

STATE CONTROL OF BAIT ADVERTISING*

BAIT advertising, a widely used consumer-enticement technique only recently brought to official attention, may prove to be among the most difficult of misleading promotional devices to control. The common law was inadequate to prevent extravagant or unconscionable claims by a seller.¹ Although a consumer induced by such claims to purchase goods could conceivably bring an action for deceit, he was hampered by the doctrine of *caveat emptor*² and by requirements that he prove his reliance upon the claim,³ actual damages,⁴ and, most difficult, that the seller had knowledge of the falsity of his representation.⁵ Warranty actions also met with little success, for not only did the purchaser have to prove reliance,⁶ but the language in issue might itself be excluded from evidence if not embodied in the written contract of sale.⁷ Furthermore, the aggrieved party was often unable or unwilling

*People v. Glubo, 5 N.Y.2d 461, 158 N.E.2d 699, 186 N.Y.S.2d 26 (1959).

1. See BEER, FEDERAL TRADE LAW AND PRACTICE § 112 (1942); *Legal Opinion of H. D. Nims*, Printer's Ink, Nov. 16, 1911, p. 6; Handler, *False and Misleading Advertising*, 39 YALE L.J. 22 (1929).

2. Under this doctrine no actionable misrepresentation was possible if the parties were dealing at arm's length, *Burwash v. Ballou*, 230 Ill. 34, 82 N.E. 355 (1907), had equal means of information, and were equally qualified to judge the value of the property sold, *Poland v. Brownell*, 131 Mass. 138 (1881). See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

3. *Carpeter v. Hamilton*, 18 Cal. App. 2d 69, 62 P.2d 397 (Dist. Ct. App. 1936). The purchaser also had to believe the representation to be true. *E.g.*, *McIntyre v. Lyon*, 325 Mich. 167, 37 N.W.2d 903 (1949).

4. Nominal damages will not support an action for deceit. *E.g.*, *Castleman v. Stryker*, 107 Ore. 48, 213 Pac. 436 (1923); HARPER & JAMES, TORTS § 7.15 (1956).

5. *E.g.*, *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N.E. 625 (1922); *Roome v. Sonoma Petroleum Co.*, 111 Kan. 633, 635, 208 Pac. 255, 256 (1922).

The cases in which a plaintiff in a deceit action recovered for misrepresentations in advertisements usually involved such other factors as hazardous instrumentalities. See, *e.g.*, *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1089 (1905).

6. *Harrington v. Smith*, 138 Mass. 92 (1884); UNIFORM SALES ACT § 12. Warranty also requires a showing of privity. See *Cochran v. McDonald*, 23 Wash. 2d. 348, 161 P.2d 305 (1945); PROSSER, TORTS 507-08 (2d ed. 1955). *But see* *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932). See also Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929) (indicating that deceit and warranty often overlap).

7. See Note, 29 COLUM. L. REV. 805 (1929).

Another common law remedy was rescission. But a purchaser may no longer be able to return the goods. Handler, *supra* note 1. See generally 5 WILLISTON, CONTRACTS §§ 1454-55 (rev. ed. 1937).

Possibly the state could convict such a seller of the crime of obtaining money under false pretenses. But this crime has the same elements as deceit, as well as the greater evidential burden of proof beyond a reasonable doubt. See Handler, *supra* note 1, at 28; *Legal Opinion of H. D. Nims*, *supra* note 1.

to sue.⁸ The growth of large scale advertising compounded the problem, and generated agitation for consumer protection by public authorities. This movement culminated with the drafting, in 1911, of the Printer's Ink model statute, presently enacted in various forms by forty-five states. The act—named after the advertising publication which sponsored it—makes “untrue, misleading, or deceptive” advertising a misdemeanor; a violation is committed by disseminating such an advertisement with the intent to sell merchandise even though no sale is made.⁹ Although the burden of preventing deceptive advertising has been shifted from private litigants to state officials, the act has not suc-

8. FAINSOD & GORDON, *GOVERNMENT AND THE AMERICAN ECONOMY* 199 (1941); Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1060 (1956).

9. The text of the model statute is set out in THAYER, *LEGAL CONTROL OF THE PRESS* § 87, at 606 (3d ed. 1956):

Any person, firm, corporation, or association [or agent or employee thereof], who, with intent to sell, [purchase] or in any wise dispose of, [or to contract with reference to] merchandise, [real estate,] service, [employment,] or anything offered by such person, firm, corporation or association, [or agent or employee thereof,] directly or indirectly, to the public for sale, [purchase,] distribution, [or the hire of personal services,] or with intent to increase the consumption of [or to contract with reference to any merchandise, real estate, securities, service, or employment], or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, [or to make any loan,] makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, [magazine] or other publication, or in any form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, [sign, placard, card, label, or over any radio or television station or other medium of wireless communication,] or in any other way [similar or dissimilar to the foregoing], an advertisement, [announcement, or statement] of any sort regarding merchandise, securities, service, [employment,] or anything so offered [for use, purchase, or sale, or the interest, terms, or conditions upon which such loan will be made] to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor.

The bracketed portions were added in 1945 but have not been adopted in most states. Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1058 n.245 (1956).

The model statute was drafted by Harry D. Nims, Esq., and first appeared in *Printer's Ink*, Nov. 23, 1911, p. 68. The only states without *Printer's Ink* statutes are Alaska, Arkansas, Delaware, Mississippi, and New Mexico. Several municipalities have also adopted the statute. Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1098-99 n.243 (1956). The statute's early history is discussed in Comment, 36 YALE L.J. 1155 (1927); 17 COLUM. L. REV. 258 (1917). See generally 1 CALLMANN, *UNFAIR COMPETITION AND TRADE-MARKS* § 18.2(a)(1) (2d ed. 1950); ROFER, *STATE ADVERTISING LEGISLATION* (1945); Legislation, 39 COLUM. L. REV. 264 (1939).

Printer's Ink has been held constitutional as a valid exercise of the police power. *State v. Schaengold*, 13 OHIO L. REP. 130 (Munic. Ct. 1915), 89 A.L.R. 1004 (1934); *Jasnowski v. Judge of Recorder's Court*, 192 Mich. 139, 158 N.W. 229 (1916); *Commonwealth v. Reilly*, 248 Mass. 1, 142 N.E. 915 (1924); *Parisian Co. v. Williams*, 203 Ala. 378, 83 So. 2d 122 (1919) (dictum). *But see Pincus v. State*, 126 Tex. Crim. 188, 70 S.W.2d 417 (1934) (invalidating portion of Texas statute imposing liability upon persons who reasonably should have known their statements to be false).

cessfully curbed abuses.¹⁰ Local prosecutors rarely invoke the statute against classic forms of unfair advertising;¹¹ subtle variants, until recently, never had to face the possibility of being within the act.

Such a variant is bait advertising.¹² A bait seller seeks to attract customers by advertising at a spectacularly low price a product which he does not intend to sell.¹³ Once contact has been made, the seller will endeavor to switch the customer to another item on which the profit margin is greater,¹⁴ and will prevent or discourage purchases of the unprofitable "bait" by disparagement or sabotage.¹⁵ Thirteen states have specifically prohibited this technique—

10. Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1063 & n.278 (1956). See Special Committee to Study the New York State Antitrust Laws, *1959 Report by the Committee on New York State Antitrust Law*, in N.Y. STATE BAR ASS'N, 1959 ANTITRUST LAW SYMPOSIUM 186-89 (1959) [hereinafter cited as *1959 Committee Report*].

11. See *ibid.* But it has been said that the act's "greatest value to the Better Business Bureau, the agency established for its enforcement, has been as a club to be used when moral suasion has failed." Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 34 (1929).

12. "For many years bait advertising has been one of the nation's foremost retailing problems." National Better Business Bureau, Serv. Bull. No. 250, *The Fight Against Bait Advertising*, April 1956, p. 1, on file in Yale Law Library [hereinafter cited as *The Fight Against Bait Advertising*]. It "is a scheme which has been made possible only by comparatively recent developments in mass communication and advertising, particularly television." *Electrolux v. Val-Worth, Inc.*, 6 N.Y.2d 556, 161 N.E.2d 197, 206, 190 N.Y.S.2d 977 (1959). The Better Business Bureaus get hundreds of thousands of complaints about bait advertising each year and more than one-half the complaints the FCC gets concerning radio and television ads involve bait advertising. Walker, *Beware of the "Bait-Ad" Gyp*, Reader's Digest, Aug. 1953, p. 98. In the first half of 1956, the Better Business Bureau of New York City had 80,336 inquiries and complaints involving bait advertising. This was a 17% increase over a similar period in 1955. Statement of Hugh R. Jackson, President, N.Y. Better Business Bureau, N.Y. Times, July 25, 1956, p. 39, col. 2. Bait advertising is primarily used in the sales of home appliances, furniture, television sales and service, home improvements and maintenance, new and used cars, storm windows, toys and novelties, women's infants' apparel, and home furnishings. *Ibid.*

The first case using the generic term "bait advertising" was decided in 1935. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935). The name was not used again in a reported court case until 1954. *Williamson v. Lee Optical Co.*, 120 F. Supp. 128 (W.D. Okla. 1954), *aff'd in part, rev'd in part*, 348 U.S. 483 (1955). Earlier cases which appear to involve bait advertising, although not so labeled, are *Rude v. United States*, 74 F.2d 673 (1935); *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945).

13. FTC, *Guides Against Bait Advertising*, 24 Fed. Reg. 9755 (1959); *The Fight Against Bait Advertising* 1.

14. FTC, *Guides Against Bait Advertising*, 24 Fed. Reg. 9755 (1959); FTC, Press Release, *Bargain On a String*, Dec. 4, 1955; Buschman, *Bait Ads*, 1954, p. 4; Buschman, *The Great Sewing Machine Racket*, 1956, p. 6 (these last two are Better Business Bureau publications.)

15. Among the more prominent methods are: (1) "knocking" or making derogatory remarks about the advertised merchandise; (2) making no effort to sell the advertised merchandise; (3) showing the advertised item to be of an inferior quality; (4) not having the advertised merchandise available; (5) tampering with the advertised item so it

"a bargain on a string"¹⁶—by new legislation or amendment of their Printer's Ink statutes.¹⁷ Others, however, afford no protection against bait advertising unless it falls within the prohibitions of the unamended act.

*People v. Glubo*¹⁸ constitutes the first reported attempt to apply a Printer's Ink statute—here the New York version¹⁹—to bait advertising.²⁰ Defendants advertised "Queen Ann console" sewing machines, equipped with the "magic stitcher," over television²¹ at twenty-nine dollars and fifty cents, but had decided that under no circumstances would they sell these machines. In answer to every inquiry about the advertised product they would send out a "lead man" to take the customer's order and deposit. Shortly thereafter, a second salesman would visit the customer, ostensibly to deliver the machine. Instead, he would attempt to convince the customer that the magic stitcher machine was defective and of inferior construction and would then try to switch the customer to a "quality" model at a higher price.²² If the customer

will not operate properly; (6) using limited guarantees or alleging unavailability of parts or repair service. *The Fight Against Bait Advertising* 2-3. For additional techniques see FTC, Guides Against Bait Advertising, 24 Fed. Reg. 9755 (1959).

16. FTC, Press Release, Bargain on a String, Dec. 4, 1955.

17. These statutes all define the forbidden conduct as offering with "intent not to sell." CAL. BUS. & PROF. CODE ANN. § 17500; GA. CODE ANN. § 106-501 (Supp. 1958); HAWAII REV. LAWS § 289-15.3 (1955); ILL. STAT. ANN. ch. 38, § 249a (Smith-Hurd Supp. 1958); MD. ANN. CODE art. 27, § 198 (1957); MASS. ANN. LAWS ch. 266, § 91A (1956); MICH. STAT. ANN. § 28.222 (1954); MO. REV. STAT. ANN. § 561.665 (Supp. 1959); N.Y. GEN. BUS. LAW § 396; OHIO REV. CODE ANN. § 2911.41 (Page Supp. 1959); PA. STAT. ANN. tit. 18, § 4869 (Supp. 1959); R.I. GEN. LAWS ANN. § 11-18-10 (1956); TENN. CODE ANN. § 39-1945 (1955). As yet, there have been no reported prosecutions under these statutes. For statutes which could be easily used against certain forms of bait advertising, see ORE. REV. STAT. §§ 646.210-230 (1955) (unlawful to advertise "fake sale" which includes limited quantity not mentioned in advertisement or offering different brands than advertised); UTAH CODE ANN. § 13-5-8 (1953) (unlawful to advertise merchandise not prepared to supply); IND. STAT. ANN. § 10-2124 (Supp. 1959) (falsely advertising includes failure to reveal material facts). These statutes, however, have not been so used.

18. 5 N.Y.2d 461, 158 N.E.2d 699, 186 N.Y.S.2d 26 (1959), *affirming* 5 App. Div. 2d 527, 534, 174 N.Y.S.2d 159, 165 (1958).

19. N.Y. PEN. LAW § 421.

20. The Printer's Ink statute has been applied to bait advertising in at least one unreported case. *Printer's Ink*, Dec. 29, 1927, p. 167.

21. The television broadcasts originated from a station in Newark, N.J. The broadcasts were relayed from the Empire State Building in New York City and were heard throughout the entire metropolitan New York area. 5 N.Y.2d at 466-67; 158 N.E.2d at 702, 186 N.Y.S.2d at 31.

22. The advertised machine was actually of poor quality. It was cast iron, small, noisy, and vibrated badly. 5 App. Div. 2d at 534, 174 N.Y.S.2d at 165.

Among the techniques used to discourage sales were the following: The salesman told the customer the television set had to be shut off as operation of the machine might cause the TV tube or fuses to blow out; that the machine would have to be oiled every few minutes; that five pounds of grease would be needed to pack the bearings; and that the customer could lose an eye if the machine jammed and the needle broke. If these tactics did not discourage the customer, the advertised machine was rigged so that the salesman could operate it but would jam when the customer tried. Furthermore, the salesmen were

insisted upon purchasing the cheap machine, the salesman would allege that the machine he had bought was a demonstrator model, reclaim it, and promise that another would be delivered. A machine would never be sent, however; rather, the customer's deposit would be mailed back to him. As a result of these practices defendants were convicted of conspiring to violate Printer's Ink.²³

In sustaining this conviction, the Court of Appeals held that the three elements of the offense—intent to sell merchandise, advertising to the public with such intent, and the existence in that advertisement of deceptive or misleading matter—had been proved.²⁴ The court rejected defendant's contention that bait advertising could not be brought within the statute since the products intended to be sold (the more expensive machines) were not the products advertised (the \$29.50 machines). "Intent" was interpreted to mean intent to sell any merchandise whatsoever, even if unadvertised. Indeed, it was apparently intent to sell sewing machines other than those advertised which in the court's view rendered the advertisement deceptive and misleading. Defendants also argued that since the legislature had, subsequent to the passage of Printer's Ink—in fact, subsequent to their trial—specifically empowered the attorney general to enjoin bait advertising,²⁵ the legislature did not believe activity such as theirs to be within the original act. But the court regarded the new statute as making already criminal behavior civilly enjoined, a pattern "not without precedent."²⁶

Glubo's interpretation of the Printer's Ink statute, then, allows states battling bait advertising to employ a weapon already in their arsenals. Reasoning from

instructed not to sell the advertised machine under any circumstances and they earned commissions only upon the sales of the higher priced machine. 5 N.Y.2d at 467, 158 N.E.2d at 703, 186 N.Y.S.2d at 32.

23. Defendants were also indicted for false advertising. This count was dismissed by the trial court on the ground that "as a matter of law . . . no crime was committed in Kings County." *Id.* at 466-67, 158 N.E.2d at 702, 186 N.Y.S.2d at 31.

Each of the individual defendants was sentenced to a fine of \$500 or 90 days, and a suspended fourth months in city prison. The corporate defendant was fined \$500. *Id.* at 467, 158 N.E.2d at 702, 186 N.Y.S.2d at 31.

24. The Appellate Division found the defendants had a prima facie intent to sell the advertised merchandise at the time the advertisement was broadcast. 5 App. Div. 2d at 540, 174 N.Y.S.2d at 167. This theory was rejected by the Court of Appeals. "[S]ection 421 requires proof of an 'actual intent' to sell as distinguished from a 'prima facie intent,' 'visible intent' or 'ostensible present intent.'" 5 N.Y.2d at 470, 158 N.E.2d at 705, 186 N.Y.S.2d at 34-35.

25. N.Y. GEN. BUS. LAW § 396.

26. 5 N.Y.2d at 473, 158 N.E.2d at 706-07, 186 N.Y.S.2d at 37.

Defendants also relied upon the Governor's message to the legislature, prior to the passage of N.Y. GEN. BUS. LAW § 396, in which he stated that various district attorneys had informed him that bait advertising was not covered by existing laws. N.Y. Sess. Laws 1958, at 1808 (McKinney). The court replied that its function of construing statutes would be usurped if weight were given to comments of the Governor subsequent to the passage of the act.

the act, the criteria of which are written in the disjunctive, the court's construction seems irreproachable; even if advertising for sale a product which under all circumstances will not be sold does not constitute an "untrue" representation, it would seem to be "deceptive," or at least, "misleading." Nonetheless, application of Printer's Ink to bait advertising might not comport with the original understanding. Of course, it can be argued that considerations of underlying intent are of no moment when the conduct questioned fits as neatly into relevant legislation as does bait advertising into Printer's Ink. But Printer's Ink is a criminal statute; in order properly to interpret such a law, courts should carefully consider what acts the legislature meant to prosecute.²⁷

The only available evidence indicates that the draftsman of the Printer's Ink model statute was not concerned with the sincerity or insincerity of the advertiser's offer to sell, but with the consumer's inability, in an age of mass production and mass distribution, accurately to ascertain the quality of purchased merchandise. Therefore, he apparently sought to ensure only that the quality of advertised goods would equal the quality which was advertised.²⁸ For a scheme to fall within this limited intent, a customer must be misled as to the characteristics of the merchandise offered, an issue which does not arise in the *Glubo*-type advertisement. The prosecution never alleged that consumers were deceived concerning the quality of the advertised machine.²⁹

27. See *Commissioner v. Acker*, 80 Sup. Ct. 144, 147 (1959) ("The law is settled . . . that one 'is not to be subject to a penalty unless the words of the statute plainly impose it.'"); *Pierce v. United States*, 314 U.S. 306, 311-13 (1941) (congressional intent controlling).

28. [T]he fact to which we gave such serious consideration when the act was drawn still remains, namely: that the person or concern that makes representations to the public in an advertisement regarding his own wares is in a better position than anyone else to know *the quality and merits of the goods he advertises* . . . [A]ll reasonable precautions . . . [should be] taken by him to avoid the purchase of his merchandise under any *misapprehension or mistake as to its quality or character*.

Letter From H. D. Nims to Editor of Printer's Ink, in *Ringing the Changes on the Word "Knowingly,"* Printer's Ink, May 26, 1921, p. 125. (Emphasis added.)

I should consider it of paramount importance that persons who advertise should be held responsible for the accuracy of the description of their wares, and that to do otherwise would be to place a premium on giving to the public careless and inaccurate descriptions of the *quality and efficacy of the articles* advertised.

Letter From H. D. Nims to Isidor Grossman, Counsel, Cleveland Ad Club, in *Printer's Ink*, Jan. 30, 1913, p. 95. (Emphasis added.)

29. The court below placed great emphasis on the fact that the \$29.50 machine did not meet the advertised claims. "[T]he advertised machine instead of being 'top quality,' actually was of 'bottom quality' . . ." 5 App. Div. 2d at 537, 174 N.Y.S.2d at 168. The Court of Appeals, however, noted that the defendants were not charged with nor were they tried for conspiracy to advertise falsely the quality of the \$29.50 machine. The true capabilities of the \$29.50 machine were not litigated. 5 N.Y.2d at 469, 158 N.E.2d at 704, 186 N.Y.S.2d at 33.

Most likely the district attorney did not litigate the issue of the quality of the advertised machine because he wanted to confront the court squarely with the issue of whether

Nor was a claim made that the more expensive item which was switched was not worth the price paid.³⁰ Thus, the injury caused by bait advertising, as represented by *Glubo*, is not the same injury which the Printer's Ink model statute was designed to prevent.

To attribute the motive of the draftsman of a model act to the various state legislatures that followed his blueprint may be unreasonable, however. Nonetheless, it has been authoritatively held in two jurisdictions that the local Printer's Ink acts aim at misrepresentation of quality or characteristics only.³¹ And the twelve state legislatures, which, unlike New York's,³² have specifically brought bait advertising within Printer's Ink's criminal sanctions, would seem to share that understanding.³³ On the other hand, the *Glubo* court found a "sweeping intent of the [New York] Legislature to make it unlawful to advertise as a fact that which is not a fact."³⁴ The swiftness with which Printer's Ink was almost universally enacted³⁵ suggests concurrence with the idea that the statute, in most jurisdictions, evinces such a "sweeping" purpose to eradicate any and all deceptive advertising devices. Thus, it may be no more valid to argue that state legislatures did not "intend" to reach bait advertising than to argue that they did not "intend" to reach advertisements over television.

In any event, application of Printer's Ink-type statutes to bait advertising, whether through judicial action invoking the authority of the New York Court of Appeals or through legislative amendment, will probably be forthcoming in an increasing number of jurisdictions.³⁶ Before examining whether such statutes are the most efficacious way to eliminate the use of bait, it will be instructive to assay the nature of the injury involved.³⁷

bait advertising was covered by the Printer's Ink statute. Had the court found that the quality of the \$29.50 machine had been misrepresented, it might have sustained the conviction without ever reaching the question of bait advertising.

30. *Id.* at 471, 158 N.E.2d at 705, 186 N.Y.S.2d at 35.

31. *Territory v. Lerner*, 36 Hawaii 244 (1942) (false allegation of bankruptcy sale not within Printer's Ink); *State v. Andrew Schoch Grocery Co.*, 193 Minn. 91, 92, 257 N.W. 810, 811 (1934) (false allegation that high wages paid to employees not within Printer's Ink).

32. See notes 25-26 *supra* and accompanying text.

33. Of the 13 statutes collected in note 17 *supra*, all but New York's make bait advertising a criminal offense.

34. 5 N.Y.2d at 471, 158 N.E.2d at 705, 186 N.Y.S.2d at 35.

35. Within ten years after its promulgation, 21 states had enacted the model statute. By 1927, 38 states had enacted the model statute, or variations of it. See Comment, 36 YALE L.J. 1155, 1157-59 (1927).

36. This trend is indicated by the fact that, of the 13 states that have passed specific legislation aimed at bait advertising, see note 17 *supra*, 1 acted in 1953 (Massachusetts), 3 in 1955 (California, Hawaii, and Tennessee), 1 in 1956 (Rhode Island), 2 in 1957 (Maryland and Michigan), 3 in 1958 (Georgia, Illinois, and New York) and 3 more in 1959 (Ohio, Pennsylvania, and Missouri).

37. The person generally thought to be injured by bait advertising is the consumer. See, e.g., N.Y. Sess. Laws 1958, at 1808 (McKinney) (message from the Governor) ("to cheat consumers by means of viscous sales promotional practices."). But it has been said

Bait advertising does not, of itself, involve the same injury which the Printer's Ink model statute was designed to prevent, since the quality of the item sold (the switched product) may not be misrepresented. But when the quality of the switched product is falsified by the advertiser,³⁸ it might be argued that the original advertisement caused the consumer to buy a misrepresented item. The actual misrepresentation occurs, however, not in the bait advertisement but at the time of sale. Direct oral representations of quality in a store or home have never been held to fall within the ambit of a Printer's Ink statute,³⁹ apparently because violations often turn upon slight variations in the phrasing of the advertisement.⁴⁰ Wording can be readily ascertained when the advertisement is available in printed form, and easily established when broadcast, but the remarks of a salesman or a switching seller can rarely be proved with exactness. Of course, bait advertising may be condemned on grounds other than misrepresented quality. By playing upon the consumer's desire for a bargain, bait arouses his interest in the item offered.⁴¹ Once the consumer has become purchase-minded, the seller encounters less difficulty in selling a higher priced version of the product. Realistically, bait advertising is thus a highly effective method of overcoming both consumer inertia and resistance. But this could not be the reason for its illegality; unprohibited selling devices, such as door-to-door selling, may be almost as effective in accomplishing the same objective.⁴² Official antipathy to bait advertising, which involves some of the elements of common-law fraud,⁴³ must, therefore, rest on its supposed offensiveness to the moral and ethical sensitivities of the community.⁴⁴

that it "is not only unfair to consumers, but to responsible small business." N.Y. Sess. Laws 1957, at 1716 (McKinney) (message from the Governor).

38. *The Fight Against Bait Advertising* 3 ("[T]his new machine may be a little-known brand, and the 'bargain' price at which it is offered may actually be an expensive price for the merchandise."); see Walker, *Beware the "Bait-Ad" Gyp*, Reader's Digest, Aug. 1953, p. 98.

39. See *State v. Cusick*, 248 Iowa 1168, 84 N.W.2d 554 (1957) (telephone solicitation not covered by statute). The statute specifically includes only printed publications and broadcasts. See note 9 *supra*. An application of the *ejusdem generis* rule would therefore seem to preclude an oral misrepresentation. See *1959 Committee Report* 189 ("[The Printer's Ink statute] still probably does not cover representations made orally . . .").

40. See, e.g., *People v. Wahl*, 39 Cal. App. 2d 771, 100 P.2d 550 (Super. Ct. App. Dep't 1940); *People v. Minjac Corp.*, 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16 (1958).

41. See *Rude v. United States*, 74 F.2d 673, 676 (10th Cir. 1935). ("It is common knowledge nothing is more alluring than the expectation of getting what is commonly called a bargain, and a scheme which holds out that one will receive greater value than he pays for, appeals to the avarice of many.")

42. See Whyte, *How Eddie and I Cleaned Up*, in EDITORS OF FORTUNE, WHY DO PEOPLE BUY? 85-98 (1953).

43. See notes 2-8 *supra*.

44. Other possible injuries that might be argued include: the money spent on the switched product would have afforded the consumer more satisfaction if spent elsewhere, see note 53 *infra* and accompanying text; the consumer suffers a loss of time, see note

No matter what the reason for combating bait advertising, a Printer's Ink type statute designed for the relatively clear-cut case of misrepresentation of quality will, at best, do the job poorly. Since such a statute does not define the offense of bait advertising it will provide no guidance for businessman or court. In traditional Printer's Ink cases, a violation occurs when the actual and represented quality of the goods differ.⁴⁵ When bait is involved, an objective test, such as comparative quality, cannot be utilized; rather the subjective element of intent not to sell must be proved. But *Glubo*, destined to be a leading case in an emerging area, does not make clear what facts will be necessary to establish such intent in future cases. In *Glubo* two facts were offered for this purpose—the seller's disparagement of the item offered and his attempt to switch the customer to another model.⁴⁶ The opinion does not indicate whether both elements need be present to sustain a conviction. For example, a seller may praise a more expensive machine without even mentioning the bait which attracted the consumer to the store, or he may allow the consumer to examine the advertised machine relying upon its obvious inferiority to discourage sale. In either case a switched sale might result without the element of disparagement but it is unknown whether "switching" alone will establish an intent not to sell. Moreover, without a definition of bait advertising, the Printer's Ink sanctions may be applied to the common practice of loss leader selling.⁴⁷ A loss leader is an item, priced below seller's cost, which is designed to attract customers into the store. Unlike the typical bait situation, the advertiser is willing to sell the item offered, since he hopes to reap his profits through the sale of additional, rather than substituted, products.⁴⁸ But the quantity of loss leaders available may be limited. If supply is insufficient to meet reasonably anticipated demand, it might be argued that the advertiser did not "intend to sell" to a percentage of those who responded to his ad. Thus, a violation of the statute might hinge upon a particular court's determination of the percentage required before intent not to sell could be inferred.⁴⁹

57 *infra* and accompanying text; loss of a potential customer by the successful bait seller's competitors, see note 60 *infra* and accompanying text; and loss of good will by the manufacturer of the product used as bait, see note 66 *infra* and accompanying text.

45. *E.g.*, *People v. Austin*, 301 Mich. 456, 3 N.W.2d 841 (1942); *State v. Gitelman*, 221 Minn. 122, 21 N.W.2d 198 (1945).

46. 5 N.Y.2d at 467, 158 N.E.2d at 705, 186 N.Y.S.2d at 31-32.

47. "Most newspapers and radio stations refuse bait ads but they are hard to spot. For example, the best of firms regularly run 'price leader' ads which are real and honest bargains to bring you into their stores, where you are likely to buy other items at regular cost." Buschman, *Bait Ads*, 1954, p. 8.

48. See *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 569, 161 N.E.2d 197, 204, 190 N.Y.S.2d 977, 988 (1959); *Sunbeam Corp. v. Payless Drug Stores*, 113 F. Supp. 31, 43 (N.D. Cal. 1953).

49. The difficulty of such a determination can be avoided by requiring a seller of a limited quantity of items to so specify in the advertisement. See ORE. REV. STAT. § 646-210(1)(b) (1955).

Aside from these problems of uncertainty, which can be remedied more or less easily, a criminal statute such as Printer's Ink will not effectuate a legislative decision to eliminate bait advertising. Juries are often reluctant to stigmatize a man as a criminal solely for false advertising.⁵⁰ More important, local law enforcement officials, faced with limited resources, have largely ignored the misdemeanor of false advertising and have primarily allocated their facilities to the prosecution of more serious crimes.⁵¹ Since bait certainly involves no greater public injury than other forms of deceptive advertising, it is unlikely that they will be more disposed to prosecute the bait advertiser. In fact, they may be less willing to undertake prosecution of this crime, since it will be more difficult to prove beyond a reasonable doubt the "intent not to sell" necessary for a bait conviction than to prove the discrepancy in quality required in the usual Printer's Ink case. Probable lack of enforcement, then, indicates that the present criminal statutes are not the most effective method of controlling bait advertising.

One possible alternative is a statute allowing baited consumers to bring an action for treble or minimum damages.⁵² Treble damages are not feasible, however, since no actual damages on which they could be based exist in the ordinary bait advertising situation. True, if the switched item is misrepresented, damages might be measured by the difference between the expected and received value. On the other hand, even if such damages are, in fact, the result of the bait advertisement, no pecuniary loss would result when the switched item is worth its price, as was the case in *Glubo*. Even so, a consumer might argue that he was nonetheless financially injured because the bait so diminished his sales resistance that he purchased an item he would not otherwise have bought: in other words, because the amount of dollars he spent for the switched item above the amount he would have been originally willing to pay for the purchased product in the open market affords him less satisfaction than the same amount of dollars would if spent for other items.⁵³ But even if such damage could be satisfactorily measured, legal recognition is unlikely. Otherwise, all advertising would be susceptible to the same attack,

50. See Handler, *Proposals for Changing the Law of New York on Unfair Competition and False Advertising*, in N.Y. STATE BAR ASS'N, 1959 ANTITRUST LAW SYMPOSIUM 173, 177 (1959).

51. 1959 *Committee Report* 190; see SPECIAL COMM. OF THE ANTITRUST SECTION OF THE N.Y. STATE BAR ASS'N TO STUDY THE ANTITRUST LAWS OF NEW YORK, SECOND REPORT 71a-93a (1959).

52. Cf. Emergency Price Control Act § 205(e), ch. 521, 56 Stat. 34 (1942).

Such a statute has been proposed in New York on several occasions. N.Y. Times, Jan. 10, 1956, p. 23, col. 1; *id.*, Jan. 29, 1957, p. 14, col. 7; N.Y. Sess. Laws 1958, at 1808 (McKinney) (Governor's message). The bill would have allowed persons defrauded by tradesmen to sue for treble damages plus reasonable attorney's fees. No indication was given, however, of how damages would be computed.

53. See 1 FAIRCHILD, FURNISS & BUCK, ELEMENTARY ECONOMICS 140 (3d ed. 1936); BOULDING, ECONOMIC ANALYSIS 638-48 (1941); SAMUELSON, ECONOMICS 424-26 (3d ed. 1955).

with bait singled out only because of its greater effectiveness. Possibly, the legislature could set a flat statutory amount, recoverable even in the absence of financial loss. While little precedent exists for such a statute it would probably be constitutional on an analogy to the *qui tam* action.⁵⁴ But consumers may not be able to distinguish bait from other advertising techniques, and may be unaware of their statutory rights. Even when these defects are overcome by adequate publicity, the expense of litigation would discourage suits unless the recoverable amount were large, while the bait advertiser would regard the expense of an occasional suit as a cost of doing business. Raising the penalty to overcome these difficulties would create other problems.⁵⁵ First, courts and juries might be reluctant to impose harsh penalties on businessmen, except in the most blatant cases; indeed, penalties which might lead to bankruptcy do not seem justified for a retailer who is not an habitual bait user. Furthermore, such a statute would be penal in nature; strict construction might allow bait advertisers to escape punishment.⁵⁶ In any event, a consumer-enforcement scheme would probably provide no remedy if the switched item is not purchased—if the consumer has not been “taken.” Although bait may mislead a consumer into a futile attempt to buy the advertised item, a frustrated would-be purchaser would suffer only a loss of time, which a court or legislature probably would not convert into monetary damages.⁵⁷

The defects of consumer enforcement could be avoided by a statute authorizing competitor suits for treble damages, but additional problems would be raised by this remedy. A civil action could be based on the theory that bait advertising is a form of unfair competition.⁵⁸ But if the evil of bait advertising

54. This was an action brought by an “informer” under a statute which established a penalty for the commission or omission of some act. The informer would divide the penalty with the state. BLACK, LAW DICTIONARY 1414 (4th ed. 1957); see *State ex rel. Rodes v. Warner*, 197 Mo. 650, 663, 94 S.W. 962, 965 (1906).

55. If the statute imposed what were deemed to be excessive penalties it might violate the due process clause of the fourteenth amendment. See *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566 (1934). The greater the disproportion between actual damage and the statutory amount, the greater the likelihood of its being held unreasonable and excessive.

The fine under the New York version of the Printer's Ink statute is only \$500.

56. See *Steam-Engine Co. v. Hubbard*, 101 U.S. 188 (1879). In New York and several other states, however, this rule has been modified. *E.g.*, N.Y. PEN. LAW § 21 (penal statutes are not to be strictly construed but are to be given the “fair import of . . . [their] terms”).

57. Compare *B.V.D. Co. v. Davega-City Radio, Inc.*, 16 F. Supp. 659, 661 (S.D. N.Y. 1936) (“It may be true that the purchaser . . . had lost nothing but his time and the effort required for shopping, and that such deception of the public alone would not be sufficient basis for maintenance of this action by the complainants.”).

If the statute allowed any reader of the advertisement to sue no limit would exist on the number of possible plaintiffs. Even if the statute only gave those who actually visited the store standing to sue, the number might be quite large.

58. See *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 571, 161 N.E.2d 197, 206, 190 N.Y.S.2d 977, 989 (1959) (“[Bait advertising] does not fall with precision into any previous groupings of unfair competition. But this is no reason to deny justice or

is that it induces consumers to purchase goods which they would not normally have bought,⁵⁹ its victims would not be in the market for a competitor's product. Viewed differently, however, bait advertising might give rise to injury to competitors. Some people who are attracted by bait advertising's promise of a bargain are in fact in the market for the switched product. While this consumer is not "injured" by the purchase of a more expensive item, the nonbait seller will have lost a potential customer.⁶⁰ Nonetheless, a particular competitor would rarely be able to prove actual damages⁶¹ which could be based only on a diminution of profits. In the field of small consumer durables, where bait advertising is most prevalent,⁶² a causal relation between such diminution and the bait advertisement would be difficult to establish; profits react to a multiplicity of variables, such as fluctuations in the business cycle, technological change, the availability of credit, and the entrance of new competitors. Additionally, the fact that bait advertising is usually disseminated throughout an entire metropolitan area compounds the difficulty of determining its effect on any one competitor. While these handicaps probably negate the value of this treble damage remedy, a competitor, although not actually damaged, might be allowed to enjoin bait advertising. In fact, one commentator has suggested that all false advertising be enjoined as a "competitive tort."⁶³ But this injunctive procedure would probably be infrequently used; a single competitor would, absent a financial incentive, hesitate before undertaking what might prove to be lengthy and expensive litigation. Perhaps a trade association with greater resources would be more likely to bring an injunctive action.⁶⁴ In any event, injunctions without further penalties, while preventing violations by the same individual, would probably have little deterrent effect

equity."); Buschman, *Bait Ads*, 1954, p. 8. The basic objectives of the law relating to unfair competition is "first, to protect the honest trader in the business which fairly belongs to him; second, to punish the dishonest trader, who is taking his competitor's business by unfair means; third, to protect the public from deception." *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. 398, 405 (8th Cir.), *cert. denied*, 223 U.S. 755 (1913).

Possibly a retailer or manufacturer could bring an action for unfair competition against a bait advertiser, who is involved in interstate commerce and using a brand name product as bait, under Lanham Act § 43(a), 60 Stat. 441 (1946), 15 U.S.C. § 1125 (1958), which provides that any person who uses any false description or representation of brand-name goods in interstate commerce shall be liable to a civil action by any person who believes that he is or is likely to be damaged by the use of such false representation or description. See *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir. 1954).

59. See text preceding note 53 *supra*.

60. Cf. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941).

61. See Callmann, *False Advertising as a Competitive Tort*, 48 COLUM. L. REV. 876 (1948); Nims, *Damages and Accounting Procedures in Unfair Competition Cases*, 31 CORNELL L.Q. 431 (1946).

62. See note 12 *supra*.

63. Callmann, *supra* note 61.

64. All major fields of retailing have trade associations. Comment, 69 YALE L.J. 168, 174 n.36 (1959).

upon future violators⁶⁵ since they may be able to garner substantial profits before an injunction issues.

The only other private party who could bring an action against a bait advertiser would be the manufacturer of a product used as bait. If a brand-name product is openly disparaged, its manufacturer could seek an injunction and possible damages by invoking the doctrine of trade libel.⁶⁶ Or, use of a manufacturer's brand name in the bait advertisement itself could conceivably be regarded as an expropriation of the manufacturer's goodwill, sufficient perhaps to allow a cause of action for the common law tort of unfair competition. But damages again will be difficult to establish,⁶⁷ and the bait advertiser may be able to retain the profits he has reaped before the issuance of an injunction. More important, the possibility of such actions would not affect the numerous bait advertisers who do not use a brand-name product as bait.⁶⁸ And actions for trade libel would not affect those schemes which attempt to switch the customer without disparaging the advertised item.

Since neither public criminal prosecution nor various forms of individual civil action will effectively control bait advertising, the obvious alternative is civil enforcement by the state. A state agency, entrusted with the responsibility of controlling bait selling,⁶⁹ could be given the power to issue a cease-and-desist order, backed up by the contempt sanction, upon the finding of a violation. In order that this cease-and-desist order would have greater deterrent impact than other possible injunctive remedies,⁷⁰ the agency should be given authority to seek financial penalties, up to a statutory maximum. The agency's power should be used in proportion to an offender's degree of culpability. For example, an isolated instance of bait advertising might result only in a warning and a request that the advertiser refund the customer's money; more serious

65. Like other conclusions about deterrence, this prediction must remain unverified. See Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 570 n.55 (1960).

66. See 1 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS § 43.3(b) (2) (2d ed. 1950); RESTATEMENT, TORTS §§ 626-28 (1938); Note, 13 GEO. WASH. L. REV. 468 (1945). See also Comment, 69 YALE L.J. 168, 182 (1959).

In *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 161 N.E.2d 197, 190 N.Y.S.2d 977 (1959), an unfair competition action, a vacuum-cleaner manufacturer sued a retailer who purchased the manufacturer's old trade-ins, rebuilt them, and then advertised them at very attractive prices. After gaining admittance to homes, salesmen would disparage the advertised machine and try to switch the customer to other models. These practices were enjoined. Although the case was distinguished from one of "disinterested trade libel" the basis for granting the injunction was to prevent destruction of good will. See *Admiral Corp. v. Price Vacuum Stores*, 141 F. Supp. 796 (E.D. Pa. 1956).

67. See *Electrolux Corp. v. Val-Worth, Inc.*, *supra* note 66, at 572, 161 N.E.2d at 206, 190 N.Y.S.2d at 990.

68. See *The Fight Against Bait Advertising* 3.

69. In this manner, the problem resulting from lack of enforcement of criminal statutes by public prosecutors with general responsibility to combat crime would be alleviated. See notes 50-51 *supra* and accompanying text.

70. See text at notes 65, 66 *supra*.

violations would be enjoined and, if a history of bait advertising appeared, the violator subjected to financial penalties.⁷¹ Although the availability of financial penalties may render this scheme "penal in nature," the possibility that it would be judicially vitiated by strict construction⁷² could be avoided by detailed agency regulations, which would probably be given considerable weight by the courts. A precise statutory definition of bait advertising would be rendered unnecessary if an agency were made responsible for enforcement; the agency could issue its own definitions, or in time would develop sufficient expertise to distinguish legitimate practices, such as loss leader selling, from the subtle schemes which the bait advertiser may devise.⁷³

Admittedly, a "Bait Advertising Commission" would probably not be viable. But the prevention of bait advertising might be assigned to an agency designed to combat deceptive advertising or "consumer fraud" in general,⁷⁴ or to an existing state body, such as the departments of agriculture or commerce.⁷⁵

71. A newly established Bureau of Consumer Frauds in the Office of the Attorney General of New York will stress refund and returns, but if systematic cheating appears it will be prosecuted. N.Y. Times, Jan. 12, 1958, p. 56, col. 1. The bureau is staffed with seven professional people, six of whom are lawyers. Volunteers man the offices in the evenings. SPECIAL COMM. OF THE ANTI-TRUST SECTION OF THE N.Y. STATE BAR ASS'N TO STUDY THE ANTI-TRUST LAWS OF NEW YORK, SECOND REPORT 45a (1959).

72. See text at note 56 *supra*.

73. Such flexibility is necessary because "there is no hard and fast line where bait advertising leaves off and the advertising of a genuine bargain begins." FTC, Press Release, Bargain on a String, Dec. 4, 1955, p. 2. Perhaps the standards recently adopted by the FTC could be used for this purpose. FTC, Guides Against Bait Advertising, 24 Fed. Reg. 9755 (1959).

74. See Annual Message of the Governor, N.Y. Sess. Laws 1958, at 1809 (McKinney) (proposal for a department of consumer protection); N.Y. Times, April 19, 1959, p. 53, col. 33 (proposal for Connecticut Consumers Bureau); Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1077 (1956).

In New York, the Attorney General established a Bureau of Consumer Frauds because "bait advertising and related frauds practiced upon consumers have become a major problem." N.Y. Times, Oct. 2, 1957, p. 22, col. 5. The Bureau will "enforce compliance with all laws enacted for the protection of the consumer." *Id.*, Oct. 15, 1957, p. 35, col. 3. The head of the Bureau said that "'bait advertising' is the most common form of consumer fraud." *Id.*, Jan. 12, 1958, § 1, p. 56, col. 1. This bureau received 1,000 complaints in its first 10 weeks of operation. *Id.*, Jan. 7, 1958, p. 32, col. 2. When the Printer's Ink statute was first presented, Mr. Nims, the draftsman, stated a need for a "central organization whose business is to prosecute fraudulent advertisers relentlessly." Printer's Ink, Nov. 16, 1911, p. 20.

75. See, e.g., MINN. STAT. ANN. § 620.52 (Supp. 1959) (enforcement by Commissioner of Agriculture). The jurisdictions having such specialized enforcement bodies have reported the greatest number of prosecutions for false advertising under the Printer's Ink statute. Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1064 n.281 (1956).

A state trade commission has been rejected by Professor Handler in favor of "existing enforcement officials and traditional judicial procedures" on the ground that the "latter would be more expeditious and economical . . ." Handler, *Proposals for Changing the New York Law on Unfair Competition and False Advertising*, in N.Y. STATE BAR ASS'N, 1959 ANTI-TRUST LAW SYMPOSIUM 173, 178-79 (1959).

Even if no administrative structure is adopted, existing criminal statutes would be made more effective if a designated arm of the state prosecution machinery were made primarily responsible for enforcing such legislation.⁷⁶

The foregoing has assumed that the states are free to control bait advertising.⁷⁷ Arguably, however, regulation of advertising carried on through interstate media is preempted by specific federal legislation. The Federal Communication Commission can regulate radio and television advertising through its power to revoke the station's broadcast license.⁷⁸ But the FCC has been reluctant to impose revocation on broadcasters for the advertisements they

76. Additionally, the media and the advertisers could assist statutory prohibitions with a program of self regulation. For an extensive discussion and evaluation of existing efforts at self regulation, see Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1078-96 (1956). In the newspaper field such papers as the *New York Times* and the *St. Louis Post-Dispatch* maintain self-imposed standards of acceptability. THAYER, *LEGAL CONTROL OF THE PRESS* § 86, at 591, 597 (1956). The *New York Times* specifically refuses to accept bait offers. *Id.* at 599. Furthermore, New York radio and television stations, at the instigation of the Better Business Bureaus, have adopted a six-point set of copy standards designed to eliminate bait advertising. *Printer's Ink*, March 18, 1955, p. 28. This code has virtually eliminated bait advertising over television in New York City. SPECIAL COMM. OF THE ANTITRUST SECTION OF THE N.Y. STATE BAR ASS'N TO STUDY THE ANTI-TRUST LAWS OF NEW YORK, SECOND REPORT 44a (1959). The National Association of Radio and Television Broadcasters also passed a resolution aimed at preventing bait advertising. "If the policy of the advertiser is to offer higher-priced models or types of the product in addition to the featured item, this fact is to be clearly and prominently set forth in the advertisement." *Printer's Ink*, March 18, 1955, p. 28.

Printer's Ink has stressed self enforced standards as the best cure and they find the prospect of further governmental regulation will be extremely distasteful to advertisers. *Printer's Ink*, Nov. 9, 1956, pp. 80-84. But doubt has recently been expressed on the ability of the industry to police itself, at least as far as radio and television advertising are concerned. *N.Y. Times*, Nov. 21, 1959, p. 1, col. 2; *id.*, Nov. 6, 1959, p. 17, col. 4.

77. It might be argued that state regulation would constitute an unconstitutional burden on interstate commerce. See *Post Printing & Publishing Co. v. Brewster*, 246 Fed. 321 (D. Kan. 1917) (state statute forbidding cigarette advertisements in newspapers such a burden). But absent an overriding interest in national uniformity, see *Southern Pac. Ry. v. Arizona*, 325 U.S. 761 (1945), states may enact police-power regulations (which include attacks on misleading advertising, see *State v. Rones*, 223 La. 839, 67 So. 2d 99 (1953)) incidentally affecting interstate commerce, see, e.g., *Clason v. Indiana*, 306 U.S. 439 (1938). Moreover, bait advertising is usually a local phenomenon. See *The Fight Against Bait Advertising 2; Where May We Ask Was the FCC?*, *Consumer Reports*, Jan. 1960, pp. 9-11; Gwynne, *The Better Business Bureaus and the Federal Trade Commission*, 2 ANTITRUST BULL. 702, 707 (1957).

78. The FCC is given the authority to grant a broadcast license when such issuance will further the "public convenience, interest or necessity." 48 Stat. 1083 (1936), as amended, 47 U.S.C. § 307 (1958). For examples of advertising which has been disapproved, but not made the basis of revocation, see *In the Matter of Broadcast of Programs Advertising Alcoholic Beverages*, 5 RADIO REG. 593 (FCC 1949) (liquor); *WRBL Radio Station, Inc.*, 2 F.C.C. 687 (1936) (lotteries); *Knickenbocker Broadcasting Co.*, 2 F.C.C. 76 (1935) (contraceptive devices); *Farmers & Bankers Life Ins. Co.*, 2 F.C.C. 455 (1936) (false and misleading advertisements); *Ben S. McGlashan*, 2 F.C.C. 145 (1935) (false and misleading advertisements).

accept.⁷⁹ Moreover, any possible FCC-state conflict would be negligible; the federal agency regulates the stations while the states would act only against the advertiser. Unlike the FCC, however, the FTC does act directly against the bait advertiser.⁸⁰ Preemption, however, should not necessarily be inferred. Although courts have articulated numerous verbal formulas to indicate under what circumstances preemption occurs,⁸¹ the subject matter of the state regulation and the nature of state's interest therein have usually been the decisive factor in determining the validity of such regulation. The state has long been regarded as primarily responsible for the protection of its citizens against fraud.⁸² Moreover, while the FTC has recently indicated its increased interest

79. WSBC, Inc., 2 F.C.C. 293 (1936) (license renewed despite continued broadcasting of advertisement for which the advertiser had been convicted under the Pure Food and Drug Act). KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931), is the only license nonrenewal in the past 29 years.

Recently, Chairman Doerfer expressed the view that the FCC had no power to make the stations stop frauds or other improper practices. N.Y. Times, Nov. 11, 1959, p. 1, col. 6. But the FCC has considered asking for new powers. Wall Street Journal, Nov. 11, 1959, p. 1, col. 3.

80. The FCC has the power to enjoin advertising which constitutes an unfair method of competition or amounts to a deceptive practice. Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1958). Bait advertising has been held within the scope of § 5. *E.g.*, Oregon Hearing Center, 52 F.T.C. 1192 (1956); Clean-Rite Vacuum Stores, Inc., 51 F.T.C. 887 (1955); Bond Sewing Stores, 51 F.T.C. 470 (1954). Furthermore, if the advertisement involves food, drugs, devices, or cosmetics, it may be enjoined if it is misleading in a material respect. 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1) (1958).

81. Among the more common "tests" are the following:

(1) *The Conflict Test*—" . . . in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance of conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together" *Sinnot v. Davenport*, 22 How. (U.S.) 227, 243 (1859).

(2) *The Coincidence Test*—"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition" *Charleston & W.C. Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

(3) *The Dominance Test*—" . . . the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

(4) *The Pervasiveness Test*—"The scheme of federal regulation may be so pervasive as to make no room for the States to supplement it." *Ibid.*

(5) *The Conflict in Administration Test*—" . . . enforcement of [the state law] presents a serious danger of conflict with the administration of the federal program." *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956).

Cramton, Pennsylvania v. Nelson: A Case Study in Federal Preemption, 26 U. CHI. L. REV. 85, 87 n.8 (1958).

82. See *Plumley v. Massachusetts*, 155 U.S. 461, 472, 478 (1894) (adulterated food); *Crossman v. Lurman*, 192 U.S. 189 (1904) (same); Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1076 (1956) ("The drastic effect of preemption would seem

in bait advertising,⁸³ it has neither the funds nor personnel to pursue every violation,⁸⁴ even if prosecution of small local advertisers is part of its proper function. Preemption would result in a "no man's land" in which the states cannot, and the federal government will not, act. Congress has recently disapproved the existence of such a "no man's land" in the area of labor relations⁸⁵ and would hardly condone the establishment of a similar zone in an area in which, to say the least, no greater federal interest exists. Therefore, at least until the FTC expands its activities against bait advertising, a system of complementary federal and state control seems desirable.⁸⁶ But until the public learns to guard against its own credulity, even a concerted attack will not wholly eliminate bait advertising.⁸⁷ No agency will be able to prevent every form of deception which the ingenious bait advertiser may devise; in the long run bait advertising will be prevented only through consumer education.⁸⁸

harmful to any comprehensive system of local advertising control . . . because it would unnecessarily exclude state action in essentially local matters and would severely diminish necessary state police powers."). See also SPECIAL COMM. OF THE ANTITRUST SECTION OF THE N.Y. STATE BAR ASS'N TO STUDY THE ANTITRUST LAWS OF NEW YORK, SECOND REPORT 52a-53a (1959) (statement of FTC Chairman Gwynne: "In the deceptive practices field particularly, the local practices parallel interstate practices in which action has been taken. As to our policy distinguished from our jurisdiction, I might point out that we rarely assert jurisdiction where commerce is minimal and the business and practices are primarily local.").

83. The FTC adopted "Guides Against Bait Advertising" on November 24, 1959. 24 Fed. Reg. 9755 (1959); see FTC, Press Release, Bargain on a String, Dec. 4, 1955.

84. See N.Y. Times, Dec. 22, 1959, p. 46, col. 3. (FTC's funds described as "grossly inadequate").

85. See Labor-Management Reporting & Disclosure Act of 1959, § 701, 73 Stat. 541, 29 U.S.C.A. § 164(c) (1) (Supp. 1959).

86. See *Ritholz v. Ammon*, 240 Wis. 578, 590, 4 N.W.2d 173, 178 (1942) ("We consider that the state may regulate the trade practices of such businesses, subject, perhaps, to a loss of jurisdiction where the . . . [FTC] in a particular case has undertaken regulation within the federal act.").

87. See Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 51 (1929).

88. See *The Fight Against Bait Advertising* 4 ("The most important weapon against bait advertising is a buying public that is well informed about it."). Such an educational campaign is presently carried on to some degree by the FTC, Better Business Bureaus, and private consumer groups. See Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1093 (1956).