Deception in Advertising: A Proposed Complex of Definitions for Researchers, Lawyers, and Regulators

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Researchers, lawyers, and regulators need a single, comprehensive, unambiguous, workable guideline for determining whether an advertisement is, or is not, deceptive. To address this need, the author proposes and discusses new definitions of deceptive advertisement, deceptive advertising campaign, and deceiver.

INTRODUCTION

Every maker of public policy, every advertising researcher, and every ordinary consumer, has many ‘good notions’ about what is, and what is not, a deceptive advertisement. As straightforward as it may seem to be, the task of combining these good notions into a single, comprehensive, unambiguous, and workable definition has yet to be done.

Why does no such definition exist? Some reasonable responses might include the following:

1. There already is such a definition, created and used by regulatory agencies such as the US Federal Trade Commission (FTC).
2. Researchers have no interest in developing such a definition.
3. No such definition is possible; researchers, lawyers, and regulators have different missions, which require customized definitions.

What is wrong with these answers? Has the FTC already developed a complete definition? No. There is no statutory definition of deceptiveness (Ford and Calfee, 1986). Instead, the operational definition for the legal standard is ‘an advertisement is legally deceptive when a majority of the five [FTC] commissioners votes its opinion that the advertisement has “the capacity to deceive”’ (Preston, 1983b, p. 295).

Currently, the FTC Commissioners’ 1983 policy statement provides the foundation for FTC rulings about deceptive advertising. This policy statement assumes many problematic notions, such as likely to mislead, reasonable consumer, and materiality. Some writers have argued that being likely to mislead
is not sufficient for deceiving (Ford and Calfee, 1986). Others have pointed out that reasonable consumer is a vague notion (running contrary to much case law) that reduces the FTC's ability to protect those most in need of protection (Scherb, 1985). Still others stress that materiality has been confused with injury, the problem of real concern to the FTC (Ford and Calfee, 1986).

Furthermore, according to Welti, the 'lack of a definitive standard of deception leaves the FTC and reviewing courts to a case by case analysis which creates unpredictable results' (1983, p.128). Thus the FTC has not provided a definition satisfactory to all concerned parties.

Are researchers even interested in a unified definition? The extensive efforts of many researchers suggest they are very interested. Researchers have taken great pains to define misleading, deception, deceptive, and puffery, as well as the conditions under which deception occurs (e.g., Howard and Hulbert, 1973; Aaker, 1974; Armstrong and Russ, 1975; Ford et al., 1975; Jacoby and Small, 1975; Gardner, 1975, 1976; Preston, 1977; Olson and Dover, 1978; Armstrong et al., 1979; Rotfeld and Rotzoll, 1980, 1981; Russo et al., 1981; Shimp and Preston, 1981; Rotfeld, 1983; Garfinkel, 1983; Shimp, 1983; Grunert and Dedler, 1985). Clearly, there is no lack of interest among researchers.

Is a single, unifying definition possible? or do the unique missions of researchers, lawyers, and regulators require unique definitions? Preston (1982, 1983a,b) seems to suggest that the definitions must remain distinct. On this view, researchers require a definition of deception; their mission and their instrumentality (i.e. direct measures of consumer beliefs about false claims) concern only those advertisement viewers who have been deceived. On the other hand, lawyers and regulators require a definition of deceptiveness; their missions and their instrumentalities (i.e. establishing whether or not there is a 'convergence of content having the capacity to result in false beliefs' [Preston, 1983a, p.7, original emphasis]) concern the potential of advertisement viewers to be deceived (Preston, 1982, 1983a,b). Thus from Preston's argument, it follows that because the considerations that concern researchers differ from those that concern lawyers and regulators, there can never be a single, unifying definition.

However, the multiple-definitions argument contains a hidden, and needlessly restrictive, assumption: that the differing missions cannot benefit from a common definition. But this is clearly wrong. A good definition must not only take both missions into account and keep them distinct, but must also offer a neutral language through which researchers may interact with lawyers and regulators without misunderstandings. Multiple definitions of the same term should be avoided if possible; they can only lead to meaningless 'apples versus oranges' debates.

Some might argue that a common definition is undesirable because researchers will want to study legally irrelevant problems. Even if it were true that researchers currently study problems that are irrelevant to the interests of lawyers and regulators, it would be foolish to preclude the researching of problems that are legally or regulatively relevant. Furthermore, it is hard to imagine a real discovery about deception in advertising that would be
intrinsically irrelevant to the interests of lawyers and regulators (Preston, 1976, 1982; Rotfeld, 1983).

Instead, it seems more reasonable to argue that if the existing definitions concerning deception in advertising are insufficient and contradictory, then researchers, as concerned parties, must continue their efforts to formulate a definition that is better, more generalizable, and more universally relevant. Although they cannot be certain of their eventual success, the history of their labours is encouraging. For example, previous efforts by these researchers have improved the quality of legal evidence for deceptiveness; the FTC has increased its use of consumer surveys in proving advertising deception (Preston, 1976, 1980).

Some might argue that a unified definition must start from the legal definitions, and not from the researcher definitions, because ‘what is deceptive’ is a legal notion. However, my concern is not to impose researcher perspectives on lawyers and regulators (Preston, 1976), or vice versa. Whatever definition is developed, it should serve researchers, lawyers, and regulators equally well. The goal, not the starting point, is important.

Clearly, a comprehensive, unambiguous, workable definition of deceptive advertising would be useful. With such a definition, the work of the researchers, lawyers, and regulators could be more effectively guided and co-ordinated. Without such a definition, the status of deceptive advertising is as troublesome as that of pornography: we cannot define the thing, but we know it when we see it.

Therefore, the only goal of this analysis is to suggest a definition that combines what researchers know about deception in advertising into a concise statement that is useful to researchers, lawyers, and regulators.

DEFINING DECEPTION IN ADVERTISING: WHAT TO CONSIDER

No amount of empirical research can prove that a definition is good; rather, a definition is good if experience shows it to be comprehensive, unambiguous, and workable. The appendix contains an attempt at a comprehensive list of important, related, and widely-held assumptions about advertising in general, and about deception in advertising in particular. The proposed definition allows for all of these assumptions. In the following discussion the proposed definition is shown to be unambiguous and workable.

THE COMPLEX OF DEFINITIONS

Complicated expressions must be defined in terms of a complex of simpler expressions which may themselves require definition. Such complexes are often used in philosophical and legal contexts. Deception in advertising is a complicated expression, and thus must be defined as a complex of simpler expressions. The complex of definitions developed here depend upon defining the terms claims, misleading, deceptive advertisement, advertising campaign, deceptive advertising campaign, and deceiver.
Advertisers use advertisements to make claims which are not always explicitly stated in words. When one speaks of a deceptive advertisement, it is really these claims which are important, not the exact wording of the advertising copy. The following definition of 'claim' is based on Grice (1975) (cf. Coleman, 1983; Garfinkel, 1983; Skipper and Hyman, 1987).

- An advertiser makes claim S through advertisement A if, and only if, purchasers or purchase influencers tend to believe that
  (a) the advertiser believes S, and
  (b) the advertiser intends A to be instrumental in revealing that the advertiser believes S.

NB: Whereas a claim S is always a sentence, it can be expressed linguistically or nonlinguistically.
- A claim S is misleading if, and only if, it encourages mistaken actions by purchasers or by purchase influencers.

Using the above, we can now define deceptive advertisement. Thus,
- An advertisement is deceptive if, and only if, it makes one or more misleading claims $S_1, S_2, \ldots, S_n$.

To define deceptive advertising campaign, it is first necessary to define advertising campaign.
- An advertising campaign is any advertisement or set of advertisements that is actually presented to purchasers or purchase influencers.

Thus, an advertisement exists even before it has been publicly presented, but after the first presentation it becomes an advertising campaign. Then,
- An advertising campaign is deceptive if, and only if,
  (a) it contains one or more deceptive advertisements, and
  (b) the appropriate regulatory agencies or the courts rule at least one of the following to be significant:
    1. the total resulting injury suffered by all consumers, or
    2. the magnitude of the resulting injury suffered by one or more individual consumers, or
    3. the total resulting loss suffered by all competitors, or
    4. the magnitude of the resulting loss suffered by one or more individual competitors.

Finally,
- A deceiver is an advertiser who innocently, negligently, or maliciously sponsors a deceptive advertising campaign.

DISCUSSION

This complex of definitions seems to cover the recognized ways in which advertisements can be misleading. By these definitions, an advertisement is
misleading if it (i) contains a believable claim that is a blatant or an unconscionable lie (e.g., Armstrong and McLennan, 1973; Gardner, 1975), (ii) encourages a discrepancy between what purchasers or purchase influencers believe to be claimed in the advertisement and what is fact (Aaker, 1974; Gardner, 1975; Armstrong et al., 1979; Rotfeld and Rotzoll, 1980; Ford and Calfee, 1986); and (iii) encourages the purchaser or purchase influencer to build upon previously held erroneous beliefs, so that their viewing of the advertisement interacts with these prior beliefs to produce (or reinforce) one or more erroneous beliefs (e.g., Gardner, 1975; Russo et al., 1981; Barbour and Gardner, 1982).

Because the misleading claim needs only to encourage, not cause, mistaken actions by purchasers or by purchase influencers, cases of exploitive misleadingness (Russo et al., 1981) and of omitted, but directly relevant, information (Jacoby and Small, 1975) are covered by these definitions. Puffs are also covered. A puff may, or may not, be deceptive; it is deceptive only if it is a claim. In other words, if consumers are not convinced that the advertiser believes the puff, or if consumers do not believe that the advertiser meant to communicate that belief via the advertisement, then the puff is not a claim, and therefore the advertisement is not deceptive (Rotfeld and Rotzoll, 1981, pp. 85–88). If a puff is a claim, then that claim can be examined for being misleading.

This complex of definitions is also consistent with other related and widely-held beliefs about deception in advertising. Deceptive claims may be made linguistically or nonlinguistically; they may be made about ideas, goods, or services; they may be false without deceiving, and deceive without being false (Gardner, 1975; Preston, 1975; Harris et al., 1979; Rotfeld and Rotzoll, 1980; Russo et al., 1981; Garfinkel, 1983). For legal purposes, the issue of responsibility remains distinct from issues of negligence or malicious intent (Preston, 1976; Russo et al., 1981; Rotfeld, 1983; Jones, 1986; Carson, 1988). The people who are likely to be affected by the advertisement, rather than expert witnesses, determine whether or not the advertisement is deceptive; thus, deceptiveness may be measured by changes in the relevant beliefs or behaviours of those most likely to be affected by the advertisement (Gardner, 1975; Ford and Calfee, 1986; Preston, 1987; Hankel and Hyman, 1989).

Finally, this complex of definitions requires that researchers rely upon all of their methodological tools when attempting to demonstrate that an advertisement claim is misleading. Certain modified beliefs and behaviours are, by this definition, the result of viewing a misleading advertisement. Thus, researchers looking for 'misleadingness' (the term used in Russo et al., 1981) should use both advertisement-related measures (i.e. testing beliefs immediately after advertisement exposure) and brand-related measures (i.e. awareness, attitudes, purchase intentions and purchases in the population) (Armstrong et al., 1980). Furthermore, because the link between beliefs and behaviours is weak (Juster, 1964; Tate and Ball, 1983), simulated brand choice experiments (e.g., Shimp and Yokum, 1981; Hankel and Hyman, 1989) would convincingly demonstrate that a deceptive claim has modified the behaviour of consumers (i.e. that the deception is relevant).
How this complex of definitions differs from previous definitions
Relative to the definitions of other researchers, this complex of definitions is somewhat novel in that it:
1. relies upon purchasers or purchase influencers rather than 'reasonable consumers';
2. takes into account a broader range of mistaken actions (most definitions only consider mistaken purchases of goods or services);
3. distinguishes purchasers and purchase influencers from consumers;
4. takes into account the total, as well as individual, injuries to consumers, and the total, as well as individual, unfair losses to competitors;
5. clearly differentiates what Preston (1982, 1983a,b) called deception (defined here as deceptive advertisement) and deceptive (defined here as deceptive advertising campaign); and
6. identifies the party responsible for the deceptive advertising campaign.

No reasonable consumer requirement
In the traditional literature, 'reasonable consumers' (a) may be ignorant, unthinking, credulous or unsophisticated (Haefner, 1972); (b) need not be knowledgeable about the product category (Gardner, 1975); yet (c) may not be stupid, unrepresentative (Haefner, 1972), or foolish (Preston, 1975). Many definitions limit advertising deception to 'reasonable consumers'. Why? Perhaps the answer lies in the prevailing ethical belief that advertisers should not be held accountable for the unanticipated actions of those who act irrationally. In this common view consumers are responsible for their own well-being, and advertisers are not accountable for the losses suffered by consumers who act in an unanticipatedly idiotic or lazy manner.

This traditional view of the 'reasonable consumer' has proved quite useful for researchers. However, one undesirable side-effect for the courts and for regulatory agencies is that such a view, if rigorously followed, would render impossible the task of protecting those advertisement viewers least able to protect themselves from deceptive advertising campaigns. Regardless of their reasoning ability, purchasers or purchase influencers must be protected from such deceptive advertising campaigns.

One advantage of the proposed complex of definitions is that it eliminates the 'reasonable consumer' requirement; the notion of injury takes into account the rights of advertisers as well as the rights of purchasers, purchase influencers, and competitors. The courts and regulatory agencies must decide whether or not a deceptive advertising campaign meaningfully contributed to an unfair loss suffered by purchasers, or by purchase influencers, or by competitors. The advertiser may still be exonerated if the loss was caused by unanticipated idiocy or unanticipated laziness on the part of the purchasers or purchase influencers themselves.

Mistaken actions
Regardless of the intentions of the advertiser, an advertising campaign for a product, service, or idea is deceptive only if the mistaken actions of purchasers or
purchase influencers cause injury to consumers or unfair losses to competitors. Mistaken actions encouraged by a deceptive advertising campaign could include more than a simple purchase; mistaken actions could also include a gathering or a processing of insufficient or inappropriate information about a product (e.g., inappropriate product attributes), or even inappropriate processing of product information (e.g., weighing product attributes inappropriately).

Consumers versus purchasers or purchase influencers
Consumers are injured, and purchasers or purchase influencers are affected, by deceptive advertising campaigns. Sometimes they are the same person; sometimes they are different. Thus, this complex of definitions keeps separate the legal issues of damages and the research issues of misleadingness.

Injury
The notion of total injury to consumers is consistent with utilitarian notions of misleadingness found in Russo et al. (1981); it also accords well with the discussion found in Ford and Calfee (1986) about materiality and injury. Because a net benefit to society may result from showing advertisements that, incidentally, cause belief-fact discrepancies, a misleading advertisement may not be deceptive, but an unnecessarily misleading advertisement is deceptive (Russo et al., 1981).

Deception versus deceptiveness
The proposed definitions take into account Preston's (1982, 1983a,b) observation that researchers are defining deception, rather than deceptive. These definitions allow the roles played by researchers to remain distinct from those played by lawyers and regulators and can complement each other. The tools of research, for example, could first demonstrate that one or more of the claims made in an advertisement are misleading. Once misleadingness had been demonstrated, the courts and regulatory agencies could ascertain whether the misleadingness resulted in significant injury to consumers, or significant unfair losses to competitors, and could then award damages and prescribe remedial action (Olson and Dover 1978; Rotfeld 1983).

It has been argued that the FTC's burden of proof regarding deceptive advertising would greatly increase were the standard to become deception, instead of deceptiveness (e.g., Preston 1983; Rotfeld 1983). As a result of this increased burden, the FTC's ability to protect consumers from deceptive advertisements would suffer. However, to argue in this fashion is to assume not only that opinion is preferable to empirical fact as a basis for rulings, but also that empirical evidence is difficult to collect. Both of these assumptions are questionable.

Thus, the proposed complex of definitions discourages courts and regulatory agencies from considering whether or not an advertising campaign is deceptive until court-appointed researchers can show the misleadingness of at least one claim made in an advertisement used in the allegedly deceptive campaign. One clear benefit of this approach would be to release valuable legal resources from dead-end cases and to channel them into more problematic cases.
CONCLUSION

The definition proposed here is not intended to supplant the work of others, but to build upon it. For this very reason, it uncritically allows for many commonly assumed notions about deception. Of course, opinions may change; new laws may be passed; new facts may be discovered. No present or future empirical theory should be ruled out by definitions, but all theories should be expressible in a common language that permits of comparison and contrast. Therefore, definitions must be flexible enough to change along with the changing circumstances of their usage. It is hoped that the proposed definition will prove to be flexible enough to serve the changing needs of three very distinct groups; researchers, lawyers, and regulators.

APPENDIX: RELATED ASSUMPTIONS ABOUT ADVERTISING AND DECEPTION IN ADVERTISING

About advertising in general
• Advertising is 'any paid form of nonpersonal presentation and promotion of ideas, goods, or services by an identified sponsor' (Kotler, 1988, p. 587).
• 'Advertisers use the words and pictures in their advertisements to make claims about the ideas, goods, or services that they are advertising. Thus, advertising claims may be made linguistically or nonlinguistically. However, a claim is always expressible as a sentence' (Grice, 1975).
• In any kind of information exchange [such as an advertisement], a tacit communication pact exists between speaker and hearer that that information will be truthful and relevant (Garfinkel, 1983, p.176; Grice, 1975).
• 'Advertisement viewers draw pragmatic inferences when they try to understand advertisements (i.e. understand information that is implied or suggested, but not directly stated, by advertisements') (Harris et al., 1979, p. 73).
• The beliefs, recommendations, or purchases of an advertisement viewer may change as a result of viewing an advertisement.
• Only the sponsors of advertisements are legally responsible for what is presented in their advertisements. Advertising agencies are merely agents of the sponsors.

About misleading advertisements
• An advertisement is potentially misleading if it makes a claim that is a blatant or unconscionable lie (e.g., Armstrong and McLennan, 1973; Gardner, 1975). Such a claim 'could not be true even if properly qualified' (Gardner, 1975, p. 42). However, a discrepancy between claim and fact is neither a necessary nor sufficient condition for misleadingness (Gardner, 1975; Preston, 1975; Harris et al., 1979; Rotfeld and Rotzoll, 1980; Ford and Calfee, 1986).
• An advertisement is potentially misleading if it contains an unqualified claim that can be understood and evaluated only if qualified properly (i.e. claim-fact discrepancy; e.g., Aaker, 1974; Gardner, 1975; Armstrong, et al., 1979; Rotfeld and Rotzoll, 1980; Ford and Calfee, 1986). Thus, the set of verbal claims made in an advertisement may be entirely consistent with fact, yet jointly imply a misleading claim (Preston, 1975; Harris et al., 1979; Russo et al., 1981; Garfinkel, 1983). (Note that the FTC is concerned currently only when the unqualified claim causes the unsafe use of products [Ford and Calfee, 1986]).

• An advertisement is potentially misleading if the viewer’s existing attitudes and beliefs can interact with the viewing of the advertisement to produce one or more erroneous beliefs (i.e. claim-belief interaction; e.g., Gardner, 1975; Russo et al., 1981; Barbour and Gardner, 1982).

• An advertisement is misleading if it ‘does not increase, but free-rides on, an existing level of misleading belief’ (i.e. exploitative misleadingness: Russo et al., 1981, p. 127).

• Advertisements containing unbelievable puffed claims cannot be misleading; advertisements containing believable puffed claims may be misleading (Preston, 1975, 1977; Russo et al., 1981). If the beliefs and behaviours of advertisement viewers are adversely affected by the puffed claim, then the advertisement is misleading. (Note that this position is contrary to the FTC’s current position on puffery.)

About deceptive advertising campaigns

• An advertising campaign is deceptive if the total injury to consumers, or the magnitude of the injury to one or more individual consumers, is unacceptable (Preston, 1977; Russo et al., 1981; Ford and Calfee, 1986). Furthermore injury differs from material harm (Armstrong and McLennan, 1973; Aaker, 1974; Armstrong and Russ, 1975; Glassman and Pieper, 1977; Armstrong et al., 1979; Rotfeld and Rotzoll, 1980). (Note that this position is contrary to the FTC’s current position.)

• An advertising campaign is deceptive if it results in unfair losses to competitors (Cohen, 1974; Gardner, 1975).

About proving that an advertisement is deceptive

• Establishing an advertiser’s intention to lie is irrelevant to establishing whether or not an advertisement is deceptive (Preston, 1976; Russo et al., 1981; Rotfeld, 1983; Jones, 1986; Carson, 1988).

• Defining deceptive advertising and measuring deceptive advertising are two separate issues (Gardner, 1975). Thus the definition of deceptive advertising should not rely upon a rule such as the percentage of viewers deceived (Gardner, 1975; Jacoby and Small, 1975; Carson et al., 1985).

• ‘Choice of appropriate criteria to indicate “seriousness” of deception and subsequent interpretation of the collected data must be based mainly on the values of the policy decision maker’ (Olson and Dover, 1978, p. 37).
• The link between beliefs and behaviours is weak (Juster, 1964; Tate and Ball, 1983). Thus for advertising researchers to prove that an advertisement is deceptive, they should supply evidence regarding consumer beliefs and behaviours.

REFERENCES


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