[Billing Code: 6750-01-S]

FEDERAL TRADE COMMISSION

Advertising of Books: Enforcement Policy

AGENCY: Federal Trade Commission (FTC).

ACTION: Statement of policy.

SUMMARY: The Federal Trade Commission rescinds its stated policy that it will not ordinarily challenge claims in advertising that promote the sale of books and other publications when the advertising purports only to express the opinion of the author or to quote – i.e., mirror – the contents of the book or publication.

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SUPPLEMENTARY INFORMATION:

On July 21, 1971, the Commission published its "Advertising in Books" enforcement policy, also known as the Mirror Image Doctrine (hereafter "MID"). The MID enforcement policy provides:

> The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. This policy does not apply,

> however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

Advertising in Books: Enforcement Policy, 36 FR 13,414 (July 21, 1971). By its terms, the MID does not circumscribe the Commission's inherent authority to proceed against deceptive advertising for books and other publications. Rather, it is a guide for how Commission staff "ordinarily" should approach such advertising.

Five years after the FTC promulgated the MID, the Supreme Court decided that the First Amendment to the U.S. Constitution protects commercial advertising from undue government regulation, albeit not to the same degree as non-commercial speech. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court held that "speech which does 'no more than propose a commercial transaction'" is commercial speech entitled to some form of First Amendment protection,[1] although it recognized that the government still may prohibit untruthful or misleading advertising or impose other measures to ensure that ads are not deceptive.[2] In

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[1] 425 U.S. at 762 (*quoting Pittsburgh Press Co. v. Human Relations Comm'n*, 413U.S. 376, 385 (1973), which held that sex-designated help wanted ads were "classic examples of commercial speech" and could be outlawed without running afoul of the First Amendment). *See also Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (holding that speech that proposes a commercial transaction is "the test for identifying commercial speech," *citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986)); *accord City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 423 (1993). *Compare Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980) ("This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech.").

[2] 425 U.S. at 771-72 & n.24. *Accord Bates v. State Bar of Arizona*, 433 U.S. 350, 382 (1977) (holding that advertising for legal services is commercial speech and noting that false, deceptive, or misleading advertising of legal services can be prohibited).

subsequent cases, courts, including the Supreme Court, have held that a commercial advertisement does not necessarily enjoy full First Amendment protection just because it promotes a fully protected product or activity or incorporates statements that, outside the advertising context, are fully protected. *See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 & n.7 (1985) (holding that statements contained in an advertisement for legal services regarding the legal rights of persons injured by the Dalkon shield normally would be fully protected speech, but not when presented in the context of an advertisement that proposed a commercial transaction – the offer of legal representation). [3]

The Commission has determined that the MID is unnecessary in light of the Supreme Court's commercial speech jurisprudence developed since the MID's adoption. The Court's commercial speech cases, not the MID, delimit the constitutional constraints on challenges to deceptive advertising claims for books and other publications that are commercially marketed. For the reasons described, the Commission hereby rescinds its "Advertising in Books" enforcement policy.

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[3] *Cf. Rushman v. City of Milwaukee*, 959 F. Supp. 1040, 1043-44 (E.D. Wis. 1997) (holding that the city could not regulate speech of an astrologer, because the targeted speech did not involve the proposal of a commercial transaction: "[A]n astrologer's advice neither proposes nor encourages an additional transaction. In contrast, if [the astrologer] told her clients that they had curses and she could remove them, that would be commercial speech because she would be using astrology to sell her curse-lifting services.").

List of Subjects: Advertising, Consumer protection, Trade practices.

Authority: 15 U.S.C. 41-58

By direction of the Commission.

Donald S. Clark
Secretary