

1967

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Recommended Citation

Lawrence D. Gaughan, *Advertisements Which Identify "Brand X": A Trialogue on the Law and Policy*, 35 Fordham L. Rev. 445 (1967).

Available at: <https://ir.lawnet.fordham.edu/flr/vol35/iss3/3>

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Advertisements Which Identify "Brand X": A Trialogue on the Law and Policy

Cover Page Footnote

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ADVERTISEMENTS WHICH IDENTIFY "BRAND X": A TRIALOGUE ON THE LAW AND POLICY

LAWRENCE D. GAUGHAN*

[The scene is the office of F. Harlan Blackstone, a senior partner in a large Wall Street law firm. A secretary has just ushered in two men. One is Rudolf G. Hofmeister IV, who is vice-president in charge of marketing for Hofmeister-Berg Breweries, Inc., of Milwaukee. He is accompanied by Geoffrey Flagpole, the executive for the Hofmeister-Berg account with a noted Madison Avenue advertising agency. The following conversation ensues:]

BLACKSTONE: Good morning, gentlemen. What brings you to these cloisters?

HOFMEISTER: Good morning, Harlan. Did you happen to see the television program sponsored by the Glutz Brewing Company last night?

BLACKSTONE: No, I didn't. What went on?

HOFMEISTER: Glutz is one of our competitors, and their medium priced beer, Glutz Premium, is the largest selling beer in the United States. Our competitive brand, Hofmeister's Supreme, is third in national sales.

FLAGPOLE: The Glutz commercial showed four bottles of beer—theirs, ours and the other two best sellers. A hand reached into the group and picked out the bottle of Glutz, while the announcer said: "Here is a scene which is repeated every day, all over America. Millions choose Glutz Premium over other brands of beer. Glutz outsells every other beer in the United States. And for good reason: Glutz has flavor, real flavor that other beers can't match. Flavor that comes from the choicest ingredients, nurtured by the skill of master brewers. Glutz is the name you can count on. So do as millions do: treat yourself to a Glutz."¹

HOFMEISTER: Our bottle and trademark were clearly visible to the television audience. We want to know if there is anything we can do to stop this commercial.

FLAGPOLE: And, if the law can't help us, we have some other ideas we want to check out with you. The beer industry is too highly competitive to let this one pass.

BLACKSTONE: Let me ask you a question first, Jeff. For years there seemed to be a sort of taboo against the naming of competitors in national advertising. When the competition was mentioned, it was called "Brand X" or something like that. Brand X was the detergent which left white

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1. This advertisement was suggested by the commercial described in note 39 *infra*.

sheets slightly gray or the cleanser which didn't get all of the spots out. Sometimes another epithet, such as "that greasy kid stuff," was substituted. But the reference was too vague and general to let the listener or reader know what was meant. Now, in the past several years, we have what seems to be a flurry of ads that name, show or otherwise identify specific competitors or their products. What's afoot?

FLAGPOLE: Most of us, I suppose, had been afraid that if we named our competitor we'd be giving him free publicity or evoking sympathy for him. Some of my colleagues also assumed that it was illegal to do so. Then along came a national car rental company with its challenge to its competitor, "No. 1," and its insistence that: "We try harder." These ads received a lot of attention. And the attention factor, you know, is an advertising man's principal problem. It's really difficult to get people to notice your advertising message. The average American is exposed to hundreds of items of advertising each day. Of these, he ultimately acts upon only a few. There is so much advertising in this country that people build up a certain immunity to it.

BLACKSTONE: It's like learning to sleep at night when you live in a noisy city. What you're saying is that these ads are currently so popular because they get attention.

FLAGPOLE: Yes, and furthermore that an advertising man who doesn't consider the potentialities of this type of advertising may be doing his client a disservice.

HOFMEISTER: I guess that I am one of the people who have assumed that there was something illegal about naming your competition in advertising. Why can't I sue Glutz for disparaging my product?

BLACKSTONE: The law makes it extremely difficult to win a disparagement case as plaintiff. To start with, what can you claim to be disparaging about the Glutz commercial?

HOFMEISTER: That's easy. Since they showed a bottle of our beer when they said that Glutz has flavor that other beers can't match, they're really saying that Hofmeister's can't match the flavor of Glutz. Now, they know that isn't true.

FLAGPOLE: Rudy, we call such general statements of product superiority "puffing" in the advertising industry. I had understood that they were all right legally as long as there is no misrepresentation of specific facts.

HOFMEISTER: Yes, but doesn't it make a difference when you refer to a competitive product?

BLACKSTONE: Perhaps it should, Rudy, but Jeff is correct in suggesting that it doesn't. "Puffing" is also a legal term. It includes all sorts of exaggerated and high-blown claims of superiority and superlatives for one's goods or services, provided that they are sufficiently broad and general

that the public will take them to be the opinion of the maker or seller rather than provable fact.²

HOFMEISTER: If your competitor names you in his advertising, though, isn't that unfair competition?

BLACKSTONE: No, at least not without further facts which would make it such. The terminology which is used in this area of the law is rather tricky, even to lawyers. We use terms such as "trade libel," "disparagement" and "unfair competition" in varying ways, often losing track of their individual origins and content. These terms have curious similarities and dissimilarities. Let's start by trying to define "disparagement." What does that mean to you, Jeff?

FLAGPOLE: Any attack upon a competitor or his product which is untrue or unfair.³

BLACKSTONE: Many of your colleagues in advertising would define it in approximately the same words. But to be legally precise, we must say that it describes a common law action for the damage proved to have been caused to another by a deliberate and unprivileged attack upon his product which contains objectively demonstrable misstatements.⁴

2. Prosser, Torts § 104, at 738-39 (3d ed. 1964). To the effect that "puffing" does not cease to be privileged when it is comparative see *Testing Syss., Inc. v. Magnaflux Corp.*, 251 F. Supp. 286 (E.D. Pa. 1966); *Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965).

A good statement of the generally accepted principle as to "puffing" is found in the works of a leading French writer on the law of unfair competition: "Unfair competition is not seen in the act of one who seeks by the use of grandiose words in his posters and advertisements to dazzle the public on the importance of his business and the claimed advantages of his products, where there is no precise and well-defined allegation in the charlatanism of his publicity." Pouillet, *Traité des marques de fabrique et de la concurrence déloyale en tous genres* § 1185 (6th ed. 1912).

3. Flagpole has given a broad, layman's definition of "commercial disparagement." Prosser calls it the "tort which passes by many names." Prosser, *Injurious Falsehood: The Basis of Liability*, 59 *Colum. L. Rev.* 425 (1959).

4. Compare the following definition of the conditions for actionable disparagement: "[O]ne who, with intent to injure another's business, makes a false assertion which disparages the quality of the other's product is liable for pecuniary damage directly caused thereby." Note, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 *Yale L.J.* 65, 75 (1953). This definition, like most others, does not distinguish between competitive and noncompetitive disparagement. In actions between competitors, it is too broad in that it does not take account of the effects of the competitive privilege. Good faith comments about products by independent consumer testing services, such as those listed in notes 97-98 *infra*, should also be privileged.

In addition to the note cited above, there have been a number of articles in legal periodicals concerning the common law action for disparagement. E.g., *Developments in the Law—Competitive Torts*, 77 *Harv. L. Rev.* 888, 893-905 (1964); Note, *Disparagement Under the Uniform Deceptive Trade Practices Act*, 51 *Iowa L. Rev.* 1066 (1966) (despite the title, much of the article deals with decisional law). Bibliographies of other articles

HOFMEISTER: Well, isn't that what the Glutz ad does?

BLACKSTONE: Not in the eyes of the law courts. Remember, Glutz is your competitor.

HOFMEISTER: Doesn't that make it worse for them?

BLACKSTONE: One might suppose so, but the common law is otherwise. In a disparagement action, general comparisons between products or services are said to be privileged when made by a competitor.⁵

HOFMEISTER: Even when they are untrue, or where there is no honest belief in their truth?

BLACKSTONE: Yes, unless you can demonstrate that there are specific factual claims which are untrue.⁶ Some of the older cases go even further and say that any comparative disparagement is privileged when made by a competitor.⁷

HOFMEISTER: Is there any reason for such a position?

BLACKSTONE: It is said that if the rule were otherwise, the judicial machinery would be exploited by being required to make judgments as to the truth or falsity of competitive claims, which would then be used for advertising purposes.⁸ This reason may have some merit in cases of competitive "puffing." Anyway, the consumers probably take such assertions by competitors with a grain of salt.

appear in Oppenheim, *Cases on Unfair Trade Practices* 310 (2d ed. 1965), and Janssen, *Commercial Disparagement*, 53 *Trademark Rep.* 274, 298-303 (1963). Other useful sources include 2 Callmann, *Unfair Competition and Trade-Marks* ch. 11 (2d ed. 1950); 3 *Restatement, Torts* ch. 28 (1938).

5. The modern version of the competitive privilege is stated in 3 *Restatement, Torts* § 649 (1938) as follows: "A vendor . . . is privileged to make an unduly favorable comparison of the quality of his own . . . chattels or other things, with the quality of the competing . . . chattels or other things of his competitor, although he does not believe that his own things are superior to those of his competitor, if the comparison does not contain assertions of specific unfavorable facts."

The classic analysis of the questions of malice and privilege in disparagement actions is found in Smith, *Disparagement of Property* (pts. 1-2), 13 *Colum. L. Rev.* 13, 121 (1913). Apparently this article became the basis for the Restatement positions on these subjects. Prosser, *supra* note 3, at 430.

6. 3 *Restatement, Torts* §§ 626, 649 (1938).

7. The older authorities are summarized in *National Ref. Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 769 (8th Cir.), cert. denied, 275 U.S. 570 (1927).

8. To examine the truth or falsity of comparative claims between competitors would only encourage "the pernicious practice of bringing actions for mere purposes of advertising." *Hubbuck & Sons v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86, 93 (C.A.). This statement was based upon the remarks of Lord Herschell in *White v. Mellin*, [1895] A.C. 154, 165. Compare the following statement from an early American case: "To say that the watches manufactured by the plaintiff are inferior to those made by any other particular manufacturer, can never be held actionable where no special damages result therefrom, without embarrassing the freedom of judgment in matters of private concern, and making errors of opinion in relation to the common and necessary transactions of life a fruitful source of litigation." *Tobias v. Harland*, 4 *Wend.* 537, 541 (N.Y. Sup. Ct. Jud. 1830).

FLAGPOLE: Doesn't the privilege to make general claims of comparative superiority almost wipe out the chances of bringing a disparagement action against a competitor?

BLACKSTONE: Not if the modern authorities are followed. A demonstrable misstatement of fact would not come within the privilege, and, thus, the absence of a competitive relationship would be evidence of an intent to harm.⁹

FLAGPOLE: The problem is that a specific misstatement of fact amounts to false advertising, and large advertisers just can't afford that. The American consumer is becoming too sophisticated; if he is burned once, he will lose faith in the advertiser's corporate image. A large advertiser who can't prove his comparative statements of fact will keep them general and not go beyond "puffing."

BLACKSTONE: There are a number of Federal Trade Commission cases, including some recent ones, which indicate that some large advertisers aren't as reluctant as you might think to stray beyond the borders of honest advertising.¹⁰ But I agree that one of the "big boys" will seldom if ever be willing to risk demonstrable falsity in ads which refer to the competition. There's just too much chance of a damaging reply.

HOFMEISTER: Suppose that Glutz advertised that their beer is aged longer than ours. We can show that to be untrue. So then can we get damage for the injury to our product's reputation?

BLACKSTONE: Would that it were that simple! Unfortunately, there would remain the problem of proving special damage.

FLAGPOLE: What does that mean?

BLACKSTONE: Some of the courts in disparagement cases have gone so far as to say that the plaintiff must be able to name the customers that he lost or to specify the sales that he didn't make. For a business of any size, that will almost always be an impossible burden of proof. Other courts are more reasonable and will permit evidence of a general loss of business.¹¹

HOFMEISTER: Does this mean that I win if I can show that my sales have declined in the month or two after the disparaging advertisement?

BLACKSTONE: No. Even the relatively more liberal authorities will

9. For a resolution of the seeming inconsistency between the malice requirement and the competitive privilege in disparagement cases see Oppenheim, *op. cit. supra* note 4, at 362. An interesting example of such a resolution is found in *Testing Syss., Inc. v. Magnaflex Corp.*, 251 F. Supp. 286 (E.D. Pa. 1966).

10. Support for this observation is found in a perusal of the names of the corporate respondents in FTC proceedings based upon deceptive advertising. See generally 2 Trade Reg. Rep. ¶¶ 7521-7942.

11. The problem of the special damage requirement in disparagement actions has been explored in several student notes. E.g., *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 899 (1964); Note, 47 Cornell L.Q. 92 (1961); Note, 17 Hastings L.J.

require you to show that, given the nature of your business, it's impossible to present more specific proof of your losses.¹² Also, you will have to show that your losses were naturally and directly caused by the disparaging ad and not by other factors.¹³

FLAGPOLE: Why, that's like asking a fisherman to prove exactly why he didn't catch as many fish as he usually does.¹⁴

BLACKSTONE: I can't think of a better way to describe the way in which the special damage requirement usually works. Many lawyers consider it to be the biggest barrier to winning a disparagement action.¹⁵

HOFMEISTER: Is "disparagement" the same as "trade libel"?

BLACKSTONE: Often the two terms are used as if they were interchangeable. The difference is that to a lawyer "trade libel" may also imply an action for damages for the defamation of a person in his business or trade.¹⁶

HOFMEISTER: Why is this any different from disparagement?

BLACKSTONE: In theory, at least, the distinction is clear. If the plaintiff's goods or products are attacked, his cause of action (if he has one) is for disparagement. It may be, however, that an insult to the plaintiff's goods is so phrased as to really impugn his honesty or integrity as a businessman, or to charge him with base, immoral or illegal business methods. In such a case, it is defamation rather than disparagement.¹⁷

HOFMEISTER: Isn't every disparagement of a product really an assault upon its maker or seller?

BLACKSTONE: Perhaps it is, in a sense. In order to be defamatory, however, the statement must be of such a nature as to bring the plaintiff into hatred, contempt, ridicule or disrepute.¹⁸ When you say that a prod-

394 (1965); Note, 23 Ohio St. L.J. 167 (1962); Comment, 18 U. Chi. L. Rev. 114 (1950); Comment, 63 Yale L.J. 65, 90 (1953).

12. E.g., *Erick Bowman Remedy Co. v. Jensen Salsbery Labs., Inc.*, 17 F.2d 255, 259-62 (8th Cir. 1926); 3 Restatement, Torts § 633, comment f (1938). But see *Dale Sys., Inc. v. Time, Inc.*, 116 F. Supp. 527 (D. Conn. 1953).

13. An example of a case in which the causation requirement was held to bar recovery is *Houston Chronicle Publishing Co. v. Martin*, 64 S.W.2d 816 (Tex. Ct. Civ. App. 1933).

14. This remark was suggested by Comment, *Libel and Slander—Disparagement of Product—Expanding Protection Against Trade Libel*, 7 Vill. L. Rev. 271, 274 n.15 (1961).

15. See Comment, 63 Yale L.J. 65, 93 (1953).

16. Green, Malone, Pedrick & Rahl, *Cases on Injuries to Relations* 188-90 (1959).

17. Most of the articles on disparagement, note 4 *supra*, deal with the distinction between disparagement and defamation. A concise summary of the cases is found in Oppenheim, *op. cit. supra* note 4, at 322-23. For a fuller discussion see Hibschan, *Defamation or Disparagement?*, 24 Minn. L. Rev. 625 (1940). Two recent New York cases illustrate the narrowness of the distinction. Compare *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961) (libel *per se*), with *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960) (disparagement, not actionable because no special damage).

18. E.g., Prosser, *op. cit. supra* note 2, § 106, at 756.

uct is poor or inferior, normally all that you are saying is that its maker or seller lacks skill or judgment. Let me illustrate the difference. Rudy, you're a brewer. If someone falsely charges that you are using a short-cut process or cheap ingredients which endanger the health of people who drink your beer, that is defamation. But if he untruthfully says that your beer tastes bad, or not as good as his or someone else's, then it's disparagement, if anything.

FLAGPOLE: Why does it make any difference whether it's one or the other?

BLACKSTONE: Both are common law actions for damages, but there are important differences in proof.¹⁹ In a defamation action, the plaintiff is not required to prove malice or special damage. The malice is implied from the defamatory statement, and only general evidence of the injury to the plaintiff's reputation is necessary. A person's reputation is deemed to have intrinsic value, while damage to a product is measured only by actual demonstrable loss. In addition . . .

FLAGPOLE: Can a corporation be defamed?

BLACKSTONE: Yes, that was established long before people started to talk about the "corporate image."²⁰ But it reflects the same idea. The law views a corporation as a person.

FLAGPOLE: I'm not sure that I agree with the distinction. Billions of dollars are spent every year in this country on advertising designed to build up good will for products.²¹ It is not unusual to create an advertising campaign around some idea designed to give a product a certain "personality." An example would be Esso's "Put a tiger in your tank" ads. A good job of disparagement may tarnish a product's image far beyond any price tag for damages which you might be able to prove in court.²²

BLACKSTONE: Yes, I suppose that the distinction is a little old-fashioned, but the courts still adhere to it. Remember the lines from *Othello*: "Who steals my purse steals trash; 'tis something, nothing;/ 'Twas mine, 'tis his, and has been slave to thousands;/ But he that filches from me

19. The differences are summarized in 3 Restatement, Torts, Introductory Note to Div. VI, at 323 (1938).

20. For early examples of cases where a corporation recovered in defamation for attacks upon its chattels see *American Book Co. v. Gates*, 85 Fed. 729 (C.C.S.D. Iowa 1898); *Ohio & M. Ry. v. Press Publishing Co.*, 48 Fed. 206 (C.C.S.D.N.Y. 1891).

21. Total advertising expenditures in the United States for 1966 are estimated at \$16,810,000,000. *Advertising Age*, Dec. 19, 1966, p. 54.

22. "The bonds of personal confidence are thus very often broken, and businessmen strive to create a new tie, substituting for personal confidence a confidence in products, in their qualities of durability, of appearance, of price: and this through the intensive use of advertising." Mermillod, *Essai sur la notion de concurrence déloyale en France et aux États-Unis* 9 (1954).

my good name/ Robs me of that which not enriches him/ And makes me poor indeed."²³

HOFMEISTER: You were telling us why it makes a difference whether a case is defamation or disparagement.

BLACKSTONE: In a defamation case, as I was about to say, the burden is on the defendant to show the truth of the statement as a defense. In a disparagement action, the plaintiff must prove that it is untrue. Since the line between truth and falsity is not always clear in these cases, the burden of proof may be an important factor.²⁴

HOFMEISTER: Who decides whether a case is defamation or disparagement?

BLACKSTONE: Normally a jury, after having been instructed by the judge as to the distinction. I'm assuming, of course, that the plaintiff has either brought his action as one for defamation or has pleaded defamation and disparagement in the alternative. Still, there have been only a relative handful of cases in this country where an attack upon a product has been held to be defamatory. There have been even fewer cases where liability for disparagement has been recognized.

FLAGPOLE: The chances that any large advertiser would be guilty of defamation are pretty slim. If an ad is so aggravated, strident or insulting that a jury would think it defamatory, it would just drive trade to the injured competitor in sympathy. Consumers have a sense of fair play which would make such an ad offensive to them.

BLACKSTONE: On top of that, it is highly unlikely that a comparative claim of product superiority would ever be held to be defamatory. Furthermore, it is customary among large advertisers and agencies, as well as among many smaller ones, to have advertisements checked by a lawyer before release. So the defamation cases in recent years have usually involved local advertisers who apparently hadn't bothered to get a legal opinion.²⁵ Occasionally one of the bigger corporations just plain goofs and is held liable.²⁶

23. Iago in Shakespeare's *Othello*, act III, scene 3, ll. 157-61.

24. A further effect of the distinction is of historical importance; it was not until 1874 that disparagement was expressly recognized as a separate cause of action. *Western Counties Manure Co. v. Lawes Chem. Manure Co.*, L.R. 9 Ex. 218 (1874). Even after the advent of a separate action for disparagement, however, the problems of proof in such an action have been so serious that in almost every case a plaintiff who is unable to prove defamation has for all practical purposes lost his case.

25. *Rosenberg v. J. C. Penney Co.*, 30 Cal. App. 2d 609, 86 P.2d 696 (Dist. Ct. App. 1939); *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962). These cases furnish good examples of situations in which attacks upon goods or services may be held to be defamatory. But see *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932).

26. An example of such a "goof" is found in *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961).

HOFMEISTER: Where does unfair competition fit in? Isn't it unfair for my competitor to use my product and trademark in his advertising?

BLACKSTONE: Of all of the terms that we have mentioned, "unfair competition" is the most imprecise and difficult to define.²⁷ Even if we ignore its application to the antitrust field, we are forced to recognize that it takes in a real diversity of situations, ranging from trademark infringement to stealing trade secrets to violation of state fair trade laws. It's impossible to describe comprehensively the variety of subjects which are grouped together under unfair competition without destroying the usefulness of the definition as to any one of them. Also, it is feared that any attempt at a general definition might leave loopholes which would permit a clever schemer to evade the spirit of the legal protection. Still, the elements of proof and remedies available in an unfair competition action are almost always determined by precedent or legislation dealing with the particular type of unfair conduct. A court doesn't just simply ask whether the defendant was competing unfairly in the case at hand. There's a lot more to it than that.

FLAGPOLE: What if the unfair conduct charged is disparagement by a competitor?

BLACKSTONE: If the plaintiff only seeks damages, it would be a law case and would be decided as I have indicated. However, if he asks for an injunction, then the limitations of the common law actions don't necessarily apply. Equity has a certain logic of its own. Courts sitting in equity are responsible for many of the major developments in the law of unfair competition. It is difficult, though, to set forth exactly the principles which govern injunctive relief for disparagement. There aren't very many reported cases where competitive disparagement has been treated as unfair competition. Still, I would guess that under the law of most states, you can obtain an injunction against a competitor who threatens or continues to publish material misstatements which are injurious or likely to be injurious to the good will of your business, products or services. The more aggravated the nature of the misstatements, the more likely you are to get an injunction.²⁸

27. The notion is "too broad . . . and . . . too imprecise to permit one to give, in a few words, an exact idea of its contours and substance." Mermillod, *op. cit. supra* note 22, at 3. It is impossible to construct any useful and brief definition of "unfair" in a competitive context. In addition, there are the cases in which liability for unfair competition has been found despite the absence of competition between the parties in any real sense. 1 Callmann, *op. cit. supra* note 4, at 87.

A selective bibliography of reference sources on unfair competition is found in Oppenheim, *op. cit. supra* note 4, at 1.

28. The following recent notes considered the availability of injunctive relief in disparagement cases, based upon a theory of unfair competition: Developments in the Law—

FLAGPOLE: Can disparagement ever be enjoined when it is not competitive?

BLACKSTONE: Yes, but not on a theory of unfair competition. There is authority for enjoining disparaging statements which are made in breach of a contract or fiduciary obligation, or are malicious and unjustified, or involve coercion, intimidation or extortion. Of course, the presence of competition in these situations will increase the likelihood that an injunction will issue.²⁹

FLAGPOLE: Isn't there a constitutional problem when an injunction would restrain the defendant in advance from speaking or writing something?

BLACKSTONE: By its very nature the injunction involves a prior restraint. For this reason the constitutional question which you raise has worried a number of courts. During the last century and the earlier part of this one, the constitutional privileges of free speech and press were the basis for a denial of injunctive relief against disparagement in many cases.³⁰ Legal writers of this century have been critical of the earlier cases, pointing out that the constitutional privilege was not designed to protect mere commercial advertisements.³¹ The United States Supreme Court seems to agree with them,³² but the constitutional argument may condition a court's discretion to grant an injunction even in cases where it is not thought to be an absolute bar.³³

FLAGPOLE: If I understand correctly, a single judge may issue an injunction without a trial by jury. Isn't there a serious danger in permitting him to act as an advance censor of advertising?

BLACKSTONE: Not really. If he abuses his discretion, or makes a decision which is arbitrary or unsupported by the facts, it may be reversed

Competitive Torts, 77 Harv. L. Rev. 888, 902 (1964); Note, 51 Iowa L. Rev. 1066, 1071 (1966).

Proof of special damage is generally considered unnecessary in cases where equitable relief against disparagement is based upon unfair competition. *Royer v. Stoddy Co.*, 192 F. Supp. 949 (W.D. Okla. 1961); *H. E. Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N.Y. Supp. 692 (4th Dep't 1928).

29. See generally 2 Nims, *Unfair Competition and Trade-Marks* ch. 17 (4th ed. 1947). Illustrative cases are collected in 2 Callmann, *op. cit. supra* note 4, at 691-704.

30. The classic case of such a restrictive approach is *Marlin Fire Arms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902).

31. The leading article is Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. Rev. 640 (1916).

32. E.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

33. Perhaps the best example of how the constitutional consideration may militate against the imposition of prior restraint, even though the court refuses to decide the constitutional question, is found in *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941).

upon appeal. Furthermore, advertising differs in many ways from the expression of political, religious, economic, philosophical, literary or artistic ideas and opinions. Its main motive is a purely self-serving one—to sell. If advertising were under the umbrella of constitutional protection against prior restraint, then not even false advertising could be enjoined. The cease and desist orders of the FTC likewise couldn't be used against false advertising.

FLAGPOLE: "So much the better," said the Big Bad Wolf. But tell me, would it be unconstitutional to enjoin a true advertisement?

BLACKSTONE: There have been a number of situations where restrictions have been upheld even where the advertising was not materially false. A defendant's loss of his constitutional privilege may be based upon his express or implied agreement, aggravating circumstances such as extortion, or the presence of other elements of public policy.³⁴ An example of the latter involves me; I am not permitted to advertise my services as a lawyer. Still, in a case where an advertiser had presented true, useful information concerning his competitor's product, the constitutional privilege might pose a serious obstacle to the issuance of an injunction.

HOFMEISTER: How is untruth determined in an action for an injunction?

BLACKSTONE: The cases aren't very explicit as to what constitutes untruth. Equity cases tend to be decided more on their own peculiar facts—that is, less categorically. The principles and guidelines are usually broader and the question of burden of proof as to any issue is less important than at law. But to answer your question as well as I can, I would assume that the plaintiff would have to show that his competitor's advertisement would tend to mislead the consumer in some material or substantial respect.³⁵

HOFMEISTER: And so again the Glutz ad, being as you say "puffing," wouldn't qualify?

BLACKSTONE: No, I'm afraid not.

HOFMEISTER: We have been talking about disparagement. But what about Glutz's use of our trademark? Isn't it illegal for a competitor to use your trademark to help sell his product?

34. Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965). Examples of cases where the court did not appear to consider the question of truth are *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937); *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960); *Saxon Motor Sales, Inc. v. Torino*, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938). None of these cases involved unfair competition.

35. E.g., *Royer v. Stoodly Co.*, 192 F. Supp. 949 (W.D. Okla. 1961); *Old Investors & Traders Corp. v. Jenkins*, 133 Misc. 213, 232 N.Y. Supp. 245 (Sup. Ct. 1928), *aff'd*, 225 App. Div. 860, 233 N.Y. Supp. 845 (1st Dep't 1929).

FLAGPOLE: I might say, Harlan, that a number of people are in trouble if Rudy's suggestion is correct. Advertisements which show competitors' trademarks are not uncommon these days. Let me show you the little file I have been keeping of ads which refer to the competition.³⁶

BLACKSTONE: (Takes the file and examines it.) This is very interesting. These advertisements seem to fall into at least two distinct types. In some of them, the advertised product is not as well-known as that of the competitor. The advertiser starts out by praising the competing merchandise, albeit sometimes rather faintly. Then he proceeds to switch the interest to his own goods or to indicate their advantages.³⁷ At times, he attempts to do the latter by factual comparisons, even some quite specific ones.³⁸ The Glutz commercial falls in the other class. There it is the advertiser's product which is as well or better known than the others. So usually he confines himself to more general statements as to the comparative superiority or popularity of his own brand.³⁹ I note that there are ads in each category which do not name or picture the competing product or its trademark, at least directly.⁴⁰

36. The collection of clippings used in the writing of this article is on file with the Fordham Law Review.

37. Illustrative of this type of advertisement is the ad of the National Brewing Co. for its "Premium Beer." The headline is: "Wherein . . . our proud premium brew from the U.S.A. comes to grips with the imported beers." A bottle of National Premium is shown beside a bottle of Löwenbräu, and this scene is repeated with bottles of Heineken and Tuborg. The copy relates how the majority of a panel of more than 1,400 beer drinkers found that the advertised beer was at least as good as that of each of the named competitors. *Washington Post*, May 22, 1966 (Potomac), p. 24.

A somewhat similar advertisement is the magazine ad for Hudson's Bay Scotch, described in *Commentary*, *Naming Competitors in Ads: Forthright, Fair, Foolish?, Printers' Ink*, Jan. 28, 1966, p. 32. On one side of the page, over the caption "Now that you have acquired a taste for scotch . . ." are shown a dozen bottles of competing brands, each with the cap removed. Some of the labels are clearly visible. The advertiser's product appears opposite, with the caption "you are ready for Hudson's Bay."

38. One of the most specific of such advertisements used so far has been the ad for Simca, a French-made automobile, in *Ladies' Home Journal*, June, 1966, p. 51. The ad pictures a Simca parked in front of a Volkswagen in such a manner as to take full advantage of foreshortening. The title reads: "For the price of a VW you get: 2 extra doors. More room inside. A 5-year/50,000-mile warranty. More horsepower. And \$21 in change." The copy elaborates on these and other specific factual comparisons between the two automobiles.

39. The prototype for this kind of ad is a television commercial for Gillette stainless steel blades. The picture shows the advertiser's product together with those of three leading competitors. While a hand reaches in and picks out the Gillette package, the announcer points out that Gillette double-edged stainless steel blades outsell all of the others combined. This commercial was described in *Time*, Aug. 20, 1965, p. 70.

40. An example is the advertisement of Bristol-Myers for its new seltzer tablet, *Resolve*, designed to compete with *Alka-Seltzer*. The ad shows a tablet fizzing in a glass of water,

FLAGPOLE: Is one type more objectionable legally than the other?

BLACKSTONE: As the law now stands, my answer is negative. I don't know of any case where either type has been held actionable merely because of the identification of the competition.

HOFMEISTER: You still haven't told me why this isn't trademark infringement.

BLACKSTONE: The reason is that in a trademark infringement case, you must show that someone is using your mark, or something close to it, in such a way as to create confusion, mistake or deception in the consumer as to the source, origin or sponsorship of his goods or services.⁴¹ The Glutz ad, as well as those in Jeff's file, make it quite clear that the advertised goods or services are not those of the competitors whose trademarks are shown.

HOFMEISTER: Well, Harlan, you certainly have given me a nice collection of reasons why the courts can't help me out. Now, what would happen if I brought an action before the Federal Trade Commission? Aren't they empowered to prevent injuries to competition?

BLACKSTONE: You don't give up easily, Rudy. The problem is that a private citizen doesn't have the power to institute an FTC action.⁴² We can file our complaint with the FTC, but if they choose not to act on it, that ends the matter. Although they are authorized to proceed in cases involving unfair methods of competition or unfair or deceptive acts or practices in interstate commerce, their primary interest in so doing is to protect the public rather than injured competitors. There is even authority for the proposition that if there is no public injury, but only an injury to a single competitor, then the FTC has no jurisdiction.⁴³ Injured competitors often benefit from FTC actions, but, as far as the Commission is concerned, that is incidental.

under the caption: "Quick, what is this? You're wrong. Come on, now. We know what you think this is. And you know what you think this is. But it's not. . . . Resolve may look the same but it's different." Although Alka-Seltzer is not mentioned by name, the reference is clear. The copy proceeds to make comparative comments as to the superiority of the new seltzer. *Saturday Evening Post*, Dec. 3, 1966, pp. 20-21.

41. A useful summary of the criteria for trademark infringement, with citations of authority, is found in *Restatement (Second), Torts* § 717 (Tent. Draft No. 8, 1963). For the infringement of a federally registered trademark see the *Lanham Trade-Mark Act* § 32(1), 60 Stat. 437 (1946), 15 U.S.C. § 1114(1) (1964).

42. See *Federal Trade Commission Act* § 5(b), 38 Stat. 719 (1914), 15 U.S.C. § 45(b) (1964); *Samson Crane Co. v. Union Nat'l Sales Co.*, 87 F. Supp. 218, 221 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950).

43. *FTC v. Klesner*, 280 U.S. 19 (1929). But see *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962); *Moretrench Corp. v. FTC*, 127 F.2d 792 (2d Cir. 1942). The *Klesner* case doubtless still overshadows the FTC's determination as to the cases with which it will proceed.

HOFMEISTER: But I recall hearing about some cases in which the FTC did issue cease and desist orders against disparagement.

BLACKSTONE: Yes, there have been many such cases.⁴⁴ However, the FTC proceeds against disparaging advertising only when it is false in such a way as to threaten an injury to the public.

HOFMEISTER: So, if the advertisement is true, the FTC won't take action just because it is disparaging?

BLACKSTONE: Correct.

FLAGPOLE: Doesn't the FTC define "truth" in a rather strange way, though? It seems to me that they have acted in some cases where the deviation from the truth was very slight, and at times where the advertisement in question was technically not false at all.⁴⁵

BLACKSTONE: Perhaps you're thinking of the recent case dealing with television "mock-ups."⁴⁶ Some of my other friends in advertising have read that case as indicating that the FTC has discarded the requirement of falsity. The FTC acted, I think, because they were concerned about the dangers inherent in the use on television of purported experiments and demonstrations to back up claims of product superiority. In the particular case, it was established that the advertised shaving cream just didn't shave sandpaper in the way shown on the television screen. After reading the FTC's order closely, I'm convinced that it was directed at a real and not an illusory evil. I don't think that it prevented the use of all "mock-ups," but only those which created a false impression in the minds of the viewers. So it is with the other cases in which the FTC seemingly enjoined true advertising; the materiality of the deception appears on a close analysis of the manner in which the ad misleads the consumer.⁴⁷

44. These are collected in 2 Trade Reg. Rep. ¶¶ 7655-70.

45. Baum, Truthful Disparagement Under the Federal Trade Commission Act, 51 Trademark Rep. 1081 (1961). "False advertisement" is defined in the Federal Trade Commission Act § 15(a), 52 Stat. 116 (1938), 15 U.S.C. § 55(a) (1964).

46. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

47. E.g., *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950). The Reader's Digest ran an article which was designed to show that cigarettes contained too much nicotine, tars and resins, and that there was no significant difference among the leading brands in the amounts contained. A chart of the results of tests on the seven best-selling brands was included to substantiate the point. The maker of the cigarette which was lowest on the chart, by an infinitesimal percentage, began to advertise that a Reader's Digest survey had proved it to be lowest among the seven leading brands in "nicotine . . . [and] throat-irritating tars and resins." *Id.* at 57. The innuendo of the advertisement was that there was a real difference between the advertised cigarette and the other leading brands in content of nicotine, tars and resins. To people who had not read or remembered the article, the ad did convey a false impression. But see *FTC v. Sterling Drug, Inc.*, 317 F.2d 669 (2d Cir. 1963).

For the most part I disagree with the charges of "nit-picking" which have been levelled against the FTC in deceptive advertising cases.⁴⁸

FLAGPOLE: I still have some reservations. Why can't the FTC spin out a similar case of falsity against some of the ads in my file?

BLACKSTONE: As far as I can tell, none of them go beyond "puffing." We're assuming that the ones which contain more specific allegations are materially true. Nevertheless, I wouldn't be surprised if the FTC were following these comparative ads with interest.⁴⁹ As you probably know, they have a program to monitor advertising in all sorts of media.⁵⁰ Whether they will act is quite another matter. Their jurisdiction is limited to cases involving either an injury to competition or to the public interest. Disparagement has not yet been held to be an injury to competition, as distinguished from the individual competitors. If the basis for jurisdiction is the injury to the public interest, then it's necessary to show that the advertising tends to deceive at least a portion of the public in some real, meaningful way. These questions of jurisdiction are not only for the courts which review FTC decisions; they also condition the FTC's own determination as to whether to proceed in a given case.⁵¹

HOFMEISTER: So if we asked the FTC to take action, they would tell us that Glutz's insinuation that we can't match their flavor is not materially false?

BLACKSTONE: The FTC looks at falsity from the viewpoint of the consumer. The only factual basis for the Glutz commercial is the true one that they're first in national sales. The rest is purely their opinion, and the consumer will take it as such. No, we don't have a reasonable chance of getting the FTC to start an action. They don't have the manpower or resources even to police all of the really bad advertisements in interstate commerce. The worst effect which Glutz's non-specific comparisons could have is to cause a few customers to switch from one brand of \$1.45 a six-pack beer to another. Mind you, the FTC is not unwilling to try the truth or falsity of statements concerning competing products in a proper case, but it's not going to get involved in anything as subjective as trying to determine whether one brand of beer really has a flavor that others can't match.

48. But see Harwood, *Once in a While the FTC Snorts, and Then Sleeps On*, *Washington Post*, March 27, 1966, § E (Outlook), pp. 1, 3. See also *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965).

49. Commentary, *supra* note 37, at 33.

50. Letter from Charles A. Sweeny, Director, Bureau of Deceptive Practices, FTC, to Professor Lawrence D. Gaughan, Dec. 9, 1966, on file with the *Fordham Law Review*.

51. The jurisdictional limitations on the FTC are discussed in Oppenheim, *op. cit. supra* note 4, at 370-74.

HOFMEISTER: Do you know of any other way to get at Glutz legally?

BLACKSTONE: I can't think of any other theory which has a decent chance of success.⁵²

HOFMEISTER: Can't we just tell the television network that if they continue to run the Glutz ad, we'll take our business elsewhere?

BLACKSTONE: Unless they relented, we would have to back down or else lose a major advertising outlet. If they did give in, on the other hand, we run the risk of an antitrust violation.⁵³ I'm afraid that that is not the solution.

FLAGPOLE: My recommendation, Harlan, is that we reply in kind. Glutz has asked for a fight and I think that we can give it to them. Our

52. Blackstone may have considered and rejected at least the following two possible theories:

(1) Antidilution. A few states have enacted so-called "antidilution" statutes, such as N.Y. Gen. Bus. Law § 368-d (Supp. 1966), which reads as follows: "Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services." Despite the broad and somewhat ambiguous language of such statutes, no court interpreting them thus far has taken them to do more than broaden the circumstances constituting infringement beyond passing off and consumer confusion. Other such statutes are Conn. Gen. Stat. Ann. § 35-11i(c) (Supp. 1965); Ga. Code Ann. § 106-115 (1956); Ill. Rev. Stat. ch. 140, § 22 (1964); Mass. Ann. Laws ch. 110, § 7A (1954).

(2) Misappropriation. Attempts have been made to apply the amorphous and somewhat discredited, although not by any means defunct, doctrine of *International News Serv. v. Associated Press*, 248 U.S. 215 (1918), to cases involving imitation of a competitor's advertising. Liability has almost uniformly been refused, and none of the few cases in which relief was granted bears any analogy to the advertisements in notes 37-40 *supra*. See 2 Callmann, *supra* note 4, § 61.4, at 901-04. It is interesting to note that Bristol-Myers has copyrighted its ad, note 40 *supra*; usually the only copyright coverage for newspaper and magazine advertising is that of the publisher. This may represent an attempt to prevent the use of its copy in a reply ad. See Comment, Copyrights—The Protection of Advertising, 5 Vill. L. Rev. 615 (1960), which also describes the application of the misappropriation doctrine.

53. *United States v. Colgate & Co.*, 250 U.S. 300 (1919), has not been overruled as to the proposition that a unilateral refusal to deal, absent other elements in restraint of trade, does not constitute a violation of the antitrust laws. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). A conspiracy in restraint of trade, however, could easily be found in the situation of a media outlet which yielded to the coercion of a large nationwide advertiser to obtain deletions or alterations in the advertising of one of its competitors. Cf. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). There is also a negligible possibility of civil liability at common law. See *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 926 (1964). For a discussion of the increasing concern over the effects of concentration in the brewing industry see *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), and *United States v. Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd mem.*, 385 U.S. 37 (1966).

beer is aged (on an average) for three days longer than theirs, and it contains two varieties of flavor-producing hops which they don't have. Furthermore, we beat them in a comparative flavor test run by an independent testing agency. Our idea is to run a series of ads entitled, "How long, O Glutz?" Each ad will rhetorically ask them how long they can remain first in sales after the public knows all of the reasons why Hofmeister's is a superior beer. Naturally we will be able to prove everything we say. We wouldn't run a picture of their bottle, but we would refer to them by name.

BLACKSTONE: I would like to check the copy of the ads before giving you any final opinion. For the reasons which we have discussed, though, I would be very surprised if any of the ads were worded in such a way as to raise legal objections. Which media do you intend to use?

FLAGPOLE: Television, newspapers and magazines. We also use billboard and transit advertising, but this particular campaign is not especially adapted to those media. We don't advertise on radio.

BLACKSTONE: Will you encounter any trouble in placing these ads? I have heard that some of the media people disapprove of comparative advertising. What about the so-called "self-regulation" in advertising? I recall several notes in law journals which have dealt in part with this subject.⁵⁴ Also, Jeff, I have skimmed through the booklet on advertising self-regulation which you gave to me.⁵⁵

FLAGPOLE: You know that I believe that self-regulation is the most meaningful way of promoting advertising ethics in the public interest. The main reason that there are few disparaging ads is that advertisers normally don't ask for them, or advertising agencies won't develop them, or the media will refuse to accept them. Our proposed series, of course, won't be disparaging because there will be nothing untruthful or unfair in any of the ads.

BLACKSTONE: Your booklet certainly elaborates on the virtues of self-

54. The most comprehensive such article is Note, *The Regulation of Advertising*, 56 *Colum. L. Rev.* 1018, 1078-96 (1956). On self-regulation in relation to disparagement see Comment, 63 *Yale L.J.* 65, 66 (1953).

55. Advertising Advisory Comm., Dep't of Commerce, *Self-Regulation in Advertising: A Report on the Operations of Private Enterprise in an Important Area of Public Responsibility* (1964). This publication is the report of a committee of executives from various trade associations in the advertising industry to Luther H. Hodges, then U.S. Secretary of Commerce. The style of the tract indicates that its major intended use was as a public relations document; it is written in laymen's language which reminds one of magazine advertising copy. Although it is a United States Government publication, it should not be taken as reflecting the official position of the Department of Commerce or any other branch of the federal government. Nevertheless, if one discounts its bias, it is probably the best available summary of the aims and problems of self-regulation in advertising.

regulation, while blaming its limitations primarily upon the antitrust laws. Self-regulation is a topic of much comment these days in your advertising journals, such as *Advertising Age* and *Printers' Ink*. Last week at a cocktail party I was also exposed to the other side as presented by an attorney for one of the federal agencies and a rather disgruntled former advertising executive. Their position was that self-regulation was mainly a pious means of avoiding needed governmental controls and substituting vague and unenforceable codes for really meaningful and effective supervision. Now you'll probably agree with me, Jeff, that the threat of increased legal controls over advertising is very present in the minds of those advertising men who continue to sing the praises of self-regulation. But I was moved to protest to my friends at the party that there is more to the question than they had indicated. You said earlier that unethical advertising may be useless or even harmful to one who uses it. Beyond that, I like to think that many people in advertising are seriously and honestly concerned about the ethics of their profession, even when that concern may run contrary to a more immediate financial interest. It's a question of pride in one's work, of a feeling that one is doing something that is socially useful. So I believe, Jeff, that your feeling for advertising ethics is genuine.

FLAGPOLE: Thank you, Harlan. Let me add that I would far prefer to determine my own standards of ethics rather than to have them set by some bureaucrat.

BLACKSTONE: There is no dearth of general pronouncements in the advertising industry against unfair or disparaging attacks upon competitors or their products, services or methods of doing business. What I am interested in knowing is the extent to which it is considered ethically wrong in advertising to identify "Brand X," even though there are no elements of untruth or unfairness.⁵⁶ Can you give me more specific information on this?

FLAGPOLE: Let me begin with a little background: many advertisers, including practically all of the large ones, have their own internal advertising department and also a contract with at least one agency. Once an individual ad or an advertising campaign is developed, it will be placed with the appropriate media. An advertisement or commercial which is bad for some reason or other probably won't reach the light of day. It can be stopped at any one of the three levels. That is quite a gauntlet to run, especially since legal advice is normally sought at each level.

BLACKSTONE: But what happens if the advertiser insists upon running the ad despite legal or ethical objections?

FLAGPOLE: We try to talk him out of it. Sometimes we compromise. At

56. An excellent discussion of the controversy among advertising men over comparative advertising is Commentary, *supra* note 37.

times we decide that risking the advertiser's displeasure is the lesser of two evils.

BLACKSTONE: But isn't it true that agencies and media don't lightly offend national advertisers? It's not uncommon for advertisers to cancel agency contracts, but the converse is somewhat like "man bites dog."

FLAGPOLE: The advertiser is the one who's spending the money, so he usually does have the real power of decision. Still, most advertisers appreciate the advice of their agencies. Furthermore, at all three levels, there are associations of various types. These associations often prescribe codes or standards of advertising ethics for their members.

HOFMEISTER: We belong to the Association of National Advertisers⁵⁷ and the United States Brewers Association, Inc.⁵⁸ Since the ANA represents diverse lines of business, it doesn't have any formal advertising code. It does circulate a very useful little booklet with a rule-of-thumb for honest advertising,⁵⁹ but there's no rule against identifying competitors. As for the brewer's association, it has established a five-man Advertising Review Panel to hear charges of alleged violations of advertising ethics. It's not considered unethical, though, merely to refer to the competition.

BLACKSTONE: Does the Advertising Review Panel have any authority to enforce its decisions, or does it operate on the basis of judgment and persuasion only?

HOFMEISTER: It has moral force.

FLAGPOLE: It is my understanding that if a trade association had any real sanctions, it might be charged with an antitrust violation.

BLACKSTONE: Yes, your booklet gives this as the main reason for the lack of effective enforcement powers by the various trade associations concerned with advertising.⁶⁰ I think that the argument is overstated if the antitrust laws are taken to prevent the policing of ethical standards of advertising where there are no ulterior motives.⁶¹ I'll admit, though,

57. 155 E. 44th St., New York, N.Y. 10017. The ANA's membership consists of leading national advertisers, including 86 out of the top 100. Other important advertiser associations include the Association of Better Business Bureaus, Inc., 405 Lexington Ave., New York, N.Y. 10017, and the Association of Industrial Advertisers, 271 Madison Ave., New York, N.Y. 10017.

58. 535 Fifth Ave., New York, N.Y. 10017. This is a trade association for large or national brewers. An organization for smaller or regional brewers is the Brewers Association of America, 541 W. Randolph St., Chicago, Ill. 60606. For information concerning trade associations see 1 Ruffner, *Encyclopedia of Associations* (4th ed. 1964).

59. "An advertisement is honest when objective facts which bear upon the product or service advertised fulfill in all material respects the understanding regarding them that is generated in people by the advertisement when observed in the way or ways that they normally perceive it." Weil, *Legal Rules of the Road to Honest Advertising* 4 (1960).

60. Advertising Advisory Comm., *supra* note 55, at 11, 33, 100.

61. Apparently the chairman of the FTC would disagree with Blackstone's observation, at least in the event that a really effective sanction (such as a boycott) were available.

that such sanctions could provide a machinery which by its very presence would encourage other coercive activity. A good way to avoid this is to set up the industry regulations under the aegis of the FTC as *Trade Practice Conference Rules*.⁶² But such rules have not been established for either advertising or brewing, and even if they were, they wouldn't go beyond proscribing false advertising and untrue disparagement.

FLAGPOLE: My agency is a member of a very important trade association, the American Association of Advertising Agencies,⁶³ which we have nicknamed the 4 A's. Our *Standards of Practice* contains a "Creative Code" which bars "comparisons which unfairly disparage a competitive product or service."⁶⁴

BLACKSTONE: How is the code enforced?

FLAGPOLE: We have a Committee for the Interchange of Opinion on Objectionable Advertising, which is operated jointly by the ANA and the 4 A's. The committee consists of twenty executives, ten from each organization. Its purpose is to review complaints against advertising and to deal with them on a confidential basis. If the objection is deemed serious and the advertiser or agency does not comply with the committee's recommended corrective action, then the noncompliance is reported back to the board of directors of the appropriate organization. The organization's action can include expulsion of the offender from membership.⁶⁵

BLACKSTONE: Do you know of any advertiser or agency which has actually been expelled for such a violation?

FLAGPOLE: No, not that I know of. But the threat is there.

BLACKSTONE: Does the 4 A's have any official position on comparative advertising?

FLAGPOLE: Yes, they do. It is stated in a policy statement adopted on February 15, 1966. (Removes policy statement from briefcase and reads it aloud.⁶⁶) The most important thing about this is that the 4 A's looks

Address by Paul Rand Dixon, Advertising Ass'n of the West Annual Convention, June 28, 1966, summarized in *Antitrust & Trade Reg. Rep.*, July 5, 1966, p. A-6; cf. *United States v. American Ass'n of Advertising Agencies, Inc.*, 1956 Trade Cas. ¶ 68361 (S.D.N.Y. 1956) (broad consent judgment). However, that case involved price-fixing. Likewise, another case often cited in this context, *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941), involved restraint of trade.

62. These are collected in 4 Trade Reg. Rep. ¶¶ 40000-41227.

63. 200 Park Ave., New York, N.Y. 10017.

64. American Ass'n of Advertising Agencies, *Standards of Practice* § 1(d) (Apr. 28, 1962) (copy on file with the Fordham Law Review).

65. Advertising Advisory Comm., *supra* note 55, at 39-40.

66. The full "Policy Statement on Comparative Advertising" reads as follows: "While the Board of Directors of the American Association of Advertising Agencies believes wholeheartedly in competition in advertising, it does not believe in advertising which untruthfully or unfairly depicts or disparages competitive products or services. Nor does it believe in

with disfavor on ads or commercials which show a competitor's package or trademark without his permission.

BLACKSTONE: Why aren't advertisements which violate this policy deemed objectionable simply on that basis? Or perhaps I'm assuming incorrectly that they aren't. I guess that I'm puzzled because some of the ads in your file which seem to contravene the policy have appeared since it was promulgated.

FLAGPOLE: Well, the policy statement is not like a code or regulation. It's simply a statement of the beliefs of the people who guide the organization. The board of directors of the 4 A's only meant to discourage such ads; I don't think they meant to change the criteria for deciding what constitutes a serious objection to advertising.

HOFMEISTER: The Glutz commercial certainly violates the policy, although our reply wouldn't. It seems to me that they are also unfairly depicting our product and trading upon our reputation.

BLACKSTONE: Perhaps I could get a court of equity to accept the 4 A's policy statement as evidence of developing commercial custom or ethics. Then we might make some new law!

FLAGPOLE: I agree with you, Rudy, that the Glutz ad violates the last sentence of the 4 A's policy. It doesn't seem to me, though, that they depicted our product unfairly. The picture of our bottle on television didn't make it look smaller or less desirable than theirs. Likewise, they're not trading on our reputation any more than our campaign would trade on their name or advertising. In my opinion, the big difference between our ads and their commercial is that ours will give the consuming public some useful information.

BLACKSTONE: You haven't answered my question about possible problems with the media.

FLAGPOLE: Each of the media has at least one trade association, but to my knowledge none of them prohibits the type of campaign that we propose. As far as newspapers and magazines are concerned, neither the American Newspaper Publishers Association⁶⁷ nor the Magazine Publishers Association⁶⁸ maintains any general codes or standards. They prefer to leave questions of policy as to the acceptance or rejection of

advertising that uses another product's trademark or brand name in an effort to trade on the reputation which the competitive brand has built through advertising and public acceptance. It believes that such use of competitors' brand names, packages, and trademarks without the express permission of such competitors should be discouraged." American Ass'n of Advertising Agencies, Policy Statement on Comparative Advertising, Feb. 15, 1966 (copy on file with the Fordham Law Review).

67. 750 Third Ave., New York, N.Y. 10017.

68. 575 Lexington Ave., New York, N.Y. 10022.

advertising to their individual members.⁶⁹ As you doubtless know, a few magazines, such as the *Reader's Digest*, will not accept any beer advertising.

BLACKSTONE: Don't some newspapers have a policy against the acceptance of advertising which refers to a competitor?

FLAGPOLE: Yes, but that doesn't apply to us. The fact that we advertise nationally makes the difference; newspapers seldom reject or make copy revisions in national advertising. But a reputable newspaper will police local or retail advertising quite closely.⁷⁰

HOFMEISTER: Did you say, Harlan, that most of the abuses in advertising are on the local level?

BLACKSTONE: That seems to be so in the case of deceptive advertising. But it may be the other way around with some other questionable advertising practices, such as subliminal advertising and the overworking of sex in ads.

FLAGPOLE: Thank you, Vance Packard! Anyway, in addition to their own guidelines on advertising acceptability, many magazines and newspapers subscribe generally to an association set of standards, such as the 4 A's "Creative Code" or the *Advertising Code of American Business*.⁷¹ This latter code was developed jointly by three major associations concerned with advertising. Neither of these standards, though, goes beyond discouraging the use of untrue or unfair disparagement in advertising.

BLACKSTONE: What about television and radio? Isn't their self-regulation stricter than in the other media?

FLAGPOLE: Yes, because of the codes promulgated by the National Association of Broadcasters.⁷² Both *The Television Code*⁷³ and *The Radio*

69. Letter from Donald R. McVay, Ass't Gen. Manager, Am. Newspaper Publishers Ass'n, to Professor Lawrence D. Gaughan, Nov. 16, 1966; Letter from Kathryn Powers, Magazine Advertising Bureau of Magazine Publishers Ass'n, to Professor Lawrence D. Gaughan, Nov. 8, 1966. Both letters are on file with the Fordham Law Review.

70. For example, the following statement appears in N.Y. Times, Standards of Advertising Acceptability 6 (1964): "Statements or representations which refer to the goods, price, service or advertising of any competitor are not acceptable." However, this policy is directed at retail (i.e., local) rather than national advertising. Letter from Vincent Redding, N.Y. Times, to Professor Lawrence D. Gaughan, Nov. 25, 1966, on file with the Fordham Law Review.

71. Art. 4 of this Code reads as follows: "Disparagement . . . Advertising shall offer merchandise or service on its merits, and refrain from attacking competitors unfairly or disparaging their products, services or methods of doing business." This code, which is undated, is published by the Advertising Federation of America (AFA), 655 Madison Ave., New York, N.Y. 10021, the Advertising Association of the West (AAW), 337 World Trade Center, San Francisco, Calif. 94111, and the Association of Better Business Bureaus, Inc., 405 Lexington Ave., New York, N.Y. 10017. A copy of *The Advertising Code of American Business* is on file with the Fordham Law Review.

72. 1771 N St., N.W., Washington, D.C. 20036.

73. National Ass'n of Broadcasters, *The Television Code* (11th ed. Aug. 1966).

*Code*⁷⁴ are administered by a strong enforcement agency called the Code Authority. The codes are kept up to date through frequent revisions by a Code Review Board. Violators of the codes may be expelled from the NAB and, in fact, some expulsions have taken place.⁷⁵ I don't think that there is anything comparable among the other media.

HOFMEISTER: Why is that?

BLACKSTONE: I can guess. Radio and television are subject to more stringent governmental controls than the other media, at least on paper. The regulatory body charged with administering the federal laws dealing with broadcasting is the Federal Communications Commission. The federal license of each radio and television station expires every three years, and it is the FCC which must approve applications for renewal. License renewal is subject to the FCC's determination that the statutory standard has been met; that is, that the "public interest, convenience, and necessity would be served thereby."⁷⁶ The vagueness of this provision has led many broadcasters to be rather wary of the FCC, and so the more extensive scheme of self-regulation is certainly related to the desire to avoid governmental alternatives. In fact, the FCC has been rather benign. Perhaps there is a feeling among some broadcasters that the FCC is a "paper tiger;" membership in the NAB is far from unanimous, and the fact that there have been expulsions may indicate only that not everyone considers the loss of NAB membership or certification to be a very serious sanction.⁷⁷

FLAGPOLE: Aren't you overlooking an important fact, Harlan? The real influence of *The Television Code* is to be found in its effect on the national networks; all of them subscribe to it.⁷⁸ I might add that some of the code provisions are not only strict, but also specific and unambiguous.⁷⁹

BLACKSTONE: Judging from the appearance of the Glutz commercial on

74. National Ass'n of Broadcasters, *The Radio Code* (12th ed. Aug. 1966).

75. Advertising Advisory Comm., *supra* note 55, at 86.

76. 66 Stat. 714 (1952), 47 U.S.C. § 307(d) (1964).

77. Editorial, *Assistance in Disguise*, *Advertising Age*, Dec. 12, 1966, p. 22. The article referred to therein is Barrow, *The Attainment of Balanced Program Service in Television*, 52 Va. L. Rev. 633 (1966). Compare the comment of Judge Wisdom in *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963): "On television truth is relative." *Id.* at 526.

78. Letter from William H. Tankersley, Vice President, Program Practices, CBS Television Network, Division of Columbia Broadcasting System, Inc., to *Fordham Law Review*, Feb. 8, 1967; Letter from Mortimer Weinbach, Ass't Gen. Counsel & Vice President, American Broadcasting Companies, Inc., to Professor Lawrence D. Gaughan, Dec. 30, 1966; Letter from Ernest Lee Jahncke, Jr., Vice President, Standards and Practices, National Broadcasting Company, Inc., to Professor Lawrence D. Gaughan, Dec. 13, 1966. These letters are on file with the *Fordham Law Review*.

79. E.g., National Ass'n of Broadcasters, *The Television Code* art. IX(5) (11th ed. 1966): "The advertising of hard liquor (distilled spirits) is not acceptable."

a national network, I'd guess that nothing in *The Television Code* covers comparative advertising.

FLAGPOLE: That's not quite correct. As a matter of fact, a little over a year ago the Code Review Board proposed an amendment which would probably have kept the Glutz commercial and our planned campaign off television. The old code provision merely forbade advertising copy which dealt unfairly with the competition.⁸⁰ It was proposed to change this so as to prohibit references to a competitor or his wares which, expressly or by implication, would "detract from or belittle the product or service mentioned."⁸¹ We understood that this wording would have given the Code Authority the power to turn down any commercial which would be derogatory to a competitor, even though it was purely factual.⁸² In my opinion, such a principle would have been unrealistic. Fortunately, the proposal was rejected after much discussion pro and con.⁸³ A compromise substitute provision is now in the code. After stating that a product or service should be advertised on its own merits, it provides that advertising should "refrain by identification or other means from discrediting, disparaging or unfairly attacking" the competition.⁸⁴ The provision in *The Radio Code* is slightly stronger in its wording.⁸⁵ In practice, these provisions have not served to eliminate comparative advertising from radio and television.

BLACKSTONE: Well, this discussion of self-regulation has been very interesting. Do you plan to go ahead with the campaign?

FLAGPOLE: We're not sure yet. Rudy has some misgivings. My feeling is that the campaign will attract interest and will be doing the public a service at the same time.

HOFMEISTER: Something still bothers me about naming a competitor. It's Glutz's fault, though. They started all this.

80. "Advertising copy should contain no claims dealing unfairly with competitors, competing products, or other industries, professions or institutions." National Ass'n of Broadcasters, *The Television Code* art. X(6) (10th ed. 1965). The same provision is found in National Ass'n of Broadcasters, *The Radio Code* art. II(C)(9) (11th ed. 1965).

81. Commentary, *supra* note 37, at 33.

82. *Advertising Age*, June 6, 1966, p. 1.

83. *Advertising Age*, June 13, 1966, pp. 1, 20.

84. The full provision reads: "Advertising should offer a product or service on its positive merits and refrain by identification or other means from discrediting, disparaging or unfairly attacking competitors, competing products, other industries, professions or institutions." National Ass'n of Broadcasters, *The Television Code* art. X(6) (11th ed. 1966).

85. The Radio Code adds the following provision to that of *The Television Code*: "Any identification or comparison of a competitive product or service, by name, or other means, should be confined to specific facts rather than generalized statements or conclusions, unless such statements or conclusions are not derogatory in nature." National Ass'n of Broadcasters, *The Radio Code* art. II(C)(9) (12th ed. 1966).

BLACKSTONE: Maybe your doubts have their roots in your old world background, Rudy. There is a general principle in continental law that you can't refer in advertising to your competitor or to his products, services or business methods when you're doing so for a competitive purpose.⁸⁶

HOFMEISTER: That is a great difference from the American law. I'd like to know how this principle works in practice. What do they mean by a reference to a competitor?

BLACKSTONE: I'll limit my discussion to the French law, Rudy. The French consider a reference to be anything which is reasonably likely to indicate the identity of the competitive firm or product. It's not at all necessary that the subject of the reference actually be named in the advertisement. Let me illustrate this with a recent French case.⁸⁷ The makers of the Citroën automobile had been advertising that "the way a Citroën holds the road has become proverbial." Later, in advertising describing its car, the competitive Simca company included the statement that "the old proverbs are all worn out." After looking at the facts, the French court found that the implication of the statement was clear and that Simca was therefore liable for unfair competition.

HOFMEISTER: The car rental company which keeps referring to "No. 1" would have to advertise differently in France, wouldn't they?

BLACKSTONE: They certainly would. The intriguing thing about the French law, though, is not its approach to the question of the way in which the advertisement identifies the plaintiff or its product. After all, American courts will sometimes permit a plaintiff in a defamation case to show by extrinsic evidence that the reference was to him.⁸⁸ No, the really interest-

86. The classical study of the attitude of French, German and Swiss law towards "truthful disparagement" is Wolff, *Unfair Competition by Truthful Disparagement*, 47 *Yale L.J.* 1304 (1938). For a discussion of the French law see Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 *Am. J. Comp. L.* 1, 8-16 (1955); Wilcox, *An Analysis of the French Law of Unfair Competition Under Article 1382 of the French Civil Code 62-70* (1937) (unpublished thesis in Columbia Law School Library). Another useful source is Rotondi, *Unfair Competition in Europe*, 7 *Am. J. Comp. L.* 327, 343-46 (1958). Surveys of the law of a number of countries relating to comparative advertising and disparagement may be found in 1 *World Unfair Competition Law* 198-224, 336-55 (Pinner ed. 1965).

References in French include the loose-leaf *Juris-Classeur, Concurrence déloyale* pt. XXV (*Dénigrement*); Mermillod, *Essai sur la notion de concurrence déloyale en France et aux États Unis* 77-81 (1954); Pouillet, *Traité des marques de fabrique et de la concurrence déloyale en tous genres* §§ 1175-95 (6th ed. 1912).

87. *Société Simca v. Société Citroën*, Cour d'Appel de Paris (4^e ch.), Feb. 14, 1958, [1959] *Annales de la propriété industrielle, artistique et littéraire* [hereinafter cited as *Annales*] 90 (Fr.).

88. E.g., cases cited note 25 supra.

ing thing is that the French courts don't bother to inquire into the truth or falsity of the defendant's statement.

FLAGPOLE: Do you mean that they assume it to be untrue in the absence of any contrary proof?

BLACKSTONE: No, that's the whole point. The gist of the complaint is the reference to the competition. Once this is shown, the truth or falsity of the statement is generally considered to be immaterial.⁸⁹

FLAGPOLE: What a strange principle! Does this mean that even a general reference, such as in the ad "Bufferin acts twice as fast as aspirin," is bad under French law?

BLACKSTONE: If the disparagement is generic, that is, if it refers to a type of goods or service rather than to those of specific and identifiable makers or sellers, then it falls within one of the few exceptions to the principle.⁹⁰

FLAGPOLE: Suppose that I inform the consumers about the deficiencies in my competitor's product just as a public service. Everything I say is true and I just want to prevent people from being harmed or swindled. That would be all right, wouldn't it?

BLACKSTONE: I'm afraid not. The French position is that since you are a competitor, at least part of your reason for circulating the advertisement is to help your own business.⁹¹

FLAGPOLE: Isn't that a rather silly attitude? The public suffers because of an abstract notion that you cannot name a competitor in your advertising.

BLACKSTONE: Is it really that bad? After all, if you are truly interested

89. A good example of a case in which the French court assumed the defendant's statement to be true, but nevertheless found liability, is *Isolfeu v. Wanner*, Cour d'Appel de Paris (4^e ch.), Feb. 1, 1934, [1934] *Annales* 227 (Fr.).

90. A rather well-known case which illustrates this proposition is *Chambre syndicale des brûleurs de café v. Société anonyme du café Sanka*, Trib. comm. de la Seine, Nov. 19, 1931, aff'd, Cour d'Appel de Paris (4^e ch.), April 30, 1935, [1936] *Annales* 32 (Fr.). The defendant had advertised that "coffee with caffeine causes heart trouble, distressing palpitations, nervous disorders, discomfort, crushing insomnia, stomach trouble, etc." The disparagement was held to be generic and thus not actionable. It is interesting to compare this case with *Perma-Maid Co. v. FTC*, 121 F.2d 282 (6th Cir. 1941), in which the issuance of a cease and desist order against disparagement of aluminum in cooking utensils was upheld where statements of respondent, a manufacturer of stainless steel cooking utensils, were found to be false.

Generic disparagement is only slightly different from the cases where the injured plaintiffs are members of an identifiable group; in this latter case, an action is generally allowed. For example, the arms makers of the city of Saint-Etienne recovered against a Paris gunsmith in *Chambre syndicale des fabricants d'armes de Saint-Etienne v. Pigeon*, Trib. comm. de la Seine, June 27, 1907, [1908] 2 *Annales* 86 (Fr.).

91. E.g., *Société universelle d'explosifs et de produits chimiques v. Société française des poudres de sûreté*, Trib. comm. de la Seine, Aug. 8, 1908, [1908] 2 *Annales* 92 (Fr.).

in doing the public a service, you can complain to the government or to some impartial source. Or very likely your competitor will have been guilty of false advertising, so you can bring an action against him for that. An advertiser who really wants to protect the public will find the means. If he can't, it's probably because he doesn't have a very good or relevant complaint against his competitor.

FLAGPOLE: I had understood that it was very difficult for an injured competitor to bring an action for false advertising.

BLACKSTONE: It is in American law,⁹² but the French law generally permits such an action.⁹³

FLAGPOLE: Well, I still don't understand what's behind the French attitude.

BLACKSTONE: I'm not an authority on the policies which led to the development of the French principle against comparative advertising. Is it a question of the relative importance of business ethics as against plain old self-interest? I don't know. It has been said that the ethics of commerce are higher in continental Europe than in the United States, but I don't think that it would help us much to check that out. The French had a full-fledged private law of unfair competition years before we did,⁹⁴ but it's also true that our antitrust laws were developed long before theirs. The Europeans seem to have been more concerned than we over the development of orderly ground rules for competition. And, of course, the best way to ensure an orderly marketplace is to elevate the system of commercial ethics to the level of legally enforceable principles.

FLAGPOLE: It sounds to me as if the French may have actually cramped or restricted competition under the guise of keeping it fair and orderly.

BLACKSTONE: I suppose that it's safe to say that the continental at-

92. The difficulties facing a plaintiff at common law are illustrated by *California Apparel Creators v. Wieder of Cal., Inc.*, 162 F.2d 893 (2d Cir.), cert. denied, 332 U.S. 816 (1947). The Uniform Deceptive Trade Practices Act, which has already been enacted in a few states, provides for injunctive relief in enumerated cases of false advertising at the suit of one "likely to be damaged" thereby. Uniform Deceptive Trade Practices Act §§ 2, 3. Examples of other somewhat similar statutes are Conn. Gen. Stat. Ann. § 42-115(d), (e) (Supp. 1965); Ga. Code Ann. §§ 106-501, -502 (Supp. 1966). For a discussion of the effect of Lanham Trade-Mark Act § 43(a), 60 Stat. 441 (1946), 15 U.S.C. § 1125(a) (1964), see *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 907 (1964).

93. Cases are collected in *Juris-Classeur, Concurrence déloyale pts. XXII (Publicité . . . mensongère) & XXIII (Prise de faux titres ou de fausse qualité)*.

94. The French law of unfair competition (*concurrence déloyale*) was well-developed by the middle of the last half of the 19th century. A leading American writer of the period used the developments in French law to support his arguments for an expansion in the American law. *Browne, Trade-Marks* § 43 (2d ed. 1885). However, at the turn of the century, unfair competition cases were still being referred to in this country as "cases analogous to trade-marks." *Cushing, On Certain Cases Analogous to Trade-Marks*, 4 Harv. L. Rev. 321 (1891).

titude towards competition is more conservative than ours. A greater sense of adherence to tradition, of safeguarding family interests and of slow rather than sudden accretion of wealth underlies their outlook. American businessmen have tended to run greater risks in the hope of more substantial rewards.

FLAGPOLE: Isn't this attitude changing, though?

BLACKSTONE: Yes, I think that it is. Some of my clients seem much more willing to settle for a steady share of the market than their fathers or grandfathers would have been. Still, although there may have been some change in emphasis towards a greater interest in commercial order and stability, I certainly wouldn't jump to the conclusion that tough, hard competition has become a thing of the past in this country. Such is certainly not the case in American advertising, which seems if anything to be more competitive than ever. The subject we have been discussing—comparative advertising—furnishes a good example of the continued vigor of American competition. Maybe the business and advertising men who most oppose comparative advertising do so in part because of a concern over the potentially sudden and violent effects from this "dangerous new weapon."

HOFMEISTER: If I may intrude upon this discussion of economic philosophy, I'd like to ask whether the adoption of the *Code Napoléon* might not account in part for the difference in the French law.

BLACKSTONE: The codifications of Napoléon created the climate for the development of the French law of unfair competition. To start with, the codes gave French law what you might call a "fresh start." Then, a system of commercial courts with elected businessman judges was created.⁹⁵ These judges could apply code provisions on tort liability as broad as any in the world,⁹⁶ and indeed they used them imaginatively to mold the new law of unfair competition. In this country, by contrast, the development of a private law of unfair competition was hindered by the common law tradition and, later, by the federal system.⁹⁷

95. Amos & Walton, *Introduction to French Law* 343 (2d ed. 1963). On the appellate level, commercial and civil cases are heard by the same courts, although in different chambers. The appellate courts are composed only of professional judges.

96. The basis for much of the French law of unfair competition is Code Civil art. 1382 (Fr. 65th ed. Dalloz 1966), which reads: "Any [intentional] act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage." For information as to the manner in which this provision was applied by the courts and the advantages in the judicial development of such a body of law see Wilcox, *op. cit. supra* note 86, at 6, 76.

97. Unfair competition is one of the areas of American law where the effects of *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938), have been most felt. For an excellent discussion of the problems of the federal system in relation to the law of unfair competition see Peterson, *The*

FLAGPOLE: Well, be that as it may, I'm still bothered by the principle that a completely true and fair ad may be actionable merely because it refers to a competitor or his merchandise.

BLACKSTONE: The charm of the French principle is that it is easy to administer. The courts aren't faced with the necessity to adjudicate merits of conflicting products and claims.

FLAGPOLE: It may be easy to administer such a principle, but is that sufficient justification for it? I think that it is essential for the consuming public to have at its disposal as much information as possible about the respective merits of goods and services. After all, that's a vital function of advertising—to furnish information.

BLACKSTONE: The advertiser who puts out useful and reliable information concerning his own wares definitely performs a public service. I even sympathize with a clever advertising campaign which doesn't tell me a thing, if the advertiser is able to sprinkle a humdrum trip to the shopping center with the stardust of imagination. Now I'll grant that some of these comparative ads are a genuine source of consumer information. For this reason, I would reject the continental approach if there were a clear, easy way to separate truth from falsity, factual claims from those which are not factual, and relevant material from that which is irrelevant. But there isn't. As I look through your file, Jeff, I'm afraid that I see too many ads which make references to the competition or comparisons that aren't really useful or meaningful. I prefer to leave the comparing and rating to independent, impartial organizations, such as the ones which publish *Consumer Reports*⁹⁸ and the *Consumer Bulletin*.⁹⁹ I might even favor the creation of a separate federal department for consumer protection if it were properly constituted.

FLAGPOLE: Protection can be carried too far, Harlan. The average consumer is intelligent enough to make up his own mind as to how he will spend his money. I dread the thought of another federal agency to interfere with business freedom; there are too many already.

BLACKSTONE: Obviously the purchaser is going to have to make the final decision among competing goods or services. My concern is that the source of the information upon which he bases his choice is a group which is primarily interested in his welfare.

FLAGPOLE: But why can't he consult other available sources as well? You admit that at least some of these comparative ads have value. I think

Legislative Mandate of Sears and Compco: A Plea for a Federal Law of Unfair Competition, 69 Dick. L. Rev. 347 (1965), 56 Trademark Rep. 16 (1966).

98. Consumers Union of United States, Inc., 256 Washington St., Mount Vernon, N.Y. 10550.

99. Consumers' Research, Inc., Washington, N.J. 07882.

that they add a refreshing candor or frankness to advertising. As long as the comparisons aren't untrue or unfair, what harm do they do? I just cannot agree that all of the rules ought to change whenever advertising contains a reference to the competitor. Advertising doesn't have to relate to the real merits of the thing advertised, as long as it isn't dishonest.

BLACKSTONE: Aren't you being inconsistent? A moment ago you justified comparative advertising as performing a useful service. Now you're saying that advertising need not be informative at all.

FLAGPOLE: If comparative advertising really informs the consumer, then that is an independent justification for its existence. Certainly, the main purpose of advertising is to sell. An advertiser should be free to sell in any way he wishes, unless his advertising is legally or ethically objectionable. Any other restriction upon this freedom would be a serious encroachment upon the privilege to do business and to compete as one wishes.

BLACKSTONE: Limitations upon commercial freedom may and have been based upon economic policies and the public interest, even though there is nothing ethically wrong with the proscribed activity. But let us consider an ethical question which relates to the subject under discussion. What about these ads in which a company uses the name, package or trademark of its better-known competitor in order to get a "free ride on the coattails" of its rival's reputation through a claim of equality or superiority? Isn't that unethical?

FLAGPOLE: Unless there's more to it than that, I don't think it is an ethical violation. But I think that an even better answer is based on economic policy, to use your term. Many people continue to be worried about bigness, concentration and oligopoly in manufacturing and selling. Don't these ads provide one good means by which a smaller company may attract public attention?

BLACKSTONE: Yes, but so does trademark infringement.

FLAGPOLE: You pointed out an important difference in answer to one of Rudy's questions about the law. In a case of trademark infringement, the public is made to think that there is some connection between the two companies, that they're the same, or that one has sponsored or certified the other. In these ads, once the consumer has done business with the smaller company it has to stand or fall on its own merits.

BLACKSTONE: The trouble is that big companies could use this device, too, either to introduce new products¹⁰⁰ or to expand to new markets. A smaller company which makes just one product, even where that product leads the field, could be severely hurt by the entry of a corporate giant,

100. E.g., note 38 *supra*.

with its huge advertising budget, into competition. And I don't think you can make a rule which says that it's all right for a smaller firm to use such advertising, but that when a bigger company does it, it's wrong.

FLAGPOLE: Well, I still think that the consumer ought to be free to decide and that the freedom of advertisers shouldn't be curtailed. I have one other question concerning the principle against references to competitors. Suppose that a French company ignores the law and engages in comparative advertising. If the competitor whose goods are mentioned chooses not to take legal action, then the French government doesn't step in and stop the ads, does it?

BLACKSTONE: No, at least so long as there's no false advertising involved.¹⁰¹

FLAGPOLE: So that if the competitor chooses instead to run a series of ads in reply, then that's all right?

BLACKSTONE: Only within rather narrow limits. The reply must be circumspect; it may not go beyond whatever is really necessary to rebut the attack made upon one's firm or product. Furthermore, it must be fair and truthful. Otherwise, it is said, the injured competitor is taking the business of the courts into his own hands, and that is not permitted.¹⁰² If the principle were otherwise, the matter could get out of hand, and the very commercial order which the law seeks to promote could be destroyed.

FLAGPOLE: But if both competitors thought that the fight was attracting public interest it could go on for a long time. Maybe the only ones who would be hurt would be the other companies who didn't participate.¹⁰³

BLACKSTONE: Dreadful, but true! Or two branches of the same company might fake a fight, again in the interest of public attention.¹⁰⁴

HOFMEISTER: Would our planned campaign in reply to Glutz be permitted under French law?

BLACKSTONE: Probably not. You're not really controverting anything that they have said about being first in sales; the gist of your campaign is whether their market leadership is justified, and that's another thing.

FLAGPOLE: I assume that you're not in favor of our planned series.

BLACKSTONE: Oh, you know me, I'm just an old utopian. I still like

101. Law of July 2, 1963, arts. 5, 6, in Code de Commerce 900 (Fr. 62d ed. Dalloz 1966).

102. E.g., *Raguet v. Société Maggi*, Cour d'Appel de Paris (4^e ch.), Nov. 6, 1913, [1914] 2 *Annales* 24 (Fr.).

103. Such could be the result of the battle between Hertz and Avis. For a late account of the continuing fight see *Time*, Dec. 23, 1966, p. 65. But apparently others are getting into the act. See the "no-gimmick" ad of Econo-Car Int'l, Inc., described in *Advertising Age*, Jan. 2, 1967, p. 78.

104. A Milwaukee shoe manufacturer is doing just this, See *N.Y. Times*, Oct. 19, 1966, p. 72, col. 3.

the French approach; it's clear-cut, and it compels the consumer to look to the proper sources for his comparative information. But given the present state of the law and the fact that I'd like to see you give Glutz a nice drubbing, well, I guess I can't object. Rudy, you've been listening to our good-natured debate. What's your preference?

HOFMEISTER: Maybe I'm one of those conservatives that you were talking about; the continental principle against naming competitors appeals to me. But the main concern I have is to advance the interests and business of my company in the most effective way. So we'll study Jeff's proposal from the standpoint of public appeal.

BLACKSTONE: It's going to be interesting to see where this all will end. Maybe there will be so many comparative ads that the public will stop paying attention to them. That could be more effective in curbing them than any legal principle. I don't expect any change in the law.¹⁰⁵

FLAGPOLE: I'll agree with you, Harlan, that the situation could get out of hand.

BLACKSTONE: And I'll admit, Jeff, that these comparative ads have been quite intriguing.

HOFMEISTER: Gentlemen, I thank you both. I'll let you know of our decision as soon as possible.

105. The Uniform Deceptive Trade Practices Act proscribes disparagement, but only when it is factually untrue. Section 2(a)(8) of that act provides that a person engages in a deceptive trade practice when, in the course of his business, he "disparages the goods, services, or business of another by false or misleading representation of fact." Of similar import is the wording of the Lindsay bill, a proposal to create a general federal private remedy for unfair competition. Section 2(3)(B) defines "unfair commercial activity" to include "the use for purposes of profit of any statement of fact as to the goods or services of either party which is false or misleading by reason either of misstatement or omission of a material fact." S. 2068, H.R. 5514, 89th Cong., 1st Sess. (1965). In any event, the passage of the Lindsay bill is unlikely. If comparative advertising were more generally considered to be violative of good standards of business ethics, it is conceivable that a court of equity might use such fact as additional substantiation for the grant of an injunction. Section 2(3)(C) of the Lindsay bill reflects the feeling of some that commercial ethics ought to be supported by injunctive relief; it provides that "the commission for purposes of profit of any other act or practice which is likely to deceive or which violates reasonable standards of commercial ethics" may be enjoined at the suit of any person who is damaged or likely to be damaged thereby.