public and to the government.

One of the great appellate judges, the late Learned Hand of your great United States Court of Appeals for the Second Circuit, has said "The Commission's powers * * * are more than procedural; its duty in part at any rate is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." Accordingly, in answer to the businessmen's quest for certainty, the rules are designed to be informative in that they pinpoint certain acts or practices which are considered to be unlawful and they

specifically spell out the practices which should be avoided. In this respect the rules are prophylactic and in many instances prevent the spread of disease.

In conclusion may I voice the view that careful planning of the Commission's enforcement activities and utilization of common sense enforcement techniques are essential if we are to merit the confidence of the public, of the Congress, and of the Executive Branch.

Again, I wish to thank you for the pleasure of being here with you on this occasion.