

PLEASE UTILIZE A FORMAL RULE-MAKING PROCESS TO ESTABLISH THE APPROPRIATE EVIDENTIARY STANDARD IN THE BRAIN-TRAINING FIELD

The FTC argues that Carrot's advertising language, specifically, the statement that Utimeyes has been "scientifically shown to improve vision" is deceptive despite the fact that Utimeyes was based on numerous peer-reviewed, published, scientific studies. This implies that the FTC is dismissing these studies as invalid or inconclusive for some reason (a reason which is not articulated in the FTC's press release).

As a consumer protection/regulatory body, the FTC is not comprised of scientific experts in either the cognitive science or the brain training field. Since these fields are likely to grow significantly in coming years, and could contribute substantially to the economy if it was allowed to do so, I hope that the FTC will engage experts from these fields in establishing standards with regards to what constitutes a reliable and appropriate basis for making claims regarding the effectiveness of a brain-training app.

THE FTC SHOULD NOT FIND THAT CARROT ENGAGED IN AN UNLAWFUL ACT, BECAUSE CUSTOMERS DID NOT SUFFER, AND WERE NOT LIKELY TO SUFFER, SUBSTANTIAL INJURY

15 USC45(n) states that "The Commission shall have no authority...to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes, or is likely to cause, substantial injury to customers." Thus, even if the FTC's evidentiary standard is appropriate in this field, we face a further question of whether Carrot's choice of advertising language caused, or was likely to cause, a substantial injury to consumers.

While the language on the Utimeyes website may not be perfect, did Carrot's linguistic imperfections actually cause a significant number of consumers to buy the product who would not have done so had Carrot advertised its product using language that the FTC would deem acceptable?

The FTC previously entered into a consent decree with Focus Education (a company offering a different brain-training app). The case is instructive because it implies that Focus Education's website should now comply with the FTC's marketing guidelines. Reading through Focus Education's page on "The Science" (<http://www.focuseducation.com/c2/howitworks.aspx>), I can't help but wonder if the average consumer will see a difference between the type of language that Focus Education currently uses, and the language that Carrot used. To my lay-person's eyes, it seems as though the FTC is nitpicking about phraseology, but is leaving the overall impact of the advertisement intact. The question here is, did a substantial number of people buy Utimeyes, who would not have bought the program if Carrot had described Utimeyes with the types of terms that Focus Education currently uses to describe its games? For instance, will consumers behave differently in the face of the following phrases?

- "The science comes from the most up-to-date techniques and proven theories being applied...(The program) has embedded decades of researched and proven...exercises to

improve (visual processing) ability).” (Focus Education’s current advertising language... adapted within the parentheses for a program aimed at improving visual processing rather than memory.)

- “Ultimeyes is scientifically shown to improve user’s vision” (Ultimeyes)

If Focus Education’s current advertisement is acceptable, how is it possible that Ultimeyes’ language caused a “substantial injury” to consumers? How many people purchased Ultimeyes, who would not have spent this money had the website’s phraseology mirrored Focus Education’s phraseology? To a consumer, those two phrases have the same impact.

THE FINE REDUCES CARROT’S ABILITY TO FURTHER TEST ULTIMEYES’ EFFICACY, AND THEREBY ENCOURAGES CARROT TO SUBSTITUTE VAGUE ADVERTISING LANGUAGE FOR SCIENTIFIC ADVANCEMENT AND INNOVATION

The product development costs and legal fees associated with complying with the FTC-investigation have wiped out all of the funds that Carrot received through the sale of Ultimeyes. As a policy matter, does it make sense to strip a company of all of its product development budget as a means of improving the quality of science behind the product? Logically, if the FTC’s goal is to encourage Carrot to conduct additional scientific studies into Ultimeyes’ efficacy, it would make sense to settle this case in a manner that left Carrot with the capacity to conduct such tests. If the FTC’s objective is to improve the quality of brain-training apps, the FTC should enforce the law in a manner that facilitates continued innovation by companies that are developing their products in conjunction with the guidance of respected scientists.

PIERCING THE CORPORATE VEIL TO SANCTION AN UNCOMPENSATED SCIENTIST WILL HAVE A CHILLING EFFECT ON OTHER SCIENTISTS’ WILLINGNESS TO PARTICIPATE IN LAB-TO-MARKET VENTURES

Since Carrot cannot pay the \$150,000 fine, the two founders named in the suit will need to pay the fine out of their own pockets. Carrot is a start up company, and its owners have not received profits, dividends, consulting fees, salaries or any other form of compensation from Carrot. Thus, each of the founders named in this enforcement action will pay \$75,000 out of pocket, and those funds will either come from money saved through work with other organizations or from personal loans.

Is fining the co-founders of a company \$75,000/each, despite the fact that they have earned nothing from their product development/sales efforts, going to increase the number of scientists and entrepreneurs who work to bring new technologies to market? In this case, the FTC is piercing the corporate veil, and directly fining a scientist who worked hard, without compensation, to bring his work from the lab to the market with the goal of offering people a way to improve their ability to process visual information and of improving the quality of vision-training-apps available to consumers. Will this enforcement action encourage other scientists to look for ways that their scientific research can benefit the public, and the economy?