TRADE REGULATION

THE UNIFORM DECEPTIVE TRADE PRACTICES ACT

The increasing complexity of modern merchandising has rendered much of the existing law of trade deception inadequate. Common law torts such as misrepresentation, disparagement, and false advertising have not developed in sufficient measure to cope with business injuries resulting from deceptive trade practices, with the result that parties affected by deceptive trade representations are often unprotected. In 1964, the National Conference of Commissioners on Uniform State Laws approved the Uniform Deceptive Trade Practices Act[1] in an effort to overcome this underdeveloped section of the law.

I. Deceptive Trade Practices Under the Act

Section 2 of the act sets out those trade practices which are deceptive under the act. "Passing off"[2] and "confusion as to source,"[3] traditionally tortious conduct, are included.[4] Each of these terms is part of the more general tort known as misrepresentation. The act substantially alters the common law tort of misrepresentation by eliminating any requirement of *actual* confusion and competition, which is prerequisite in some states,[5] and substituting instead mere *likelihood* of confusion.[6] Furthermore, subsections 2(a)(2) and (3) have broadened the traditionally narrow concept of "confusion as to source" to include confusion as to sponsorship, approval, certification, affiliation, connection, and association as well. In addition, in order to create a basis from which a court could establish a new kind of misrepresentation not specifically set out in the act, subsection 2(a)(12) designates as a deceptive trade practice any other conduct *similarly* creating a likelihood of confusion or of misunderstanding.

Unfortunately, the Uniform Act does not set forth any guidelines for

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1 9 U.L.A. 183 (Supp. 1965) [hereinafter cited as Uniform Act]. To date five states have adopted the act. Conn. Gen. Stat. Ann. §§ 42-115(c)-(g) (Supp. 1965); 6 Del. Code §§ 1401-07, as noted in 9 U.L.A. 183 (Supp. 1965); Idaho Code Ann. §§ 48-601 to -606 (Supp. 1965); Ill. Ann. Stat. ch. 121½, §§ 311-17 (Smith-Hurd Supp. 1965); Okla. Stat. Ann. tit. 78, §§ 51-55 (Supp. 1965).

2 "Passing off" characterizes the practice whereby a businessman diverts customer patronage from a competitor by copying the competitor's product and marketing it as his own. In such a situation, the customer, a third party, is deceived not as to the source of the product, but as to the product itself.

3 "Confusion as to source" refers to the same kind of copying present in a "passing off" situation, but results in deceiving the customer as to the source of the product. This result occurs when a product has acquired a "secondary meaning"—that is, when the consumer has identified a certain product with a certain manufacturer. In these circumstances, the customer chooses to purchase product "A" on the basis of its source of manufacture, but is deceived into buying the competitor's product because of its identical design or name.

4 Uniform Act §§ 2(a)(1), (2).

5 Some states require actual competition in business between two products or with respect to a rival territory, e.g., Connecticut, Iowa, Massachusetts, Michigan, Minnesota, Missouri and New Jersey. Others do not make the existence of actual competition a prerequisite, but consider its absence an important negative factor, e.g., South Carolina.

6 Uniform Act §§ 2(a)(2), (3).

determining when likelihood of confusion has occurred. Some insight as to the meaning of "likelihood of confusion," however, may be gained by examination of the second tentative draft:

> [L]ikelihood of confusion or deception is determined by considering the general impression created by a method, act, or practice upon an ordinary purchaser buying under normally prevalent conditions in the trade and giving the attention that a purchaser usually gives in buying that class of goods or services.[7]

Essentially, the test reduces itself to little more than whether a reasonable purchaser is likely to be confused or deceived by a trade practice. Suppose an article such as a Bavarian-style beer mug has become associated in the eyes of the public with a certain manufacturer "A" (secondary meaning); if another beer mug of identical design, with an identifying label deep inside its well, is marketed by manufacturer "B," it is doubtful that a reasonably prudent purchaser would examine the inside of the copied mug which he believed to originate from "A." Under the "likelihood of confusion" test set out in the second tentative draft, the deceived customer could maintain a misrepresentation action, since the apparently identical design and inconspicuous labeling would result in confusion to a reasonable consumer. However, if the article on sale was a console stereo set, with an identifying label on the inside cover, the result might be different. In this instance, reasonably prudent consumer conduct should include an examination sufficient to discover the manufacturer's label under the cover and near the controls.[8]

The omission from the act of a definition of "likelihood of confusion" is significant, for if the act is to be uniform in its effect, then a definite standard should be set out in the text for the benefit of the courts. The Commissioners' comment to the official edition, stating that the standard is to be found in the Restatement of Torts,[9] has proven inadequate, since only Illinois has printed the comments of the Commissioners, and no adopting state has incorporated the definition *in toto.*

Subsections 2(a)(5) through (11) relate to deceptive advertising practices and are divided into three main areas. The first encompasses false representations as to sponsorship, approval, affiliation, characteristics, ingredients, uses, benefits, quantities, and status;[10] as to condition or age of goods;[11] as to the standards, quality, grade, style, or model of goods or services;[12] and as to reasons for, existence of, or amounts of price reductions.[13] The second part proscribes the disparagement of goods, services, or business of another.[14] The third makes actionable the advertisement of goods or services

7 Uniform Act § 1(b) (Tent. Draft No. 2, 1963).

8 Estate Stove Co. v. Gray & Dudley Co., 41 F.2d 462 (6th Cir. 1930), vacated on other grounds, 50 F.2d 413 (6th Cir. 1931).

9 Uniform Act § 1(a)(2), Comment; Restatement (Second), Torts § 729, comment a (Tent. Draft No. 8, 1963).

10 Uniform Act § 2(a)(5).

11 Uniform Act § 2(a)(6).

12 Uniform Act § 2(a)(7).

13 Uniform Act § 2(a)(11).

14 Uniform Act § 2(a)(8).

with intent neither to supply reasonably expected public demand, nor to sell them as advertised.[15]

With respect to the false representations of the first division, the act provides that a party, upon showing likelihood of injury, may enjoin another from falsely advertising goods or services.[16] Thus the injured party is entitled to injunctive relief notwithstanding the absence of actual damage and actual competition with the injuring party.

This approach constitutes a significant advance from existing common and statutory law. At common law false and misleading advertising has been recognized as a tort, but one for which only the deceived *customer* has had an adequate remedy.[17] The *competitor* is precluded from maintaining an action unless he can prove special damages—that his product would have been purchased by the customer *but for* the deceptive advertising.[18] Since the likelihood of such proof is remote, the competitor, for all practical purposes, has not been protected from deceptive advertising practices. Furthermore, by definition, the non-competitor has been totally unprotected. Statutory law, although more encompassing in its range of parties, nevertheless remains incomplete and inadequate by virtue of its application to a narrow range of products.[19]

In the second main area of protection from deceptive advertising, the Uniform Act provides a cause of action to a party whose goods, services, or business are disparaged.[20] "Trade disparagement" refers to the situation where a customer is diverted from purchasing a certain product because of the derogatory representations made by another. It should be noted that the moving party does not carry a *but for* burden, but, as in the case of false and misleading advertising, need merely show a likelihood of confusion.[21] Furthermore, actual competition between the parties is not required.[22] The act substantially augments the common law tort of disparagement by a more comprehensive inclusion of deceptive trade practices and by elimination of the allegation and proof of pecuniary damages.[23]

In jurisdictions where the common law tort of disparagement is recognized, certain representations have been held privileged and, hence, nonactionable.[24] The Uniform Act makes no such explicit allowances, and thus raises the question of whether this common law privilege exists under the act. Here it is important to note that the privilege has been extended only

[15] Uniform Act §§ 2(a)(9), (10).

[16] Uniform Act § 3(a).

[17] Callman, False Advertising as a Competitive Tort, 48 Colum. L. Rev. 876 (1948).

[18] Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603, 604 (2d Cir. 1925), rev'd on other grounds, 273 U.S. 132 (1927).

[19] E.g., North Carolina restricts its statute to diamonds. N.C. Gen. Stat. §§ 66-74 (1965). Only six states have comprehensive deceptive advertising legislation. Ariz. Rev. Stat. Ann. § 44-1481 (1965); Conn. Gen. Stat. Ann. § 42-115(a) (Supp. 1965); La. Rev. Stat. § 51:411 (Supp. 1962); N.D. Cent. Code §§ 51-12-01 to -14 (Supp. 1965); Ore. Rev. Stat. § 646.810 (1966); Wis. Stat. Ann. § 100.18 (1957).

[20] Uniform Act § 2(a)(8).

[21] Uniform Act § 2(a)(12).

[22] Uniform Act § 2(b).

[23] Uniform Act § 3(a).

[24] Prosser, Torts § 122 (3d ed. 1964).

to situations where a defendant is seeking to protect an existing property interest.[25] This is to be distinguished from the situation where one makes disparaging remarks, however well-intentioned, about the quality of another's goods or the conduct of his business. By these representations, defendant is seeking to attract business, rather than to protect an existing property interest, and such conduct is never privileged.[26] The Uniform Act provides that false or misleading representations which disparage the goods, services, or business of another are actionable.[27] Its concern, then, goes only to the protection of competition for future business and not to the protection of existing property interests. Consequently, it is submitted that common law privileged disparagement has no place in the Uniform Act.

The third main area of deceptive advertising is covered by subsections 2(a)(9) and (10), which prohibit the advertising of goods and services where the advertiser has the intent neither to sell them as advertised, nor to satisfy reasonably expected public demand.[28] It is important to note that these subsections explicitly require an intent to deceive, notwithstanding the fact that section 3 of the act generally dispenses with intent as a prerequisite to an action.[29] The burden on the plaintiff of proving intent may present a serious roadblock to the exercise of these sections. The use of inferences to establish a prima facie case of intent, however, could substantially lessen this burden. For example, several state statutes prohibit the sale of goods below cost if the seller intends to minimize competition or destroy a competitor, and in many instances these statutes provide that advertising, offering to sell, or selling such goods below cost is prima facie evidence of intent.[30] This approach could effectively be applied to subsections 2(a)(9) and (10) of the act. Accordingly, an offer to sell sofa-beds at an attractive price would constitute a prima facie case of intent not to satisfy reasonably expected public demand if the seller has in fact only two sofa-beds available for sale and does business in a large city where customer demand is high. Once the plaintiff has established a prima facie case, he is entitled to get to the jury. The defendant in most situations will come forth with some contrary evidence at this point. This is not an inequitable burden, since he is the party best informed as to the circumstances surrounding the advertisement, reasonable public demand, and the available quantity of stock.

Subsection 2(c) provides that any unfair practice otherwise actionable

[25] Thus, one is privileged to assert in good faith that another has infringed his patent or trademark by the sale of goods. Kemart Corp. v. Printing Arts Research Lab., Inc., 269 F.2d 375 (9th Cir.), cert. denied, 361 U.S. 893 (1959).

[26] National Ref. Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 770-71 (8th Cir.), cert. denied, 275 U.S. 570 (1927); Prosser, op. cit. supra note 24, § 122.

[27] Uniform Act § 2(a)(8).

[28] It should be noted that Connecticut has deleted these subsections from the Uniform Act. Conn. Gen. Stat. Ann. § 42-115(d) (Supp. 1965). However, under Conn. Gen. Stat. Ann. § 42-115(a) (Supp. 1965), the whole area of deceptive advertising practices is treated in depth. The substance of the provisions omitted from the Uniform Act are contained therein.

[29] The Uniform Act § 2(a)(10) allows the advertiser to protect himself from liability for this kind of false advertising by disclosing a quantity limitation in his advertisement.

[30] E.g., Ariz. Rev. Stat. Ann. § 44-1466 (1956); W. Va. Code Ann. § 4678(8m) (1961).

under common or statutory law remains unaffected by the act. At first glance this provision may appear to diminish uniformity, but it should be noted that the law of unfair competition includes many areas in which state interest may vary.[31] The enumeration of additional deceptive practices in an attempt to broaden the scope of the act would have rendered it a clumsy document and lessened its chance of adoption by the states. Prudently, the act covers those deceptive trade practices which affect all jurisdictions, leaving the regulation of regional trade practices to the individual states. This allows for the uninhibited development of the local law of trade deception and unfair competition.

Section 3 of the act sets out the injunctive relief available upon a showing of any of the practices outlined in section 2. *Potential* injury resulting from deceptive conduct is sufficient to warrant equitable relief, and the act explicitly eliminates the common law proof requirements of monetary damages, loss of profits, or intent to deceive.[32] This liberal approach reflects the draftsmen's awareness that damage, once done, may be irreparable. Accordingly, the act has taken on a *preventative*, as well as *remedial* aspect, by providing for the injunction of deceptive trade practices before any damage occurs.

The last sentence of subsection 3(a) limits the scope of relief available with respect to "articles" to the prevention of confusion or misunderstanding as to source. Since this limitation applies only to *articles*, it would appear that the copying of *non-articles*, such as packaging, common law copyrights, and trade secrets, falls within the broader provisions of the first part of section 3(a). This reference to "articles" results from the decisions of the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*[33] and *Compco Corp. v. Day-Brite Lighting Co.*[34] Both cases involved actions for infringement of design patents and for unfair competition. In *Sears*, the plaintiff designed a pole lamp which was obviously copied by the defendant. In *Compco*, the defendant copied the plaintiff's design of a fluorescent lighting fixture with a cross-ribbed reflector. The lower courts in each instance held the design patent invalid, but allowed an injunction against copying on the basis of unfair competition resulting from source confusion.[35] In reversing both cases, the Supreme Court held the unpatented articles to be in the public domain and refused to grant an absolute injunction.[36] It stated that the courts may do no more than require the manufacturer of the copy to label his article in such a way as to eliminate confusion as to source.[37] Accordingly, the

31 E.g., Cal. Bus. & Prof. Code § 17532 provides that the knowing advertisement of coal by other than its true name or description constitutes an act of unfair competition.

32 Uniform Act § 3(a).

33 376 U.S. 225 (1964).

34 376 U.S. 234 (1964).

35 Stiffel Co. v. Sears, Roebuck & Co., 313 F.2d 115 (7th Cir. 1963); Day-Brite Lighting Co. v. Compco Corp., 311 F.2d 26 (7th Cir. 1962).

36 Sears, Roebuck & Co. v. Stiffel Co., supra note 33; Compco Corp. v. Day-Brite Lighting Co., supra note 34.

37 Sears, Roebuck & Co. v. Stiffel Co., supra note 33, at 232; Compco Corp. v. Day-Brite Lighting Co., supra note 34, at 238.

limitation in the act is an attempt to accommodate these recent Supreme Court decisions.

Section 3 of the act also provides for the awarding of attorneys' fees and costs. As originally adopted, the first sentence of subsection 3(b) was optional and allowed the courts, in exceptional cases, to award reasonable attorneys' fees to the prevailing party.[38] The second sentence of the subsection provided that costs, and, optionally, attorneys' fees might be assessed only if the court finds that the defendant had *willfully* engaged in a deceptive trade practice.[39] At their conference in 1966, however, the Commissioners amended section 3 to provide for the awarding of costs to the prevailing party unless the court directs otherwise.[40] The amendment further provides for the award of attorneys' fees to the prevailing party if (1) the complaining party has brought an action known to be groundless, or (2) the party charged with a deceptive trade practice has willfully engaged in the practice knowing it to be deceptive. Thus, the Commissioners have eliminated the "exceptional cases" qualification from the award of attorneys' fees. The amended provision adds certainty to what was no more than a general scheme capable of varied interpretation. Consequently, a party is now in a better position to estimate the cost of litigation and thereby more effectively weigh the merits of initiating a legal contest.

Section 4 exempts from provisions of the act "publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matter," so long as they are without knowledge of the deceptive character of the contents of the materials they disseminate. It remains unclear, however, whether actual knowledge, or merely constructive notice will suffice as the effective test of liability. This conditional exemption recognizes the impossible burden of checking the substantive accuracy of all trade representations, and acknowledges the fact that it is the businessman, and not the printer, who reaps the profits from the deceptive advertising practices. But should a disseminator, for one reason or another, be put on guard, he ought to come under an affirmative duty to investigate further. At that point, the commitment of his time and resources is not intolerable when balanced against the public interest in truthful advertising.

II. Weaknesses of the Act

The act contains four major shortcomings. First, the important area of dilution has been neglected altogether. "Dilution" is the use of another's name or mark in such a way as to reduce its distinctiveness.[41] Usually, dilution is involved in situations in which there will be no likelihood of confusion, since the diluting product will typically be dissimilar to the one diluted. For example,

[38] Uniform Act § 3(b) (1964).

[39] Ibid.

[40] Uniform Act § 3(b).

[41] See generally Derenberg, The Problem of Trademark Dilution and the Antidilution Statutes, 44 Calif. L. Rev. 439, 463-76 (1956). Substantial injury may also result from the widespread use of a name or mark in a non-commercial manner, with the result that it acquires a generic interpretation. Such injury is uncompensable. See Bayer Co. v. United Drug Co., 272 Fed. 505 (S.D.N.Y. 1921).

it is reasonable to assume that there would not be source confusion between "Polaroid" and "Polaraid," since the former manufactures photographic equipment, and the latter installs refrigeration and heating systems; yet the use of the name "Polaraid" was enjoined as diluting the name "Polaroid."[42]

There are several possible reasons why dilution protection has been omitted from the Uniform Act. First, the Commissioners may have felt that the Lanham Act[43] had preempted the states in this area,[44] even though that act has no anti-dilution clause of its own. Second, judicial interpretation of dilution statutes has been restrictive in all of the five adopting states[45] except Illinois.[46] Third, the draftsmen may have been of the view that the possible injury is insufficient to warrant dilution legislation.[47] Finally, it may have been feared that the liberal tenor of dilution protection would hinder broad acceptance of the Uniform Act, especially in conservative states.

For whatever reason dilution protection was omitted from the act, the fact remains that the distinctiveness of a trade name or trademark is deserving of protection.[48] A party should not be permitted to realize financial gain by appropriating the name or mark of another while at the same time dimming its distinctiveness. The concept of free competition is not compromised by putting the offender to the test of creating his own "good will." The Uniform Act should incorporate a dilution section if it is to constitute a comprehensive law of deceptive trade practices.

The second criticism of the Uniform Act results from the draftsmen's effort in subsection 3(a) to tailor relief in copying cases so as to come within the *Sears* and *Compco* doctrine. As noted earlier, the Court held in both cases that a party may not enjoin the exact copying of his unpatented *article*, but could merely obtain an order requiring the other party to identify the copy as his own. This, the Court suggested, might be done through proper labeling or by the use of other precautionary devices.[49]

With these holdings specifically in mind, the Commissioners attempted to limit the relief available in situations involving article copying. Therefore, in the last sentence of subsection 3(a), they provided that relief granted with respect to articles shall be limited to the prevention of confusion or misunderstanding as to source. The draftsmen probably intended such relief to be effected by an order requiring that the copy be sufficiently labeled. It should

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42 Polaroid Corp. v. Polaraid, Inc., 319 F.2d 830 (7th Cir. 1963).

43 60 Stat. 427 (1946), 15 U.S.C. §§ 1051-127 (1964).

44 See, e.g., Sargent & Co. v. Welco Feed Mfg. Co., 195 F.2d 929, 935 (8th Cir. 1952); Time, Inc. v. T.I.M.E. Inc., 123 F. Supp. 446, 451 (S.D. Cal. 1954).

45 Conn. Gen. Stat. Ann. § 35-11i(c) (1963); Ga. Code Ann. § 106-15 (1956); Ill. Ann. Stat. ch. 140, § 22 (Smith-Hurd Supp. 1965); Mass. Gen. Laws Ann. ch. 110 § 7A (1958); N.Y. Gen. Bus. Law § 368D.

46 E.g., compare Food Fair Stores, Inc. v. Food Fair, Inc., 177 F.2d 177 (1st Cir. 1949), and Libby, McNeill & Libby v. Libby, 103 F. Supp. 968 (D. Mass. 1952), with Polaroid Corp. v. Polaraid, Inc., supra note 42.

47 See Comment, Dilution: Trademark Infringement or Will-O'-The-Wisp? 77 Harv. L. Rev. 520, 528 (1964).

48 National City Bank v. National City Window Cleaning Co., 180 N.E.2d 20 (Ohio Ct. App. 1962), remanded on other grounds, 174 Ohio St. 510, 190 N.E.2d 437 (1963).

49 Sears, Roebuck & Co. v. Stiffel Co., supra note 33, at 232; Compco Corp. v. Day-Brite Lighting Co., supra note 34, at 238.

be noted, however, that instances have occurred,[60] and will again occur, where labeling alone will not obviate source confusion. In these instances, the only way to prevent source confusion may be to enjoin the exact duplication of the article itself. It is arguable that section 3(a) does not foreclose such an absolute injunction: the language specifically calls for the prevention of source confusion, but it does not proscribe enjoining of the copying of an unpatented article. It is submitted, however, that such a prohibitory order would be contra to the *Sears* and *Compco* doctrines, for in *Sears* it was stated that "because of the federal patent laws a State may not, when the article is unpatented . . . , prohibit the copying of the article itself. . . ."[51] The Commissioners would have more effectively complied with *Sears* and *Compco* had they incorporated this statement into the text of the Uniform Act.

A third flaw in the Uniform Act is that while offering remedial relief for both the businessman and the consumer, it fails to take notice of the practicalities of consumer injury. The consumer who is duped by a deceptive trade practice will usually not undertake the burden of initiating a law suit, since the extent of his damage seldom overrides the expense of litigation. In this situation, the deceptive conduct will often continue without restraint until a competitor of the deceiving party becomes aware of its damaging effect upon his own interests. It would seem, therefore, that if the consumer class is to be adequately protected, the procedure for invoking statutory remedies must be made easier for the purchaser.

Connecticut has undertaken to reduce the practical barrier that separates the consumer from his statutory rights.[52] That state provides for a Commissioner of Consumer Protection and allows him to proceed against any person he reasonably believes to have violated the law of unfair sales practices. Furthermore, any person may present evidence of such violations to the Commissioner. Thus, the activity of a single customer in bringing his complaint to the Commissioner, and the subsequent action by the Commissioner, serves to increase the protection afforded the consumer public.

Undoubtedly some jurisdictions would be reluctant to establish another state office necessarily requiring staff and funds with which to operate. Yet, the additional expense to the state is of small consequence when one balances it with the public interest against deceptive trade practices. The Uniform Act would more effectively meet its responsibility to the consumer if it, too, made allowance for this kind of assistance.

A fourth difficulty with the act results from the fact that state variations such as the Oklahoma modification concerning confusion,[53] threaten to impose upon its uniformity. Although the problem of uniformity and state variations is one common to all efforts at uniform state legislation, it is submitted that

[60] E.g., Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 424 (1916).

[51] Sears, Roebuck & Co. v. Stiffel Co., supra note 33, at 232.

[52] Conn. Gen. Stat. Ann. § 42-112 (Supp. 1965).

[53] Okla. Stat. Ann. tit. 78, §§ 53(a)(2), (3) (Supp. 1965). The Oklahoma modification eliminates any clause involving *likelihood* of confusion or of misunderstanding, and uses instead *knowledge* of confusion or misrepresentation. As a result, the moving party must establish that the defendant knowingly made false representations. This amendment severely restricts the scope of the Uniform Act, which requires that instances of confusion and misunderstanding be clarified without regard to the motives behind their origin.

with respect to uniform deceptive trade practices this problem need not necessarily arise, since unlike some other areas of the law, unfair competition involves substantial interstate activity and thus falls within the regulatory power of the federal government. Thus, enactment of a federal law of unfair competition would obviate most of the problems caused by state variations.

III. Legislative Outlook

A comprehensive federal law of unfair competition may already exist in the form of the Federal Trade Commission Act[54] and the Lanham Act.[55] These acts allow for the application of federal law by federal courts in private unfair competition cases without the requirement of monetary injury.[56] Judicial interpretation of these statutes, however, has run contrary to the thesis, and the courts have restricted the scope of the Lanham and Federal Trade Commission Acts in many instances by confining their injunctive remedies to situations involving a public interest.[57] As a result, private relief is not comprehensively provided for by existing federal legislation.

In response to the decisional evidence that no existing federal unfair competition law presently exists, legislation constituting such a law has been submitted to Congress on many occasions.[58] The Lindsay Bill, presently before the House,[59] parallels the Uniform Act. It includes within its scope confusion, false or misleading advertising, and a general prohibition against any act likely to deceive.[60] Competition between the parties is not required, nor is the absence of actual damages to the public interest a valid defense.[61] Broadcasters and publishers are exempt providing they have no knowledge of deceptive conduct.[62] An important difference between the Lindsay Bill and the Uniform Act, however, is that the proposed bill covers the area of dilution protection.[63] Since the enactment of the Lindsay Bill would result in a comprehensive and uniform law of deceptive trade practices, it deserves more careful consideration by Congress.

There are, however, deceptive trade practices which cannot by any standard be said to involve interstate commerce. Accordingly, application of state law cannot be absolutely foreclosed even by sweeping federal legislation. For this reason the Uniform Act has a definite contribution to make. Although it is thorough in those areas of the law traditionally recognized by the more liberal jurisdictions as constituting deceptive trade practices, it could be

54 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-77 (1964).

55 60 Stat. 427 (1946), as amended, 15 U.S.C. §§ 1051-127 (1964).

56 See Bunn, The National Law of Unfair Competition, 62 Harv. L. Rev. 987 (1949); Friendly, In Praise of Erie—and of the New Federal Common Law, 19 Record of N.Y.C.B.A. 64, 87 (1964).

57 See FTC v. Klessner, 280 U.S. 19, 25 (1929); National Fruit Prod. Co. v. Dinwell-Wright Co., 47 F. Supp. 499, 504 (D. Mass. 1942).

58 H.R. 7833, 86th Cong., 1st Sess., 105 Cong. Rec. 11337 (1959); S. 1036, 87th Cong., 1st Sess., 107 Cong. Rec. 2516 (1961); H.R. 10038, 87th Cong., 2d Sess., 108 Cong. Rec. 9601 (1962); H.R. 4651, 88th Cong., 1st Sess., 109 Cong. Rec. 3774 (1963).

59 Ibid.

60 H.R. 4651, 88th Cong., 1st Sess. §§ 2, 3(b) (1963).

61 H.R. 4651, 88th Cong., 1st Sess. § 4 (1963).

62 H.R. 4651, 88th Cong., 1st Sess. § 5 (1963).

63 H.R. 4651, 88th Cong., 1st Sess. § 3(a)(3) (1963).

expanded to include dilution, and modified in certain of its other provisions. The exemption granted information disseminators, for example, should be withdrawn upon the showing of constructive knowledge of deceptive advertisements. The act also should incorporate a prima facie intent theory in those deceptive advertising sections requiring intent. Privileged disparagement ought to be clearly written out of the law. A definition or standard of "likelihood of confusion" should be stated in the text of the act itself. Lastly, provision should be made for a more realistic procedure which allows the consumer himself to move against deceptive trade conduct without undertaking the costs of litigation.

The Uniform Act continues to merit enactment by the individual states. Together, the Lindsay Bill, applied in interstate commerce, and the Uniform Act, applied on the local level, would mark significant progress in an important area of the law.

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