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THE DEFINITION OF DECEPTIVENESS IN ADVERTISING AND OTHER COMMERCIAL SPEECH

Ivan L. Preston*

This Article proposes an unprecedented full statement of the legal definition of deceptiveness in advertising and other commercial speech. Definitions available to date identify deceptiveness vaguely, in some respects incorrectly, and in all respects far too briefly. A more complete definition would reduce or eliminate the frequent disputes arising from these inadequate definitions.

When Federal Trade Commission (FTC or Commission) or Lanham Act deceptive advertising decisions are lengthy, the reason is almost always the contentiousness involved in identifying what facts do and do not define deceptiveness. Recently, the FTC's initial decision in Kraft, Inc.\(^1\) devoted forty-four of its seventy-two pages to disagreements over the validity of facts about consumer perception of the challenged advertisements. Another fourteen pages assessed similar disputes over facts about the product's features.\(^2\) Commission and respondent counsel defined differently these two essential elements of deceptiveness, facts about consumer perception and product features; they disagreed not merely over the facts established, but, more fundamentally, over the types of facts required.

This Article defines deceptiveness in detail sufficient to help eliminate such misunderstandings. The resulting full definition includes only elements that case law has already treated as part of the definition, although many of these elements have not been formally identified as such. This Article also proposes additions to the definition which accurately reflect the interdisciplinary nature of deceptiveness both as a behavioral concept and a legal concept. The definition calls for evidence about the communication as well as the advertised product or service. Both types of evidence frequently in-

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2. Id. at 12-69.
volve the study of what happens inside consumers' heads. Thus, the definition of decep-
tiveness proposed in this Article is based on consumer behavior as well as on law, and its factfinding process represents a blending of the expertise of both fields.

The additions suggested here reflect the best expert knowledge available about consumers' perceptual responses to marketplace communications, and about consumers' interpretations of product features. Incorporating these additions would augment and improve, not discredit and abandon, the prevailing definition. There would be no break with the past, but a smoother flow into the future.

The FTC Act and the Lanham Trademark Act define decep-
tiveness poorly, stating only that "deceptive acts or practices" or "any . . . false or misleading description [or] representation of fact" are violations of the law. More precise definitions emerge when an agency or court interprets those phrases. Such interpretations provide definitional content explicitly or, in the many instances when they do not identify it as such, implicitly. These decisions provide a conceptual definition of decep-
tiveness, meaning that they identify which consumer responses and product features indicate the presence of a violation. They also provide, although never labeling it as such, an operational or measurement definition, meaning that they identify which methods of measurement will validly indicate the presence of consumer responses and product features that might result in a violation. As a whole, these interpretations and decisions create the "real" definition of decep-
tiveness, which is what this Article seeks to identify.

While case decisions frequently rewrite definitional elements on a piece-
meal basis, overall examinations of the topic are rare. Only recently has the FTC incorporated the elements of the decep-
tiveness violation into a formal definition. Before that, the FTC had identified the elements, but had not conveniently packaged them into a single statement. The absence appar-

5. Until the 1970's, the most frequent FTC procedure was for the complaints to lay out the elements one at a time and for the decisions to consider them one at a time. Sometimes an opinion would not comment on a particular element, apparently taking it for granted. Other times, an opinion would interpret an element, but without recourse to the overall definition. Eventually, the decisions began including sections specifically discussing the legal framework for the violation. Such comments were definitional, even though they usually did not explicitly state a definition. See, e.g., Pfizer, Inc., 81 F.T.C. 23, 58 (1972) (the court stated a "regulatory framework" against which "the deception charge in this case must be viewed"). Among others, see Crown Cent. Petroleum Corp., 84 F.T.C. 1493, 1523-26 (1974), modified on other
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ently was of no great import until 1983, when a Commission majority of three led by Chairman Miller noted that "[n]umerous Commission and judicial decisions have defined and elaborated on the phrase 'deceptive acts or practices.' Nowhere, however, is there a single definitive statement." 6

The Miller majority's interest in the definition stemmed from a desire to change it. 7 Two Commissioners dissented on the basis that the current definition was longstanding, and thus should remain unchanged. The dissent held that the definition of a legally deceptive communication (reflecting the topic of this Article, and more generally, any act or practice in or affecting commerce) is one which has the tendency or capacity to deceive or mislead a substantial number of consumers in a material respect. 8

Chairman Miller defined a deceptive communication as one that is likely to mislead consumers acting reasonably under the circumstances and is also material. 9 The actual differences involved in this new definition dwindled


9. Cliffdale Assoc., 103 F.T.C. 110, 165-66 (1984). This is not quite the original from the Policy Statement on Deception, supra note 6, at 174, but rather is the revision the majority actually used in subsequent cases, beginning with Cliffdale. The original referred to being likely to mislead consumers acting reasonably in the circumstances "to [their] detriment." Policy Statement on Deception, supra note 6, at 176. The quoted portion was elaborated ambiguously to mean either that consumers would be injured, which had not traditionally been a
once the majority was criticized for its apparent repudiation of the old definition. Although the FTC now applies the Miller definition in consumer cases, no litigated case has shown that the new standard makes a difference in the outcome.

In Lanham Act cases, which are brought privately by advertisers against each other, the courts have attempted no parallel formal definition. The statutory wording, however, is more detailed than the FTC's regulatory language. The wording used until November, 1989, and thus applicable to the Lanham Act cases cited herein, required that the false description or representation apply only to the defendant's goods or services, and that it either damage or be likely to damage the plaintiff. The new wording refers to false or misleading descriptions or representations of fact which in commercial advertising or promotion misrepresent any goods, services, or commercial activities so as to damage or be likely to damage the plaintiff.

Readers may wonder whether the term "falsity" is defined the same way in Lanham Act cases as in FTC cases. In one early Lanham Act case, the court referred to "actually false" claims as a contrast to claims having a definitional element, or that they would be likely to be injured, which was traditional. Id. at app. 182-83.

10. Protests that materiality should not be changed to mean actual injury resulted in the revision in Cliffdale. See discussion in Ford & Calfee, supra note 7, at 85-86, 93-94. Ford and Calfee call the definition as revised "a modest clarification and elevation of the standards," meaning that the new definition will be met less frequently and result in slightly less deception. Id. at 100. Another commentator calls it "neither a restatement of the current case law nor a totally new set of standards." Comment, Trade Regulation, supra note 7, at 815. Other commentators, however, regard the changes as much more significant. See Dahringer & Johnson, supra note 7, at 341; Comment, Enforcement Policy, supra note 7, at 159.

11. The FTC began using this definition in Cliffdale, 103 F.T.C. at 110.

12. Commissioner Bailey's dissent in International Harvester Co., 104 F.T.C. 949, 1077 (1984) (Bailey, Comm'r, concurring in part, dissenting in part), might be interpreted as an attempt to distinguish, but her disagreement with the majority on this occasion was directed toward other reasoning which she found novel and inappropriate. In a case decided at the Commission level just before the new definition appeared, respondent asked an appellate court to make the FTC apply the new standard rather than the old, probably hoping that the new standard would make a deceptiveness finding less likely. The attempt was unsuccessful. Amrep Corp. v. FTC, 768 F.2d 1171, 1177-78 (10th Cir. 1985), cert. denied, 475 U.S. 1034 (1986). Elsewhere, the Ninth Circuit said, "[w]e cannot accept petitioners' argument that a 'substantially different standard was applied, to which [they] had no opportunity to respond.'" Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1436 (9th Cir.), cert. denied, 479 U.S. 1431 (1986).


"tendency to mislead, confuse or deceive."15 A "false description or representation" as well as "words . . . tending falsely to describe or represent" a product were used together in another case.16 These usages may suggest that Lanham Act decisions treat deceptiveness as one way, but not the only way, to be false. This suggestion probably developed through the original wording of the Lanham Act, which referred only to falsity,17 just the reverse of the FTC's development of terminology in which actual falsity, in other words, a false explicit claim, was one type of deceptiveness.18

The difference between Lanham Act and FTC Act definitions of deceptiveness, however, has been in terms and not in actual concepts. The FTC's two kinds of deceptiveness are without question the same as the Lanham Act's two kinds of falsity. When forced to choose between terms, this author prefers the term deceptiveness because the FTC's use of deceptiveness is older and is probably interpreted by most observers as a broader concept than the Lanham Act's use of falsity.

The key to evaluating these definitions of deceptiveness is to realize that they amount to no more than skeleton definitions, and do not attempt to explain fully all of the elements actually required for a complete definition of deceptiveness. Their incompleteness may be well motivated because they are naturally appealing in their simplicity; the definitions are easily memorized and quickly accessible to users in their brevity.

In the long run, however, simple definitions may result in offsetting disadvantages if observers think a topic is simple when actually it is quite complex. To solve this problem, each conceptual and measurement element actually used to define deceptiveness must be identified.

Although regulators use more than one definition of deceptiveness, this Article refers only to a single definition because the two major definitions, those of the FTC Act and the Lanham Act, are essentially similar. Considerable differences exist in their procedural law; this Article, however, focuses on substantive law. Therefore, this Article discusses the FTC Act and the

Lanham Act in tandem, and notes the occasional substantive differences between them.

The sovereign states also produce definitions of deceptiveness, but this Article ignores these definitions because they are based largely on the national model of the FTC, which is usually pre-Miller. The definitions produced by individual jurisdictions vary only slightly. The advertising industry’s self-regulation apparatus is also a significant source of activity, but its published decisions regarding deceptiveness provide too little detail to allow the type of treatment given here.

The following sections identify the prevailing conceptual and measurement elements used in defining deceptiveness and state a definition that explicitly incorporates all such elements. This Article then criticizes the definition and suggests changes and additions. Finally, this Article proposes an augmented definition that incorporates these suggestions.

I. HOW DECEPTIVENESS IS CURRENTLY DEFINED—CONCEPTUAL ELEMENTS

A. Claim Must be Commercial

Deceptiveness, as an exemption from the ordinary rights of freedom of expression protected by the first amendment, applies to commercial speech only. Thus, determining whether speech is commercial or noncommercial

19. In 1981, the fiftieth state passed a version of the FTC Act. Comment, Enforcement Policy, supra note 7, at 159 n.216. For discussions of state laws, see D. PRIDGEN, CONSUMER PROTECTION AND THE LAW, chs. 3-6 (rev. 1989); J. SHELDON & G. ZWEIBEL, SURVEY OF CONSUMER FRAUD LAW (1978).


21. “The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 563 (1980) (citation omitted).

is critical to the question of whether the FTC has jurisdiction to hear a case.\textsuperscript{23} If the speech is noncommercial, the respondents avoid the issue of deceptiveness.

Although commercialness is required under the Lanham Act as well as the FTC Act, no Lanham Act cases have discussed the issue. Perhaps this is because the Lanham Act requires demonstrating the likelihood of damage,\textsuperscript{24} which demands the existence of a commercial purpose.

\textbf{B. Claim Must be Disseminated}

The definition of deceptiveness requires that the challenged commercial communication be disseminated. This sometimes means "widely disseminated,"\textsuperscript{25} which often happens with advertising; however, the FTC has noted elsewhere that "Section 5 prohibits deception in advertisements which are disseminated in a single publication or numerous periodicals . . . without regard to whether the ad was published once by itself or several times."\textsuperscript{26} Thus, the necessary threshold for dissemination is far less than what often occurs in national advertising. Of course, dissemination in the mass media is not required for a salesperson's oral claim, which is typically stated only within a place of business. Dissemination, therefore, need not be "wide" in the sense of encompassing the entire nation or even a "large" audience. Rather, dissemination must merely be wide enough to cause an agency or court to conclude that the effect on consumers or defendants will be significant.\textsuperscript{27} The criterion is not defined more precisely.

\textbf{C. Claim Must Consist of What is Conveyed}

Perhaps the definition of deceptiveness is imprecise because the degree of dissemination is not a critical element of the definition. Nor is deceptiveness defined by what is literally communicated. Rather, the definition focuses on

\textsuperscript{1990] Deceptiveness in Advertising 1041}

\textsuperscript{23. Two respondents argued unsuccessfully in this way to avoid having their advertisements judged on deceptiveness: \textit{R. J. Reynolds Tobacco Co.}, 5 Trade Reg. Rep. (CCH) \textsuperscript{22,522}; \textit{National Comm'n on Egg Nutrition}, 88 F.T.C. 89 (1976), \textit{modified}, 570 F.2d 157 (7th Cir. 1977), \textit{modified order}, 92 F.T.C. 848 (1978).}

\textsuperscript{24. See discussion \textit{infra} notes 52-53, 58, 103-04 and 113-19 and accompanying text.}

\textsuperscript{25. \textit{Litton Indus., Inc.}, 97 F.T.C. 1, 13 (1981). Although indicia of dissemination were given, the phrase was not defined nor was any dispute over the matter evident.}

\textsuperscript{26. \textit{Chrysler Corp.}, 87 F.T.C. 719, 751 (1976), \textit{modified on other grounds}, 90 F.T.C. 606 (1977).}

\textsuperscript{27. FTC complaints routinely charge, and decisions find, that Commission proceedings and resulting orders are in the public interest. Lanham decisions find that defendants' actions damage or are likely to damage. The opinions, however, never seem to link levels of dissemination to these matters explicitly.}
the claim conveyed to the consumer by the disseminated communication. As the FTC explained long ago, "[t]here is no contest as to the wording of the advertisements . . . . The contest is as to the meaning of the said advertisements." Lanham Act cases recognized a similar interpretation of deception: "[t]he question in such cases is — what does the person to whom the advertisement is addressed find to be the message?" Under either the FTC or the Lanham Act, the meaning must be determined on the basis of the entire challenged advertisement or other communication. Where more than one such communication is involved, the meaning must be determined on the basis of each one separately.

Logically, then, the conveyed claim need not be stated explicitly in the challenged communication; it may instead be implied. Proof establishing

28. Rhodes Pharmacal Co., 49 F.T.C. 263, 282 (1952), aff'd, 348 U.S. 940 (1955); see also American Home Prods. Corp., 98 F.T.C. 136 (1981), enforced as modified on other grounds, 695 F.2d 681 (3d Cir. 1983), modified on other grounds, 103 F.T.C. 528 (1984). "It is immaterial that the word 'established,' which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public." Id. at 374.


30. For FTC Act cases, see American Home Prods. Corp. v. FTC, 695 F.2d 681, 687 (3d Cir. 1982) (stating that the court should judge the advertisement as a whole); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (stating that courts should view the entire mosaic to determine deceptiveness, rather than each tile separately); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942) ("Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."); Policy Statement on Deception, supra note 6, at 176. See generally Preston, Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases, 1987 COLUM. BUS. L. REV. 633, 675-76, 680-81 (1987) (analyzing an advertisement for deceptiveness involves viewing the advertisement in its entirety). For Lanham Act cases, see Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 276 (2d Cir. 1981) (stating court should view advertising in its entirety); American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 n.11 (2d Cir. 1978) (same).

31. American Home Prods. Corp., 98 F.T.C. at 414-15. See generally Preston, supra note 30, at 681 (when considering a number of advertisements together, the advertiser may be held accountable for each individual advertisement as a separate violation). The point has not arisen in Lanham cases.

32. For the FTC Act: "The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied." Aronberg, 132 F.2d at 167. See generally Policy Statement on Deception, supra note 6, at 175 n.4 (misrepresentations may be either express or implied); Analysis, supra note 8, at 382-83 (an implied claim may arise from express statements regarding the performance or attributes of a product, or from some innuendo conveyed by the advertisement as a whole); Preston, The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising, 57 U. CIN. L. REV. 1243, 1247-49 (1989) [hereinafter Preston, Implications] (express statements, as well as reasonable implications, must be considered when analyzing a deceptive claim).

For the Lanham Act: "That Section 43(a) of the Lanham Act encompasses more than literal falsehoods cannot be questioned." American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978). See generally Preston, False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence, 79 TRADEMARK REP. 508,
the truth of the explicit content does not conclusively rule out a finding of deceptiveness, nor does the failure to be aware of an implication excuse the advertiser. Implications may be based not only on what is conveyed but also on what is omitted. Identification of all implications, however, must be reasonable.

Until 1989, in Lanham Act cases, the challenged claim in the defendant's communication had to be about the defendant's own product, although the claim could also be about plaintiff's product if the claim was of comparative form, thus mentioning both products. The rewording effective since 1989

33. For the FTC Act: "Claims that are literally true may also be deceptive where the overall impression communicated is misleading . . . ." Analysis, supra note 8, at 381; see also Preston, Implications, supra note 32, at 1247 (if the net impression created by the advertisement tends to mislead, then it is no defense that the express statements in the advertisement are true). For the Lanham Act: "[T]he plaintiff may show that, although the challenged statement is ambiguous or literally true, the advertising is nonetheless misleading . . . ." American Home Prods. Corp. v. Abbott Labs., 522 F. Supp. 1035, 1040 (S.D.N.Y. 1981).


Lanham Act cases have not explicitly stated that the failure to be aware of an implication does not excuse the advertiser, but the same types of implications have been identified as in FTC Act cases. Similarly, courts have rejected advertisers' protests about the nonexistence or inapplicability of advertisements' implications. See generally Preston, Lanham Act, supra note 32, at 513-26 ("Identifying implications as Lanham Act violations").

35. Policy Statement on Deception, 103 F.T.C. at 176; Analysis, supra note 8, at 383. For discussions of the No Qualification Implication and the Ineffective Qualification Implication in FTC Act cases, see Preston, Implications, supra note 32, at 1277-84. For Lanham Act cases, see Preston, Lanham Act, supra note 32, at 516-18.

36. "This is not to say that an advertisement is susceptible to every reading that it may technically support, no matter how tenuous it might be; rather, the interpretation must be reasonable in light of the claims made in the advertisement, taken as a whole." Kroger Co., 98 F.T.C. 639, 728 (1981), modified on other grounds, 100 F.T.C. 573 (1982); see Policy Statement on Deception, supra note 6, at 178; Analysis, supra note 8, at 392. The point has not arisen in Lanham Act cases, probably because Lanham courts do not have the FTC's privilege of identifying implications on the basis of the advertisement's content alone but rather must use extrinsic evidence. See discussion infra text accompanying note 86.

allows an action against a claim about either, and not necessarily both, the defendant's or the plaintiff's product.\(^{38}\)

**D. Claim Must be Conveyed to Criterion of Consumers**

To be legally defined as conveyed, a claim need not be conveyed to all relevant consumers. Rather, the communication can convey two or more claims, each to significant portions of the audience. Such a communication can be a violation if one claim is deceptive, even if the remaining claim or claims are not.\(^{39}\) Accordingly, the regulators must designate, in effect, a criterion for the number of consumers acting reasonably, or more typically a criterion percentage, and then find that the challenged claim has or has not been found conveyed to that many.\(^{40}\) Often, regulators do not do this explicitly, but they appear in virtually all cases to do so at least impliedly.

To describe the claim's conveyance in numerical terms tracks closely with Commissioners Pertschuk and Bailey's definitional element of a "substantial number"\(^{41}\) and with the Lanham Act element of a "substantial segment"\(^{42}\) or "a not insubstantial number of consumers."\(^{43}\) It does not, however, reflect the Miller majority's now prevailing replacement element of "consumers acting reasonably in the circumstances."\(^{44}\) Chairman Miller's rationale for this phrasing\(^{45}\) did not incorporate a numerical concept, and left the definition in dispute.\(^{46}\)

Although the criterion percentages of consumers acting reasonably have never been specified precisely, the number may be relatively small, as little as

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39. Policy Statement on Deception, supra note 6, at 178; Analysis, supra note 8, at 381-82; Preston, Lanham Act, supra note 32, at 514.

40. Use of numbers ("many thousands") rather than percentages occurred in Travel King, 86 F.T.C. 715, 759-60 (1975), but such usage is rare.

41. Analysis, supra note 8, at 387-94.


44. Policy Statement on Deception, supra note 6, at 176.

45. Id. at 177-82.

46. Cliffdale Assoc., 103 F.T.C. 110, 185-88 (1984) (Pertschuk, Comm'r, dissenting), 192-95 (Bailey, Comm'r, dissenting); Analysis, supra note 8, at 372, 391-94. That the discrepancy is more apparent than real will be seen in this Article's discussion of how the new and old elements are measured, which will augment the immediate discussion of how these elements are conceptualized. Until then, this Article will tentatively treat the criterion as being numerical.
under fifteen percent in Lanham Act cases and from twenty to twenty-five percent at the FTC. The Pertschuk-Bailey minority would use the latter range, holding the figures to reflect past practice and protesting the Miller majority's statement. The minority argued that, despite the majority's silence about such numbers, the majority opinion was open to the interpretation that the appropriate percentages, should percentages be used, would be significantly larger than twenty to twenty-five. A higher figure would reduce the number of deceptiveness findings and comport with the reported predilections of Reagan appointees to deregulate. Thus, the minority was protesting not only that the majority was misdescribing the law, but also that the majority was deregulating.

Nevertheless, of the nine litigated cases since the Miller definition was installed, only two cases contain percentages, or even numbers. Both cases include figures that are above the twenty to twenty-five percent level, thereby supporting a finding of deceptiveness under either the old or the new definition. Thus, the post-Miller FTC record does not indicate that the criterion percentages have changed.

Under either the old or the new definition, however, certain figures are called too insignificant, even though considerable mystery accompanies the process of determining the proper figure. One reliable guideline is that the

49. Cliffdale, 103 F.T.C. at 184-85, 191 (Pertschuk, Bailey, Comm'r's, dissenting).
51. Percentages less than 20 to 25% are not automatically too insignificant at the FTC, but vague statements imply that some figures will be considered too small to support a finding of deceptiveness. See Analysis, supra note 8, at 390; Preston, Implications, supra note 32, at 1250. For Lanham Act cases, the determinative inquiry focuses on whether a "not insubstantial number of consumers were clearly misled." See Coca Cola, 690 F.2d at 317. See generally Preston, Lanham Act, supra note 32, at 533 (where false claims create a danger to consumers, the "not insubstantial number of consumers" standard, although vague, is applicable). "There is no established quantitative measure of the degree . . . ." R. J. Reynolds Tobacco Co. v.
greater the potential harm, the smaller the minimum percentage. Nevertheless, the cases offer no insight as to whether the percentage is based on all relevant consumers acting reasonably, on those to whom the message has been disseminated, or on some other group.

E. Claim Must be Material, Factual, and False or Unsubstantiated

The claim conveyed to a criterion percentage of consumers must also be material; it must be likely to affect consumers' choice of, or conduct regarding, the promoted item. Presumably, for a false and material claim, the effect would be detrimental; however, the criterion is not the actual impact but only the potential impact.

Once the claim is found to be conveyed and material, it must be found false or unsubstantiated. As a starting point, the claim must be capable of Loew's Theatres, Inc., 511 F. Supp. 867, 876 (S.D.N.Y. 1980). The decision then cited the "not insubstantial" terminology and declared that "over 25%" met this test. Id. In consumer behavior literature, finding the proper figure has been discussed as the "n percent problem." Jacoby & Small, The FDA Approach to Defining Misleading Advertising, 39 J. MKTG. 65, 67 (1975); Russo, Metcalf & Stephens, Identifying Misleading Advertising, 8 J. CONSUMER RES. 119 (1981).

52. Some harm to consumers may involve physical injury or even death, while other harm may be only the loss of a small sum spent in paying more than the lowest available price. For FTC cases, see Analysis, supra note 8, at 393. For Lanham Act cases, this guideline has not been stated, no doubt because the harm in question is to plaintiffs rather than to consumers.

53. For FTC Act cases: see, e.g., Thompson Medical, 104 F.T.C. at 816; Clifftdale, 103 F.T.C. at 165. The Policy Statement on Deception gained notoriety for equating materiality with actual injury. Policy Statement on Deception, supra note 6, at 183 (1984). Nonetheless, the Commission in all subsequent cases including those just cited fell back toward earlier understandings such as: "[A] misrepresentation may be material in affecting a buyer's choice even though it does not relate to the product's quality or merits." FTC v. Colgate-Palmolive Co., 62 F.T.C. 1259, 1273 (1963), remanded, 326 F.2d 517 (1st Cir. 1963), rev'd and enforced, 380 U.S. 374 (1965). The Supreme Court upheld the point. Colgate-Palmolive Co., 380 U.S. at 390. The newest expressions stress likelihood to affect, while the early ones stressed a weaker potential to affect. See supra notes 9-10 and accompanying text.

For Lanham Act cases: the claim must be one that "is likely to influence the purchasing decision." Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974). In Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2d Cir. 1981), defendants argued that the claim was immaterial because it was based on tests of the product rather than the product's inherent qualities. The court, however, pointing out that the statute referred to representations made "in connection with" the product, concluded in effect that test claims were material: "[T]he medium of the consumer test truly becomes the message of inherent superiority." Id. at 277-78.

Section 43(a) of the Lanham Act also states that the challenged claim must be one for which plaintiff "is or is likely to be damaged." 15 U.S.C. § 1125(a) (1988). The amended version is the same as the earlier version except that the new language is gender neutral. Act of Nov. 16, 1988, Pub. L. No. 100-667, § 132, 102 Stat. 3946 (codified as amended at 15 U.S.C. § 1125(a)). This element may appear related to materiality, but it involves the fate of the plaintiff whereas materiality involves the fate of the consumer.
being found true or false. Therefore, it must be factual. Puffery, the type of opinion statement held to be accorded no factual meaning by consumers, is thereby immune from being defined as deceptive.\footnote{54}

The product or service is then examined to determine whether the conveyed fact about it is true or false. Should the regulators fail to find the claim false, they may sometimes establish that it cannot be found true, either. In such a case, the regulators may charge that the claim lacks substantiation or a reasonable basis.\footnote{55}

\section{F. Claim Must be Considered Apart from Knowledge from Other Sources and Must Damage or be Likely to Damage}

When a conveyed claim is false or unsubstantiated, the consumer may sometimes learn the truth before making a purchase, prompting the protest that the claim was not, in the end, deceptive. The FTC’s position on this point, however, is that “it is well established that it is unfair to make an initial contact or impression through a false or misleading representation, even though before purchase the consumer is provided with the true facts.”\footnote{56}


\footnote{55. This author elsewhere created the combinatorial term of “RB/S” or reasonable basis/substantiation representation following an analysis which showed that these two terms, although originated separately, have at the FTC long since described the same phenomenon. See Preston, Description and Analysis of FTC Order Provisions Resulting from References in Advertising to Tests or Surveys, 14 PEPPERDINE L. REV. 229, 253-54 (1987). A typical current usage is that “[i]f the claims are not in fact substantiated, that is, supported by a reasonable basis, the advertising may be found deceptive.” Analysis, supra note 8, at 383.

While the lack of substantiation is an equally available and valid alternative to falsity in FTC Act cases, courts are divided on these approaches in Lanham Act cases. See generally Preston, Lanham Act, supra note 32, at 512 & n.19 (judicial decisions conflict as to whether lack of substantiation alone, absent any showing that the claim is false or deceptive, is a violation of the act). Compare Toro Co. v. Textron, Inc., 499 F. Supp. 241, 253 (D. Del. 1980) (lack of substantiation is not itself a violation) with Stiffel Co. v. Westwood Lighting Group, 658 F. Supp. 1103, 1111 (D.N.J. 1987) (lack of substantiation is itself a violation); see also Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 227-28 (3d Cir. 1990) (plaintiff must show that advertisement is false or misleading and not just that the advertisement is unsubstantiated). There is little basis available for speculation on when, if ever, this discrepancy will be reconciled, or in which direction.

\footnote{56. Chrysler Corp., 87 F.T.C. 719, 739, 751-52 (1976), modified on other grounds, 90 F.T.C. 606 (1977). See generally Analysis, supra note 8, at 385-86 n.56 and accompanying text (once a deceptive practice has occurred, it may not be cured through subsequent disclosure of the misleading information). There are no comments in Lanham Act cases on this point.}
Thus the impact of an advertisement is considered by itself: "Judge Hyun correctly considered the net impression of individual advertisements and was not required to consider the meaning of the claims in the context of the total sales process."\(^{57}\)

Although falsity or lack of substantiation is the final element in FTC Act cases, an additional definitional element in Lanham Act cases is that the claim must damage or be likely to damage the plaintiff.\(^ {58}\)

**G. Claim Need Not be Intended, Believed, nor Create Actual Deception**

The absence of certain traditional elements in this definition of deceptiveness is noteworthy. Intent to deceive has been a requirement for proving common law fraud since before the FTC was created, but intent need not be proved by the Commission nor by Lanham Act plaintiffs.\(^ {59}\) In addition, the consumer's actual belief need not be shown. A violation stems not from a communication's actual deception, but rather from its deceptiveness, in other words, its capacity or likelihood to deceive or mislead.\(^ {60}\)

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57. Removatron Int'l Corp., FTC Docket No. 9200, slip op. at 6 (Nov. 4, 1988), aff'd, 884 F.2d 1489 (1st Cir. 1989).

58. See supra note 53.


60. For the FTC Act: Policy Statement on Deception, supra note 6, at 176; Analysis, supra note 8, at 380. For the Lanham Act: Toro Co. v. Textron, Inc., 499 F. Supp. 241, 251 (D. Del. 1980) (citing Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 649 (3d Cir. 1958)); Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974). The distinction was made at the FTC to implement Congress' intent to prevent deception before it actually occurred, as acknowledged in the first appellate challenge to a Commission decision. "[T]he legislative intent is apparent. The [C]ommissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived." Sears, Roebuck & Co. v. FTC, 258 F.3d 186, 189 (2d Cir. 1980).
sumer sees a false or unsubstantiated claim conveyed, then legally the claim is likely to deceive because it can be believed. Therefore, a violation exists even without knowledge of whether belief actually occurs or is even likely to occur.

H. The Conceptual Definition

Thus, a complete conceptual definition of deceptiveness would read as follows:

When a claim is presented in a communication that is commercial and is disseminated to some criterion of consumers, and the claim, considered within the communication taken individually and as a whole, is conveyed explicitly or impliedly to some criterion proportion of relevant consumers, with or without intent to deceive, with or without belief, with or without actual deception, with or without consumers learning the truth prior to acting on it, and the claim is factual, is material, is false or unsubstantiated, and it damages or is likely to damage a plaintiff party, the claim is legally deceptive.

The conceptual definition actually is more complex, though, because it implicitly includes the definitions of its component terms ("commercial," "material," etc.) as discussed throughout this section.

II. How Deceptiveness is Currently Defined—Measurement Elements

The definition just stated is more complete and informative than the skeleton definitions previously described. It has, however, been endowed only with the relevant conceptual elements. Many people may choose to go no further because the resulting definition is useful for abstract contemplation.
Nevertheless, for use in actual practice, a definition cannot be complete without including the relevant operational or measurement elements. Without the appropriate measurement method or test, one cannot identify conceptual elements of the definition in concrete terms. Most of the definitional disputes that occur focus on measurement methods or tests. Thus, determining the measurement elements of deceptiveness is probably even more important, albeit more difficult and uncertain, than determining the conceptual elements.

It may seem odd to speak of “measuring” a communication in the case of elements not customarily described in numerical terms, as for example in determining whether a claim is factual or nonfactual. Measurement, however, is done not only in numerical scaling but also in nominal scaling consisting of nominating observations into one category or another. A thing is X or is not X, and in that sense every element of a definition is measured. Accordingly, now that this Article has already defined the elements in conceptual terms, it will define them in measurement terms.

A. Commercialness Must be Measured

In deciding whether a communication is commercial, the United States Supreme Court has asserted that certain factors are not determinative.

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that [the individual] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself . . . . 63

The Court, however, added that the presence of all such factors in this instance made the speech commercial.64

Recently, R. J. Reynolds argued that its advertising was noncommercial and thus beyond FTC jurisdiction. The Commission observed that the message itself may determine commerciality. Factors to consider include whether the message is a paid advertisement, refers to a product (even if only generically), discusses attributes of the product, and relates to the speaker’s economic or commercial motivation.65

Thus, while most speech by commercial firms contains factors which make it commercial, some speech by commercial firms may not be commer-

64. Id. at 67.
The determination involves an overall judgment as to the speech's primary purpose; the primary purpose overrides the inclusion of some content that might on its own be noncommercial. The criteria as stated, however, are vague and difficult to apply to close cases.

B. Dissemination and Conveyance of the Claim Must be Measured

No FTC Act or Lanham Act case exists which (1) explicitly states a criterion or assesses the extent of dissemination against any assumed criterion; (2) focuses on a dispute over whether the dissemination met a criterion; or (3) holds that the dissemination did not meet an assumed criterion. The decisions usually include a summary of the extent of dissemination. The apparent criterion, however, is simply that there be some unspecified amount of dissemination. Common sense seemingly demands that too little dissemination could sometimes occur, but such a possibility seems not to be present on the record.

In order to identify conveyed claims and the percentages of people seeing them conveyed, consumer researchers and regulators obtain data from consumers. First, researchers and regulators must determine whether the conveyance is explicit or implied. The FTC is authorized to determine whether a claim has been conveyed by looking at nothing but intrinsic evidence, in other words, the literal communication alone. The FTC chooses to use that method in the case of explicit claims for which "the representation itself

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68. See Note, supra note 66.
69. Criterion is discussed neither in the FTC majority's Policy Statement on Deception, supra note 6, at 174, nor in the minority's Analysis, supra note 8, at 372.
70. Typically, at the FTC such data are summarized in the initial decision and not appealed to the Commission by either side. The summary includes such things as the media used, the number of times and dates of exposure, and the total audience exposed.
establishes the meaning." Courts also typically judge explicit claims under the Lanham Act by intrinsic evidence alone. Thus, measuring the conveyance of explicit claims simply consists of finding claims in the communication and assuming that they are thereby conveyed into consumers' minds.

For implied claims, one must base the determination generally on certain reasoning, although conveyance is assumed when evidence, which is typically unavailable, shows that the advertiser intended to convey an implied meaning. The FTC's method of determining whether implied claims have been conveyed depends on whether it can decide with confidence using intrinsic evidence alone. When such claims are easy to interpret, no other evidence is necessary. In recognition that its interpretations must be reasonable, however, the Commission requires extrinsic evidence when the claims cannot be interpreted by relying on intrinsic evidence alone.

For those easily interpreted implicit claims, the FTC now decides, consistent with the new Miller definition, how consumers acting reasonably would interpret the communication. This definition replaces the old definition, which required that a substantial proportion of consumers see the advertise-

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74. For the FTC Act: "An interpretation will be presumed reasonable if it is the one the respondent intended to convey." Policy Statement on Deception, supra note 6, at 178. For the Lanham Act: "[P]roof that the advertiser intended to communicate a false or misleading claim is evidence that that claim was communicated, since it must be assumed that more often than not advertisements successfully project the messages they are intended to project, especially when they are professionally designed . . . ." McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517, 530, modified on other grounds, 501 F. Supp. 540 (S.D.N.Y. 1980).
75. Policy Statement on Deception, supra note 6, at 176; Thompson Medical, 104 F.T.C. at 789.
76. See supra note 36 and accompanying text.
77. See supra note 74 and accompanying text.
78. Although the original Miller reference was to "reasonable consumers," the change was quickly made to refer to "consumers acting reasonably under the circumstances." The latter reference is variously described as involving consumers making reasonable interpretations or involving messages that can reasonably be interpreted as being conveyed. See Figgie Int'l, Inc., 107 F.T.C. 313, 374 (1986); International Harvester Co., 104 F.T.C. 949, 1056-57 (1984); Thompson Medical, 104 F.T.C. at 788, 790, 791, 797; Cliffdale Assoc., 103 F.T.C. 110, 165 (1984).

The term "reasonable consumers" sometimes still appears. See, e.g., Thompson Medical, 104 F.T.C. at 812. The sum of the various usages and the overall context in which they appear, however, suggests that the term no longer refers solely to those consumers who act reasonably in the sense that the Policy Statement originally put it. Instead, "[t]his element focuses only on the interpretation of a claim. We do not inquire further and consider the reasonableness of the consumer's decision to accept or believe in a particular claim." International Harvester, 104 F.T.C. at 1056 n.21. "Consumers acting reasonably under the circum-
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ment conveying the claim. Presumably, the change should make a difference. Nevertheless, in practice it is impossible to discern a change because the measurements used in the two cases are not identifiably different.

No explanation of how one defines a consumer acting reasonably is given in FTC decisions today, just as no explanation of how one defined a substantial proportion was given in the past. Nor have the cases decided under the Miller definition produced any comments suggesting that some claims found conveyed under the old definition would be found not conveyed under the new one.

Therefore, for easily interpreted implied claims, the measurement definition of conveyance is that conveyance occurs when a majority of Commissioners says it occurs for consumers acting reasonably, as determined by examining the advertisement. The Commission's reasoning is often not explained, and when it is, no standardized criterion is invoked.

When the Commission considers implied claims about which it cannot decide with confidence, the Commission insists on extrinsic evidence, that is, evidence of consumers' perceptions apart from the communication itself. This requirement allows the Commission to avoid otherwise arbitrary opinions. One may note, however, that the Commission itself decides its own level of confidence. Should the Commission wish in a certain case to determine deceptiveness without examining consumer response, it need only claim it can do so confidently. Thus it really has not eliminated the possibility of making arbitrary opinions, although it has created a possible mechanism for self-restraint.

A commitment which the Commissioners cannot escape is that they must consider extrinsic evidence that has been introduced into the record. Such evidence may, however, be assessed as having greater or lesser probative value. When extrinsic evidence has probative value, its role is to supple-

79. The old definition was rejected: "The Commission, however, will not require evidence that a claim has been interpreted in a certain way by some threshold number of consumers." International Harvester, 104 F.T.C. at 1057.

80. See supra text accompanying note 49 (critics of the Miller definition warned that the new definition was a deregulatory tool).

81. Thompson Medical, 104 F.T.C. at 789.

82. Cinderella Career & Finishing Schools, Inc., v. FTC, 425 F.2d 583, 588 (D.C. Cir. 1970). "Because Thompson offered extrinsic evidence, we are obliged to consider it." Thompson Medical, 104 F.T.C. at 794. See generally Preston, supra note 71, at 366-69 (distinguishing between situations where the FTC is required to allow extrinsic evidence and situations where the FTC must have extrinsic evidence to decide the cases).

83. Firestone Tire & Rubber Co., 81 F.T.C. 398, 454 (1972), aff'd, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); see also Preston, supra note 71, at 366-68 (the rule
ment rather than to replace the Commission's own expertise. This role largely transforms the process of identifying deceptiveness into an interdisciplinary blending of legal and consumer behavior expertise.

When the extrinsic evidence consists of probative consumer surveys, the Commission's current assertion that it is applying the new Miller definition is cast into doubt because the survey evidence inevitably produces the type of percentage figure indicated by the old definition in calling for a substantial proportion. Thus, while the conceptual element of the definition involves no explicit reference to numbers or a numerical criterion, the measurement element does. In such cases, the measurement element provides the actual definition because it identifies the decision steps the definer actually uses.

The Lanham Act procedure differs from the FTC Act procedure in that the Lanham Act requires extrinsic evidence for all implied claims. Such evidence does not have to be obtained directly from consumers, but must go beyond looking at just the communication by examining consumer response at least indirectly. As at the FTC, such evidence is not absolutely determinative, but, under the Lanham Act, it plays a more prominent role than at the Commission.

The major types of extrinsic evidence are consumer surveys and expert testimony. Both FTC Act and Lanham Act proceedings have stringent requirements for surveys, mostly because opposing lawyers have learned ways to criticize standard copytesting, such as day-after-recall or theater testing. When acceptably rigorous, such surveying of consumers is the best extrinsic evidence, and theater testing is the best kind of surveying. The only other kind of extrinsic evidence often used is expert testimony; however, when experts testify nakedly, that is, without consumer data on the precise communication under challenge, they do poorly. Other sources of extrinsic

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85. See discussion supra text accompanying notes 44-46.


87. Preston, Lanham Act, supra note 32, at 529.

88. "[W]e do not have the same expertise as the Federal Trade Commission .... Accordingly, we, as judges, must rely more heavily on the reactions of consumers ...." American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 172 n.27 (2d Cir. 1978). Preston, Lanham Act, supra note 32, at 527.
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evidence, such as textbooks or dictionary definitions, have value, but are not used frequently.99

One point, however, deserves mention for its insight into how well the new Miller definition prevails over the old in actual FTC practice. Decisions involving consumer surveys in both FTC Act and Lanham Act cases have held that, for determining conveyed meanings, there is no need for samples to: (1) be national probability samples; (2) include only those who use the product or have characteristics indicating the probability of such usage; or (3) include only those exposed to the media running the advertisement.90

The explanation is that the sheer perception of what a message is saying should not differ from one sort of person to another, although the reverse might be true for such things as opinions, beliefs, and actual purchasing.91

The relevance to the Miller definition is that the resulting samples encompass more than just those consumers acting reasonably under the circumstances. Consumers exhibiting any degree of reasonableness or unreasonableness may be included, which in practice comprises all consumers.92

To summarize a lengthy discussion, a claim conveyed to a criterion of consumers occurs: (1) when FTC Commissioners or Lanham judges find that explicit claims are in the communication or that implied claims were intended to be made; (2) when FTC Commissioners find, using unspecified reasoning with no criteria, (a) that implied claims are easy to identify based on examining the communication, and that such claims have occurred for consumers acting reasonably in the circumstances; or (b) that implied claims are hard to identify, but also find by using probative extrinsic evidence93 that they have been made impliedly to consumers generally without regard for reasonable or unreasonable persons, users or nonusers, exposed or nonex-

89. Preston, supra note 30, at 637-71; Preston, Lanham Act, supra note 32, at 526-37.


91. This author feels from generalized knowledge of the research literature that a significant proportion of consumer researchers may not be fully satisfied with this conclusion. In the FTC Act and Lanham Act records to date, however, this conclusion stands as stated.

92. The only way to conclude anything about consumers acting reasonably is to decide that a percentage below a specified criterion indicates that only unreasonable consumers perceived the message, while a percentage above indicates that a significant number of reasonable consumers, among others, perceived the message. This amounts to a reversion to the earlier "substantial proportion" definition, causing the definition of "consumers acting reasonably" to be measured and defined in practice as nothing more than a percentage meeting a criterion.

93. Theater testing is the most likely to be probative, followed by other surveys, then by expert testimony, and finally by infrequently used miscellaneous sources.
posed persons, or other types of consumers, to a criterion percentage that will vary but is likely to be specified as about twenty to twenty-five percent or more; or (3) when Lanham Act judges find by similar extrinsic evidence that implied claims have occurred for a not insubstantial segment that will vary but is likely to be specified as about fifteen percent or more.

C. Materiality Must be Measured

FTC Commissioners and Lanham Act judges generally determine whether a claim is material simply by looking at the communication. By fiat, the FTC presumes that explicit claims, intended implied claims, and unintended implied claims about the product's central characteristics are material. More broadly, the FTC presumes that substantive claims are made to affect consumers' choices about a product, and "[i]t thus, the very existence of the claim ordinarily is sufficient evidence for us to conclude it is material." Such conclusions are not enforced arbitrarily, because the respondent is always free to counter this evidence either with arguments pertaining to the content of the ad itself or with extrinsic evidence. Moreover, the presumption does not preclude us from exercising our own judgment and concluding from evidence in the advertisement (or extrinsic evidence) that a claim is not material even if the respondent does not dispute materiality.

Thompson Medical Co., for example, used extrinsic evidence by offering an advertising agency executive's opinion that aspirin content was material only for internally taken products because consumers treat rub-on pain relievers such as the company's own Aspercreme less seriously than internally ingested products. Alternate research, however, showed that thirty-nine percent of consumers and fifty-three percent of arthritis sufferers preferred aspirin over non-aspirin pain relievers. Ruling that this finding contravened the opinion, the FTC found it material to claim that Aspercreme con-

94. Figgie Int'l, Inc., 107 F.T.C. 313, 379 (1986); International Harvester Co., 104 F.T.C. 949, 1057 (1984); Thompson Medical, 104 F.T.C. at 816-17; Policy Statement on Deception, supra note 6, at 182. Central characteristics include the purpose, safety, healthfulness, efficacy, cost, durability, performance, warranties, or quality of the advertised item. Policy Statement on Deception, supra note 6, at 182-83.
95. Thompson Medical, 104 F.T.C. at 816 n.45.
96. Id. "The Commission will always consider relevant evidence offered to rebut such presumptions of materiality . . . ." Figgie, 107 F.T.C. at 379.
98. Id. at 708.
99. Id.
tained aspirin. Extrinsic evidence played similar roles in other cases, and an independent researcher has devised a survey method to determine materiality. Nevertheless, in the great majority of FTC Act cases, neither side has offered extrinsic evidence on materiality, and respondents have not opposed the Commission's findings.

Parties rarely dispute the finding of materiality in Lanham Act cases, probably because damages or their likelihood must also be proven. Unless damages are proven, the plaintiff's position fails and materiality does not matter. On the other hand, if the plaintiff proves damages, materiality follows from the presumption that the plaintiff could not suffer injury unless the misrepresentation affected consumers' purchasing decisions.

D. Factuality and Truth or Substantiation Must be Measured

Determining whether a claim is factual or nonfactual entails deciding whether or not the claim is capable of being found true or false. As the Commission stated in Pfizer, Inc., "[t]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or

100. Id. at 707-08, 817.
101. The FTC deemed material a claim that Listerine was "'effective for colds and sore throats.'" This conclusion was based on survey evidence that the claim was "'extremely important'" in choosing a mouthwash to 37.5% of consumers interviewed over seven years. Warner-Lambert Co., 86 F.T.C. 1398, 1504 (1975), modified on other grounds, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). Materiality was established in part through testimony of individual consumers. North Amer. Philips Corp., FTC Docket No. 9209, slip op. at 29-30 F. 168-79 (Oct. 24, 1988). Economic evidence, such as pricing, can also indicate materiality. Policy Statement on Deception, supra note 6, at 183 & n.57 (citing American Home Prods. Corp., 98 F.T.C. 136, 369 (1981)).

In Kraft, Inc., Kraft claimed only 1.6% of surveyed consumers listed calcium as a reason for buying its Singles cheese slices, thus making calcium claims not material. That figure is much lower than the figure for Thompson Medical, or for Warner-Lambert. In addition, calcium was rated seventh or eighth in importance among the nine surveyed reasons for buying the product. The survey, however, merely asked consumers questions about calcium and did not show them the advertisement containing the calcium claims. The judge found materiality. Kraft, Inc., FTC Docket No. 9208, slip op. at 45-48, 70-71 (Apr. 3, 1989) (initial decision, Commission opinion pending).

103. There appears to be only one case: Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811 (N.D. Ill. Sept. 28, 1984). Therein, the defendant argued immateriality, but the court worded ambiguously its finding of no actionable misrepresentation, meaning either that the claim was not material or that it was not false. Id. at 819. See discussion in Preston, Lanham Act, supra note 32, at 551-52.
104. See infra text accompanying notes 113-19 (discussion on measuring damages).
the consumer would expect documentation." The regulators do not determine truth or substantiation for such claims.

The measurement definition of whether material and factual conveyed claims are true or false, or substantiated or unsubstantiated, has been advanced to highly sophisticated levels in recent cases. Nevertheless, the definition begins with the simplest of propositions — whether the advertised item's characteristics are as claimed. If the product is factually consistent with the claim, the claim is true; if the product is factually contradictory, the claim is false. In many instances, regulators or anyone else can ascertain with the naked eye, with other sense organs, or by routine questioning, fact gathering, or reasoning whether the claim is consistent with the product. In other instances, only experts in the given field can determine whether a claim is true, and often can do so only with the aid of professional instruments, product tests, or consumer response surveys. A typical summary of the regulators' expectations is that the false conveyed claim is prohibited: unless at the time of such representation respondent possesses and relies upon a reasonable basis for such representation, consisting of competent and reliable evidence which substantiates such representation; provided, however, that to the extent such evidence consists of any test, experiment, analysis, research, study or other evidence based on the expertise of any professional, such evidence shall be "competent and reliable" only if... conducted and evaluated in an objective manner by a person qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

106. Id. at 64. For the FTC Act: see generally Policy Statement on Deception, supra note 6, at 181 (obvious exaggerations, such as those statements that ordinary consumers would not take seriously, will not be pursued by the Commission); Analysis, supra note 8, at 382 (puffing, obvious exaggerations, and subjective opinions normally do not mislead the public); Preston, Implications, supra note 32, at 1300-06 (arguing that the FTC should not apply the "puffery implication" as an exception in all cases, but instead, should analyze each case on its own facts in light of extrinsic evidence). For the Lanham Act: see Preston, Lanham Act, supra note 32, at 521-22.

107. For example, a complaint charged that an item advertised for sale was not available for public purchase. Although the consent settlement involved no admission of a violation, the FTC could not have found the fact of availability hard to determine. Commodore Business Machines, Inc., 105 F.T.C. 230 (1985).

108. See, e.g., Preston, supra note 55 (a survey of FTC cases concerning misrepresentations of surveys and tests in advertisements), Preston, Lanham Act, supra note 32, at 544-51 (section IX. "Determining the Truth of the Conveyed Meaning"). Because these sources have detailed extensively the appropriate requirements specified in many FTC Act and Lanham Act decisions, the requirements are not detailed here.

One factor underlying such a requirement is that advertisers frequently have evidence that they claim is sufficient to prove the truth of the conveyed claim, but which is insufficient because it is not competent and reliable to the required degree. In many cases, evidence has been found irrelevant for determining the required facts. Such decisions show that the mere provision \textit{per se} of evidence is not enough; evidence must establish the facts. Such evidence need not be more sophisticated nor scientific than necessary for the type of claim involved, but it must be no less.

\textbf{E. Damage or its Likelihood Must be Measured}

Upon being required to demonstrate actual or likely damages, Lanham Act plaintiffs usually opt for the lesser showing of likelihood. The latter standard will not be presumed, however, it must be demonstrated. The plaintiff may meet the requirement by measuring either the actual or likely direct diversion of sales from the plaintiff to the defendant, or the actual or likely reduction of goodwill that the plaintiff’s product enjoys with the buying public. In one case, actual lost sales were shown by a loss of six percent in market share, and in another by losses in both market share and revenue by the plaintiff along with gains by defendant. Actual loss of goodwill does not appear to have been found in any cases.

Likely lost sales have been inferred from findings of statements that tend falsely to make the defendant’s product appear superior to the plaintiff’s because these statements will cause consumers to shift purchases from the

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111. The term often used is “nonequivalent” or “lacking equivalence.” \textit{See}, e.g., Preston, \textit{supra} note 55, at 287-89, 292, 295-98 (giving examples of advertisements where claims were not supported by the test or study used); Preston, \textit{Lanham Act, supra} note 32, at 545-51 (examples of improper claims based on ineffective uses of comparative preference tests, clinical tests, and physical feature tests).


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plaintiff to the defendant. 118 Thus, where the element of falsity is first satisfied, the finding of likely lost sales is apparently presumed and need not be separately measured. Likely loss of goodwill could similarly be inferred. 119 Cases have not discussed whether the same presumptions apply when the lack of substantiation is recognized as an alternative to falsity.

All definitional elements, both conceptual and measurement, have now been examined, and are ready to be summarized. The reader should note that in the following discussion some definitional elements refer to the claim and some to the communication that contains the claim.

III. THE CURRENT DEFINITION OF DECEPTIVENESS

This combined conceptual and measurement definition should be interpreted as including implicitly the definitions of all component elements discussed above. All elements in the definition are actually applied by the regulators; this author contributes only by summarizing them in a single statement for the first time. The elements are defined as precisely as the record specifies, which, in some cases, means quite imprecisely. All elements are subject to future change. The definition is:

When a claim is presented in a communication that is commercial, because the communication has factors that include being paid for, and/or being about a commercial item (even if only impliedly), and/or discussing the attributes of that commercial item, and/or supporting the speaker’s economic motives, and which factors, despite the presence of noncommercial content, lead to a conclusion that the communication’s primary purpose is commercial; and the communication is disseminated to consumers, to a criterion of unspecified amount or degree; and the claim, considered within the communication taken individually and as a whole, is found conveyed, via one of several processes, including:

(1) by FTC Commissioners or Lanham Act judges finding that claims are made explicitly on examining the communication (intrinsic evidence) or that implied claims were intended to be made; or
(2) (a) by FTC Commissioners finding that claims made impliedly are easy to identify as such and so finding by usually unspecified and criterionless reasoning based on examining the communication

118. Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 317 (2d Cir. 1982).
(intrinsic evidence) that such claims have been conveyed to consumers acting reasonably in the circumstances; or

(2) (b) by FTC Commissioners finding that claims made impliedly are hard to identify as such but further finding by examining consumer response (extrinsic evidence, of which theater testing is most likely to be probative, followed by other surveys, then by expert testimony, and finally by infrequently used miscellaneous sources) that the claims have been conveyed to consumers generally (that is, without regard for reasonable or unreasonable persons, users or nonusers, exposed persons or nonexposed, or other types of consumers), to a criterion percentage that will vary but is likely to be specified as approximately twenty to twenty-five percent or more; or

(3) by Lanham Act judges finding by similar extrinsic evidence that implied claims have been conveyed to a not insubstantial segment that will vary but is likely to be specified as approximately fifteen percent or more;

and the claim is conveyed with or without evidence of intent to deceive, with or without evidence of belief, with or without evidence of actual deception, with or without evidence of consumers learning the truth prior to acting on it;

and the claim is material, that is, having the potential to affect consumers' purchasing decisions, either by being explicitly stated, or intended to be conveyed impliedly, or describing impliedly even though unintendedly the advertised item's central characteristics, or for other possible reasons relating to affecting consumers' purchasing decisions, such findings being made on the basis of at least intrinsic evidence, subject to rebuttal in FTC Act cases by extrinsic evidence of consumers' relevant perceptions;

and the claim is factual, as determined through reasoning that it is capable of being found true or false;

and the claim is false or unsubstantiated, by being found disconfirmed or not confirmed by the facts of the promoted item, as determined by an objective observation method appropriate to the item, ranging from the use of any observer's unassisted sense organs to the competent use by qualified experts of scientific measurement instruments or methods generally accepted in the given field;

and, in Lanham Act cases, the claim damages plaintiff as indicated by its loss and/or defendant's gain of market share or revenue, or is likely to damage plaintiff through loss of sales or lessening of goodwill as indicated by existence of a claim giving a false perception of the relative superiority of plaintiff's and defendant's products;
the claim is legally deceptive.

This statement is offered as superior to the previous skeleton definitions. It contains no new elements and draws everything from the existing record. What is original is that a complete definition of deceptiveness is now stated explicitly rather than only impliedly. In particular, measurement elements take their place along with the conceptual elements as essential components of the total definition. The result is hard to commit to memory and offers none of the advantages of the customary brief sentence definition. The definition's only virtue is that it tells more.

IV. SUGGESTED CHANGES TO THE DEFINITION

With all of the definition's actual elements in place, the discussion now turns to what might be changed or added. This section criticizes conceptual and measurement elements in the current definition and proposes a new element. The purpose of the suggestions is not, as others have attempted, to write a new definition. Rather, the purpose is to make the current definition more logical and complete.

A. Consumer Belief of the Conveyed Claim Could be Considered

An element that might be added to the definition is consumer belief of the conveyed claim — not actual belief, which is not required, but rather the potential for belief. Under this element, the central issue is whether a conveyed claim can reasonably be called likely to deceive even if it is found unlikely to be believed. A more acceptable concept might be that the conveyed claim have the potential to deceive if believed; thus, the potential to deceive exists only to the extent that the potential for belief exists. When the regulators look at what is conveyed, and not at whether the claim is believa-


121. See discussion supra note 60 and accompanying text. The definitions offered by Craswell, and by Russo, Metcalf, & Stephens, supra note 51, involve actual belief and essentially would produce a new definition which is not attempted here.

122. PRESTON, Research on Deceptive Advertising: Commentary, 13 INFORMATION PROCESSING RESEARCH IN ADVERTISING, at 294-98 (R. Harris, ed. 1983). Another new element, “likely to act,” is offered by Schechter, supra note 120, at 612-18. After equating it conceptually with actual belief, he offers surrogate measurement elements. Id. As stated earlier regarding Craswell, Interpreting Deceptive Advertising, supra note 60, the proposal appears to involve a new definition of deceptiveness rather than an improved one.
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They may find that the capacity for deception exists in instances where it simply does not exist.\(^{123}\)

An instructive example occurred in *American Home Products Corp. v. Abbott Laboratories*,\(^{124}\) where a claim that a drug "'stops pain immediately'"\(^{125}\) was found to convey to consumers that the pain would really end, not just decrease very soon. The court, noting that many consumers called such meaning false, held that "'consumer disbelief... may reduce the injury caused...'."\(^{126}\) The court concluded, however, that "'skepticism, or whatever is at work, does not affect the meaning itself or the fact that the meaning was conveyed.'"\(^{127}\)

Although the court may have meant that nonskeptical consumers could believe the claim, and thus could be injured, the net impression seems to be that, despite strong contrary evidence, the mere conveyance of a message causes a likeliness of injury because the message might be believed.\(^{128}\) What is missing is the reasonable observation that the potential to injure is inherent in the false conveyance only when there is a potential for belief. Further, while the potential for belief might reasonably be presumed from the conveyance, it might reasonably be found absent in some cases.

A recent test for the presence or absence of belief came in a copytesting study of advertisements from actual FTC Act cases in which questions were asked about what was conveyed and whether the surveyed persons believed the message.\(^{129}\) The Commission found that consumers believed several of

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123. The Commission in *International Harvester* commented on why belief is not examined. "In view of deception's unalloyed negative qualities, the three elements of the deception analysis represent streamlined procedures adopted by the Commission to deal most effectively with such practices. . . . [A]s one instance of streamlining, we do not go beyond likelihood to require evidence on the incidence of actual false belief." 104 F.T.C. 949, 1056 (1984). While the value of streamlining is not insignificant, it might well be overshadowed in this instance by other factors discussed herein.


125. *Id.* at 1045.

126. *Id.*

127. *Id.*

128. Another Lanham Act decision stated that "these tests provide sufficient evidence of a risk of irreparable harm because they demonstrate that a significant number of consumers would be likely to be misled." *Coca-Cola Co. v. Tropicana Prods.*, Inc., 690 F.2d 312, 317 (2d Cir. 1982). Actually, the copy tests showed only which claims were conveyed, and provided no evidence concerning whether they might be or were believed, without which they could not be found to mislead. "The jury's conclusion that consumers actually were deceived . . . is supported by the false advertising contained on the record albums and the fact that Audiofidelity successfully sold the albums on the market." *PPX Enters., Inc. v. Audiofidelity Enters.*, Inc., 818 F.2d 266, 272 (2d Cir. 1987). Although such a conclusion might reasonably be presumed in certain contexts, the two facts cited certainly do not prove that consumers actually were deceived.

129. *Richards, supra* note 102, at 146-77.
the conveyed claims that were challenged, but they disbelieved other claims. The latter claims thus appeared to have no potential for harm. Therefore, advertisements with similar abilities to convey falsity differed in their potential for harm.

In a rare reflection of such considerations, one court recognized that:

> today's newspapers, magazines and other forms of advertisement are rife with the message of low tar content in cigarettes, and [we] find that because of such profusion it is substantially less likely that any reader having an interest in the subject will be misled by the messages before us . . . . Readers who do not have an interest may be misled but are unlikely to be consumers.\(^{130}\)

Regulators apparently are also responsive to spoofs or joke advertisements, especially prominent in television, in which something is so obviously played as comedy or fantasy that few if any consumers will take such advertisements seriously or even think of believing them.\(^{131}\) Undoubtedly, the regulators decide that such advertisements involve no potential for deception and should not be subject to prosecution. In this way, belief is considered. Regulators also assert that puffery is not believed, and although some argue that such decisions may be wrong,\(^{132}\) they do involve judgments about belief.

While regulators consider belief in puffery or joke advertisements, they do not apply the same standard to claims which are not explicit jokes or puffs. In the cases used in the copytesting study,\(^{133}\) people who had additional sources of information, such as competing advertisements or personal experience with the product, could reasonably have disbelieved the claims. The claims, however, were presented straightforwardly, and for that reason could be interpreted as being intended to be believed and therefore believed. In such cases, one may reasonably doubt that regulators have considered the possibility that a potential for belief may be absent.

Therefore, although regulators might consider belief, such consideration is not systematic.\(^{134}\) This Article suggests that consideration of belief be sys-

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131. The author is not aware of any regulator's statement on this point, but calls it apparent because such content has never been challenged. Common sense suggests the obviousness of seeing no violation in such things as an ordinary automobile flying through the air on the television screen.

132. Preston, Implications, supra note 32, at 1300-06 (section XX, "The Puffery Implication").

133. Supra text accompanying note 129.

134. The potential for belief issue interacts interestingly with the definitional element of consumers acting reasonably under the circumstances. See supra note 9 and accompanying
tematic, either as the regulators’ burden to show that potential for belief does exist or as a defense. One approach is to adopt the FTC’s treatment of materiality: there could be a rebuttable presumption that conveyed claims carry a potential for belief. If the challenged claim is conveyed, material, either false or unsubstantiated, and is presumed to be believed, the claim falls under the current definition. Should the claim be found without potential to be believed, however, it may have no potential to deceive. If that is the case, then the definition of deceptiveness cannot ignore belief and still be accurate.

If considered as an element of deceptiveness, potential for belief could be expressed as a percentage of consumers, just as conveyance is. For example, twenty-five percent might see the claim conveyed, but only twenty percent of that twenty-five percent are capable of believing it. The resulting potential for belief, therefore, would be only five percent of that twenty-five percent, which would then be assessed against a predetermined criterion. The five percent would probably be too insignificant to prohibit the advertisement even if the twenty-five percent taken alone would justify a prohibition on public interest grounds. More claims would meet a measurement threshold under a conveyed standard than under a belief standard. Therefore, consideration of belief would reduce the number of findings of deceptiveness, but increase their accuracy.

There are a number of ways to measure the potential for belief. For spoof advertisements that are intended to be taken as false, the regulators’ apparent method is simply that of looking at the advertisement alone. Extrinsic evidence was used in American Brands, Inc. v. R. J. Reynolds Tobacco Co., where the court examined the surrounding context of other media messages that consumers could be expected to see in addition to the challenged message. Although these methods will often be acceptable, the same criticism may be offered as in other instances of relying on intrinsic evidence or indirect extrinsic evidence.

The best solution is to ask questions directly of consumers. The copytesting study asked those people who reported seeing conveyed claims text. Does acting reasonably involve what consumers reasonably see conveyed, or what they reasonably believe about what they see conveyed? The first assumption characterizes reasonable behavior as a perception choice, while the second characterizes it as a belief choice. Can it be only one or must it be both? When consumers acting reasonably encounter a claim they do not believe, do they see it as conveyed and false or do they see it as not conveyed? Such analysis may seem merely academic, but it shows that regulators who fail to consider the potential for belief do not evaluate deceptiveness fully.

136. Id. at 1360.
137. Supra text accompanying note 129.
whether they believed them. Although such questions can legitimately measure the general public's potential for belief, questions which probe potential directly may be the most appropriate.

Although this is not the place to discuss the many necessary decisions on method, three considerations concerning pertinent legal requirements should be addressed. First, while conveyance can be measured by using consumers of various types, because regulators assume that sheer perception is similar for most people, the measurement of belief potential probably would not be legitimate unless done on users or prospective users. Belief will vary considerably according to differences in such things as knowledge of and previous experience with the advertised item.

Second, measuring deceptiveness legally requires evidence of the belief potential of the claim specifically as conveyed in the advertisement, not as conveyed by other means, because evidence from other sources cannot validly support a charge that the given communication is deceptive. Third, the superiority of artificial over natural research methods for determining conveyance is reversed for determining belief because both natural conditions and belief involve longer term responses.

B. Commercialness and Dissemination Could be Better Defined

On defining commercial speech, it is obvious to many, including a Supreme Court justice, that a better job needs to be done. "[T]he Court's opinion creates the impression that 'commercial speech' is a fairly definite category of communication . . . . That impression may not be wholly warranted . . . . [A]dvertisements may be complex mixtures of commercial and noncommercial elements . . . ." The Supreme Court's efforts to date have not convincingly established the distinction. No doubt the zeal with which advertising respondents try to avoid prosecution by arguing that their

138. Supra text accompanying notes 90-91.
139. See discussions and citations in Preston, supra note 30, at 655-56; Preston, Lanham Act, supra note 32, at 530-32.
140. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 81 (1983) (Stevens, J., concurring). The Court said elsewhere that the precise bounds of commercial speech are subject to doubt. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); see also In Re Primus, 436 U.S. 412, 438 n.32 (1978) (the line between speech motivated by personal commercial interests and speech motivated by a desire to advance an association's beliefs and ideas will be difficult to draw).
communications should be characterized as noncommercial will result in further clarification of what constitutes commercial speech.¹⁴²

No stated criterion or measurement standard exists for the extent of dissemination apart from the obvious assumption that some dissemination is necessary. Given these omissions, the element of dissemination is barely alive. The regulators might well have a rationale for keeping it that way, but if so, an explicit statement would be helpful. Admittedly, this topic has not been a source of disputes; nor is it likely that mass media users can successfully argue that their claims were not sufficiently disseminated when even modest campaigns reach huge numbers of people. Therefore, despite the weak treatment of this element, the results have not caused much of a problem.

C. Conveyance Could be Better Defined

By contrast, the handling of conveyance includes many significant issues. To begin, the idea that deceptiveness should be based on conveyed content rather than merely explicit content, although extremely well-established and fundamental, is nagged by certain conceptual problems. The problems are not with the idea of conveyance per se as a criterion, because such an idea supports the regulators’ stated goal of preventing harm to consumers and competitors. It is elementary that such harm comes from what a message communicates rather than from what it literally contains.

The difficulties, rather, lie with unresolved questions regarding the relationship between conveyed content and explicit content. One such issue stems from the regulators’ apparent unwillingness to consider that explicit content sometimes may not be conveyed to consumers. In some statements, the FTC appears to argue that explicit content is always conveyed: “[i]n cases of express claims, the representation itself establishes the meaning.”¹⁴³

¹⁴². This question has provoked enough comment already that it will not be examined further here. See Note, supra note 66; Comment, R. J. Reynolds Tobacco Co., Inc.: The “Common Sense” Distinction Between Commercial and Noncommercial Speech, 14 Hastings Const. L.Q. 869 (1987); Note, Common Sense and Commercial Speech, 48 U. Pitt. L. Rev. 1121 (1987); see also Bolger, 463 U.S. at 81 (Stevens, J., concurring) (suggesting that rigid classifications are unnecessary and stating that mixtures of commercial and non-commercial speech are inevitable; the key is the balance between the aspects of each that are present in the speech); R. J. Reynolds, FTC Docket No. 9206, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1277 at 219 (Aug. 7, 1986) (initial decision; dismissed on summary judgment) (cigarette manufacturers claimed that advertisement was an editorial comment and not commercial speech), remanded for trial, 5 Trade Reg. Rep. (CCH) ¶ 22,522 (Apr. 11, 1988), consent, slip op. (May 22, 1989), and cases cited in both.

¹⁴³. Policy Statement on Deception, supra note 6, at 176.
Elsewhere, however, the Commission recognizes that explicit content may be insignificant or obscure and thus not be communicated. "Written disclosures or fine print may be insufficient to correct a misleading representation," and "[p]ro forma statements or disclaimers may not cure otherwise deceptive messages or practices." These statements lead to the overall impression that the Commission believes an explicit representation does not always establish its meaning. Rather than having to rely on impression, however, observers would be better served in both FTC Act and Lanham Act cases by a specific understanding that explicit content is not automatically conveyed, but rather that the determination of conveyance as a separate step must be made for explicit content just as it is for implied content.

Another problem arising from the concept of conveyed content involves whether it should include implications. The regulators have firmly established that implications should be included in conveyed content. Only one recent law review article has argued to the contrary. Although not yet prominent, the argument is mentioned because it may be a sleeping giant, invoking the first amendment, which in recent years has been a potent force for change in the handling of commercial speech.

As expressed by Schmidt and Burns, the argument against implications is that advertisers face an "intolerable uncertainty" in knowing whether im-

144. Id. at 180.
145. See also Analysis, supra note 8, at 383 (an analysis of whether qualified representations containing disclosures or disclaimers sufficiently correct a misrepresentation depends upon the overall impression conveyed); Preston, Implications, supra note 32, at 1277-84 (sections on "The No Qualification Implication" and "The Ineffective Qualification Implication").
146. Another minor problem is the Commission's statement that any message intended to be conveyed will be conveyed. Policy Statement, 103 F.T.C. at 178. The result, however, is not automatic. Thus, conveyance should be determined separately.
147. "The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied." Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). See generally Preston, Implications, supra note 32, at 1244-51 (FTC policy prohibits implied representations if they are "identified by reasonable interpretation, are conveyed to a significant percentage of consumers, and are found material and false"). "That Section 43(a) of the Lanham Act encompasses more than literal falsehoods cannot be questioned." American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978). See generally Preston, Lanham Act, supra note 32, at 513-15 (prohibitable content may consist of more than what is explicitly claimed, as long as the conveyed content is false with respect to the characteristics of products).
149. The argument is also mentioned because opposition to its acceptance has been published by this author. Preston, Implications, supra note 32, at 1243; see also McKenzie, Ambiguity, Commercial Speech and the First Amendment, 56 U. CIN. L. REV. 1295 (1988) (arguing that consumer protection laws neither violate the first amendment nor inhibit the flow of truthful product information).
plied messages exist, and what they are.150 This uncertainty places an undue burden on advertisers; any deceptiveness from implications should thereby be protected by the first amendment.151 Schmidt and Burns would prohibit implications only when advertisers have actual knowledge of an implication, or when advertisers should have known of an implication because of an existing trade rule stating the conditions under which an implication would occur, or when consumer surveying showed that an implication has been conveyed. This rule would result in far fewer prosecutions of implications than currently occur, they say.

Nevertheless, the rule would seem to eliminate very little current prosecution because consumer research is already used frequently.152 In Lanham Act cases, all implied content must be supported by extrinsic evidence, of which the best and most used is consumer surveys.153 Although Schmidt and Burns focus primarily on FTC regulation, they seem not to realize the great extent to which implications are already identified through consumer research in the Commission’s proceedings.

More significantly, Schmidt and Burns’ claim that speech will be chilled is based in the advertisers’ alleged inability to know when implications exist. This basis does not seem accurate in light of the analyses showing that implications found in FTC Act and Lanham Act cases have occurred in a number of distinct types having readily recognizable and predictable characteristics.154 These types were not previously evident because, although the regulators obviously must assert that a message has been conveyed, their evidentiary burden does not extend to identifying any particular kind of message. With the identifications now available, however, advertisers can use comparisons to learn whether current advertising content is likely to produce one of the types of implications. Current conditions thus are very close to Schmidt and Burns’ suggestion that trade rules might be drafted specifically to identify implications for advertisers. The case record, although not crystal clear, seems to imply that such trade rules are probably not necessary. There will always be some degree of open endedness because new implications could be recognized at any time. Nevertheless, the existing

150. Schmidt & Burns, supra note 148, at 1280.
151. See id. at 1273-74. “It is our thesis that uncertainties in the federal regulation of advertising chill legitimate commercial speech and that even some false and misleading speech should be protected to provide breathing room for legitimate commercial speech.” Id.
152. See, e.g., supra text accompanying notes 89-90. However, consumer research is not always used. See infra note 160 and accompanying text.
153. Supra text accompanying notes 86-88.
154. See Preston, Implications, supra note 32; Preston, Lanham Act, supra note 32, at 513-23 (section III, “Identifying implications as Lanham Act violations”).
types undoubtedly comprise a huge proportion of all the implications likely to be recognized in the future.\textsuperscript{155}

Notwithstanding the reasoning against prosecuting implications, we will assume here that the element of conveyed meaning will continue to include such implied conveyance. In addition, the definition of deceptiveness should be augmented to include the specific types of identifiable implications.

\textbf{D. Conveyance Could be Identified as Explicit or Implied and be Better Measured}

It would be helpful if the Commission's decisions identified conveyed claims as explicit or implied. Many recent cases distinguish between the claims, especially when extrinsic evidence is required for hard to identify implications.\textsuperscript{156} When extrinsic evidence is not used, however, the decisions may not report whether the conveyed claim was explicit or was an easy to identify implied claim.\textsuperscript{157} Possibly, this omission follows from the fact that FTC complaints routinely charge that a claim has been made "directly or by implication."\textsuperscript{158} The FTC's actions understandably offer the factfinders two ways rather than one way to find the claim, but leave readers uninformed when cases do not resolve the matter.

Problems also exist in measuring the conveyed claim. When Commissioners and judges invoke their privilege to determine conveyance from the literal message alone,\textsuperscript{159} they evaluate the conveyed claim on a measurement-free basis which creates no direct knowledge of the conveyed claim. To reason that the conveyed claims are evident in the literal message is not objectionable for clear and conspicuous explicit claims. For less clear explicit content or for implied claims, however, such an approach cannot be well accepted. In the latter case, the regulators are open to the protest that their "method" consists entirely or partly of seeing what they wish to see.

\textsuperscript{155} The set of types seems similar to the Table of Elements in chemistry, in which, although the future finding of new elements may never cease, those earliest known will continue to account for most of the earth's matter. Arguably, a similar level of maturity has been reached with implications, such that the types already identified probably represent a major percentage of those ever to be recognized.

\textsuperscript{156} \textit{See, e.g.,} Thompson Medical Co., 104 F.T.C. 648 (1984).

\textsuperscript{157} This problem has not occurred in litigated FTC cases following the landmark discussion that raised consciousness about types of evidence. \textit{Thompson Medical}, 104 F.T.C. at 788-90. Such identification is not required by any published FTC rule or protocol, however, and thus conceivably could be omitted in the future. Also, the problem continues to occur in the many FTC consent cases for which no decisions are written.

\textsuperscript{158} \textit{See, e.g.,} Sun Indus., 110 F.T.C. 511, 512 (1988).

\textsuperscript{159} \textit{Supra} text accompanying notes 71-73.
Regulators are aware of such problems and use extrinsic evidence to overcome such protests in many cases. Nevertheless, regulators might have identified incorrectly some types of implications absent extrinsic evidence.\textsuperscript{160} The same is true for the arbitrary assumptions about explicit content.\textsuperscript{161} Such results suggest that data-free decisions should be made with the greatest care and with carefully explained reasoning.

Determinations made with extrinsic evidence are superior, but they are not without problems. FTC Commissioners and Lanham Act judges have offered no formal guidelines about extrinsic evidence.\textsuperscript{162} They have commented that certain measurement methods are acceptable, superior or inferior to others, or unacceptable, and these comments have been examined for the specifications they may yield.\textsuperscript{163} The conclusions of an outside observer, however, are not necessarily a sufficient substitute for the regulators' own guidance. The FTC should provide guidelines, and the same should be done for Lanham Act cases, although in the latter situation, no central organization exists to do such a job.

An aspect of extrinsic evidence that could benefit from official guidelines is types of survey questions. Disputes continue to occur over the relative merits of open ended versus forced choice survey questions.\textsuperscript{164} Other extrinsic evidence topics that are more settled but for which disputes may still occur include the following: sampling; coding of verbatims; protocols; the need for control groups or control advertisements; the superiority of artificial over natural testing conditions; evidence that may be indirectly useful (i.e., about the product, its users, or other aspects of the context of the claim); focus groups; the qualifications of experts; and the appropriate bases for expert testimony.\textsuperscript{165} All such matters involving the collection of extrinsic evidence

\textsuperscript{160.} Preston, Implications, supra note 32, at 1263, 1268, 1270, 1273, 1276, 1281, 1284, 1305 (identifies types of implications whose existence is not supported by extrinsic evidence).
\textsuperscript{161.} Id. at 1281, 1284 (discussing the No Qualification and Ineffective Qualification Implications).
\textsuperscript{163.} See Preston, supra note 30, at 640-87; Preston, Lanham Act, supra note 32, at 529-43.
\textsuperscript{164.} For an FTC Act case which demonstrates strongly opposing opinions on this topic, see Kraft, Inc., FTC Docket No. 9208 (Apr. 3, 1989) (initial decision, Commission opinion pending). See generally Preston, supra note 30, at 656-67 (discussion of the various inadequacies and structural problems of open-ended versus forced-choice questions); Preston, Lanham Act, supra note 32, at 534-36 (same).
\textsuperscript{165.} See generally Preston, supra note 30 (offering examples and evaluations of testing methods); Preston, Lanham Act, supra note 32 (same).
should be incorporated into the definition of deceptiveness to the extent possible.

E. The Criterion for Conveyance Could be Better Defined

The definition of deceptiveness must also include the criterion portion of consumers who must see the conveyed claim. The definition should identify the criterion as a number, usually a percentage, of consumers.\textsuperscript{166} This assertion does not mean that the definition should state a specific figure, but only that it specify that a numerical value will be determined at the appropriate time.

Because one can scarcely conceptualize the idea of “less than all consumers” without assuming that some quantifiable portion is implied, the reader may wonder at the obviousness of this addition. The point is made, however, because the FTC has described the prevailing definition in terms that pointedly avoid conceding that a number can possibly be involved.\textsuperscript{167} Yet, we have also seen that numbers are involved and cannot help but be involved.\textsuperscript{168} Therefore, the definition should explicitly acknowledge a criterion in the form of a percentage.

Further, the definition should give some indication of what the percentages should be. Such figures need not be stated so precisely as to foreclose consideration of the facts of each individual case. Rather, the definition could acknowledge what past cases have revealed about how such figures have been chosen. For example, because the figure is theoretically intended to be smaller for potentially greater harms, the definition could note that a lesser figure is required for health claims, which endanger personal health or safety, and that a higher figure is required for non-safety related claims where the product differed only slightly from what had been claimed.

Notwithstanding the attractiveness of that theoretical point, the case record shows that most determinations of the criterion are made absent survey evidence.\textsuperscript{169} Therefore, the Commission is free to say that, in its opinion, the claim was conveyed to a substantial number of consumers, or in recent cases, to consumers acting reasonably, without the slightest hint as to how many

\textsuperscript{166} Although a criterion number would normally be a percentage, there might be times when a number is appropriate such as when a small number of consumers is deemed sufficient.

\textsuperscript{167} See supra text accompanying notes 44-46, 85.

\textsuperscript{168} See supra text accompanying notes 47-50, 85.

\textsuperscript{169} This privilege has been considered valuable by some: “The absence of extrinsic evidence about consumer expectations has never barred the Commission from making informed, considered judgments about what consumers could reasonably be expected to believe about a given claim.” Bristol-Myers Co., 102 F.T.C. 21, 384 (1983) (Pertschuk, Comm’r, dissenting), aff’d, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985).
consumers saw the claim. Further, even from cases in which survey evi-
dence was present to supply percentages, we cannot necessarily glean the
nature of the criterion figure. For example, if the Commission has found a
claim conveyed to twenty percent of consumers and has ruled that twenty
percent was or was not a substantial number, the Commission typically has
not hinted at what it considered the minimum substantial number.

Accordingly, a requirement that decisions specify a criterion percentage in
each individual case would improve the definition of deceptiveness. Instead
of ruling simply that the claim was conveyed to enough consumers to con-
clude that they were acting reasonably, the decision would be required to
enunciate the court's reasoning and to identify a particular minimum per-
centage that would constitute evidence that the consumers had acted reason-
ably. After a number of these decisions, observers could check the specified
percentage figures against the types of claims involved and arrive at much
better conclusions about the requisite percentages.

An analysis recently published by Schechter suggests a method for deter-
mining the criterion percentage based on how the nature of the communica-
tion determines what percentage of consumers will be “at risk.” While
this Article neither endorses nor opposes this method, the idea that the crite-
ron should vary is consistent with comments made herein.

F. Claim Could be Considered in Context of Potential Knowledge from
    Other Sources

To support their prospection of false claims even when consumers may
later find out the truth from other sources, regulators argue that some con-
sumers will never encounter those sources and thus never learn the truth.
This argument's validity may be questioned, especially when the regulators
do not use a measurement method to determine the number of consumers
who see the conveyed claim or believe it. The regulators' approach may be
acceptable if its underlying premises are accurate, but without measure-
ments, it is impossible to find facts to disconfirm the premises. In some
cases, the false claim might be conveyed in a context in which most or all
consumers already know or are certain to learn the truth. In this instance,
the claim has no potential to deceive.

170. See supra note 50 and accompanying text.  
171. Schechter, supra note 120, at 617; see also Russo, Metcalf & Stephens, supra note 51; Jacoby & Small, supra note 51. Also, a method for determining the criterion percentage based on cost-benefit analysis is offered in a forthcoming article: Craswell, Regulating Deceptive Advertising, supra note 60.  
172. See supra text accompanying notes 56-57.
The potential to deceive, therefore, should be found only in situations where a specified criterion number of consumers who see the false claim conveyed can be found unlikely to learn the truth elsewhere. These consumers should have a potential to believe the claim on the basis of the challenged communication alone, and the unlikelihood to learn the truth elsewhere should be established by acceptable reasoning. An alternative would be to adopt a rebuttable presumption that the consumer is not likely to learn the truth concerning the claim elsewhere.

G. Materiality Could be Better Defined and Measured

The current concept of the materiality element reflects regulatory concern over whether harm to the consumer exists. Materiality properly separates potentially harmful deceptiveness from harmless deceptiveness. The Miller majority interpretation of materiality, however, created inconsistencies, or at least the perception of inconsistencies, that need to be removed. Originally, the Miller statement equated materiality with injury, and otherwise caused confusion.173 Subsequent cases have shown a return toward the traditional understanding that a material claim is one that has the potential to affect consumer purchasing.174 Even if later developments stabilize the situation, the FTC should restate the definition.

As to measuring materiality,175 regulators and decision-makers have sometimes used consumer data, but without great success. The regulators have been even more prone to accept intrinsic evidence alone for examining materiality than for examining conveyance. Dependence on intrinsic evidence alone might be more objective and thus less controversial when examining materiality than when examining conveyance. Perhaps this explains why defending advertisers typically offer no defense in the matter. Nevertheless, the actual criterion that determines whether a claim is material to consumers is their own perception, which therefore might be examined more often.

Thus, a measurement standard for materiality should allow for intrinsic evidence as it currently does, but should also encourage and more precisely

173. Supra note 53.
174. See, e.g., Figgie Int'l, Inc., 107 F.T.C. 313, 374 (1986) (Commission held that representations about fire warning devices effectiveness were material because they were likely to influence consumer choices), aff'd mem., 817 F.2d 102 (4th Cir. 1987); International Harvester Co., 104 F.T.C. 949, 1057 (1984) (Commission noted that a material effect is one likely to influence consumer conduct or purchase decision); Thompson Medical Co., 104 F.T.C. 648, 816 (1984) (Commission held that representation concerning efficacy of Aspercreme in relieving the pain of arthritis was material because it was likely to affect consumer choice), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).
175. See supra text accompanying notes 94-104.
The final elements are truth or falsity and substantiation. Falsity means that the facts conveyed about an item’s features or performance are disconfirmed by examining the item. Lack of substantiation means that the facts are not confirmed, that is, either disconfirmed or neither confirmed nor disconfirmed. Failure to confirm means that the consumer may see the item having a feature it does not have or at least is not known by the seller to have.

Truth or falsity and substantiation are the essence of deceptiveness. When materiality is added, the deceptiveness becomes the harmful sort in which the consumer’s likelihood of buying the product has been increased because of the attraction of the feature that is not really present. These concepts seem to have been handled well and do not require changes.176

Greater strides appear to have been made with respect to measuring truth and substantiation than anywhere else in the definition. The measurement methods established in FTC Act and Lanham Act cases suffer from being open ended, as is the case with measuring conveyance. Identification of such methods, however, is much more complete than for conveyance, and provides for greater certainty.

The above is true despite, or perhaps because of, the fact that measurement methods for truth and substantiation must be written more broadly or vaguely than the standards for determining conveyance. The standards are more broad because, whereas examining conveyance is similar for every advertisement, examining facts about the advertised item is potentially different for every such item. Tires, for example, are tested by seeing how they hold up under use, while no comparable durability test exists for butter or margarine.

176. Those who find it possible that evidence could be strong enough to allow a reasonable inference that substantiation exists, yet not strong enough to prove the claim true, may sense a difference between finding a claim true and finding it substantiated, feeling that substantiation connotes less knowledge. Some discussion of this point exists in FTC analyses using the term "reasonable basis." This author's prior analysis, however, concludes that "reasonable basis" and "substantiation" mean the same thing today, and that in practice no different measurement criteria are used to find a claim false than to find it unsubstantiated. See supra note 55.
On the other hand, one can glean generalizations about what constitutes proper evidence from the cases and infer broad standards.\textsuperscript{177} As with all other elements in the deceptiveness definition, well conceived and widely published guidelines on truth and substantiation will improve the current approach of requiring outsiders to infer requirements. Regulators should promulgate formal expressions of these requirements.

V. AN AUGMENTED DEFINITION OF DECEPTIVENESS

These suggestions incorporated into the definition offered in section III produce a new and improved version. There are first, however, some comments to be made on the considerations faced in deciding whether such a prospective definition is feasible. Some observers might not attempt at present to improve the deceptiveness definition because certain of its elements are unsettled. Unsettled issues include disputes over the proper characterization of some elements and uncertainties over the fundamental open endedness of some elements.

To illustrate this point, we observe that when specifications about extrinsic evidence of the conveyed meaning are drawn from cases, there are unresolved disputes, such as the current \textit{Kraft} case's arguments about open ended versus forced choice questions.\textsuperscript{178} Such disputes may leave us unable to state with certainty what is acceptable or unacceptable. Such enumerations also produce open ended lists which must allow for future additions. For example, although certain kinds of samples have been identified to date, additional kinds may be identified in the future. The likelihood of new methods or aspects of methodology is always high, not only because various existing methods have yet to appear in cases, but also because new methods are continually being invented.

Incorporating these troublesome disputes and open ended features into the definition of deceptiveness has both advantages and disadvantages. On the positive side, doing so reflects legal requirements that must be respected. Parties to proceedings have extensive rights in creating their own prosecutions or defenses, and the introduction of a new survey method cannot be rejected simply because an intendedly all inclusive definition already exists when the method becomes available.

There may be advantages to a closed definition of deceptiveness which is based solely on measurement methods accepted without dispute in the existing case records. One significant characteristic is that any evidentiary methods not found in the existing record would not have been acceptably

\textsuperscript{177} See supra text accompanying notes 107-12.

\textsuperscript{178} See supra text accompanying note 164.
validated and would be excluded. Moreover, many measurement aspects would have been aired thoroughly and a consensus on their value reached. For example, artificial conditions have been found preferred over natural conditions in survey methodology.\(^{179}\) Thus, many conclusions are available that could be incorporated.

On the negative side, however, a closed definition assures that the measurement methodology assumed by law to exist will not grow over time. The definition, therefore, will soon become less sophisticated than what is known to the consumer research community. This detriment alone may outweigh the benefits.

Another option is to refuse to write a definition, on the ground that the field’s open endedness makes any definition vague while its disputes make consensus impossible. The alternative would be to continue to monitor cases in the hope that more measurement methods would be incorporated and the disputes eventually resolved.\(^{180}\) A more precise and certain definition then could be written at a later time.

The solution chosen here is to write a definition now because a more ideal time may never come. Of course, if written now, the definition must be open ended and reflect any unresolved disputes. As such, it will reflect not only what has actually been defined, but also what still needs to be defined. The definition may be imperfect, but imperfection is no reason not to go ahead. Thus, the augmented definition from section III is as follows:

\begin{quote}
When a claim is presented in a communication that is commercial, because the communication has factors which, although needing further clarification by the courts, include being paid for, and/or being about a commercial item (even if only impliedly), and/or discussing the attributes of that commercial item, and/or supporting the speaker’s economic motives, and which factors, despite the presence as well of noncommercial content, lead to a conclusion that the communication’s primary purpose is commercial;

and the communication is disseminated to consumers, to a criterion amount or degree that needs to be specified and given a rationale;

and the claim, considered within the communication taken individually and as a whole, is identified as explicit or implicit, and if implicit, is identified as to type of implication, and is found conveyed, via one of several processes, including
\end{quote}

\(^{179}\) See supra text accompanying note 165.

\(^{180}\) For an approach to resolving disputes, see Richards & Preston, Quantitative Research: A Dispute Resolution Process for FTC Advertising Regulation, 40 Okla. L. Rev. 593 (1987).
(1) by FTC Commissioners or Lanham Act judges finding that claims are made explicitly by specified reasoning based on examining the communication (intrinsic evidence); or finding through specific reasoning or factfinding that implied claims were intended to be made, or

(2)(a) by FTC Commissioners finding that claims made impliedly are easy to identify as such and so finding by specified reasoning based on examining the communication (intrinsic evidence) that such claims have been conveyed to a predetermined and justified criterion percentage of consumers acting reasonably in the circumstances, or

(2)(b) by FTC Commissioners finding that claims made explicitly or impliedly are hard to identify as such but further finding by examining consumer response (extrinsic evidence, having characteristics needing more formal specification, and subject to disputes needing resolution, but of which theatre testing is most likely to be probative, followed by other surveys, then by expert testimony, and finally by infrequently used miscellaneous sources) that the claims have been conveyed to consumers generally (i.e., without regard for reasonable or unreasonable persons, users or nonusers, exposed persons or nonexposed, or other types of consumers), to a predetermined criterion percentage likely to be about twenty or twenty-five percent or more but needing to be specified more precisely and justified, the justification including a rationale for the percentage to vary for different conditions, or

(3) by Lanham Act judges finding by similar extrinsic evidence that implied claims have occurred for a predetermined criterion of a not insubstantial segment likely to be about fifteen percent or more but needing to be specified more precisely and similarly justified;

and there is a potential for a predetermined and justified criterion percentage of consumers to believe the claim, based preferably on extrinsic evidence needing more formal specification but consisting preferably of surveying under natural conditions, of consumers who use or may use the advertised item, based on their response solely to the conveyed claim;

and a predetermined substantial number of consumers seeing the claim conveyed are unlikely to learn the truth elsewhere prior to acting on the claim, the unlikelihood being determined at least by reasoning or by rebuttable presumption;

and the claim is conveyed with or without evidence of intent to deceive, and with or without evidence of actual deception;

and the claim is material, i.e., having the potential to affect consumers' purchasing decisions, either by being explicitly stated, or
intended to be conveyed impliedly, or describing impliedly even though unintendedly the advertised item's central characteristics, or for other reasons needing to be specified, such findings being made at least by specified reasoning on the basis of intrinsic evidence, subject to rebuttal in FTC Act cases by extrinsic evidence according to a measurement standard needing to be specified;

and the claim is factual, as determined through reasoning or evidence that it is capable of being found true or false;

and the claim is false or unsubstantiated, by being found disconfirmed or not confirmed by the facts of the promoted item, as determined by an objective observation method appropriate to the given item, following standards that need to be specified more formally but ranging from the use of any observer's unassisted sense organs to the competent use by qualified experts of scientific measurement instruments or methods generally accepted in the given field;

and, in Lanham Act cases, the claim damages plaintiff as indicated by its loss and/or defendant's gain of market share or revenue, or is likely to damage plaintiff through loss of sales or lessening of goodwill as indicated by existence of a claim giving a false perception of the relative superiority of plaintiff's and defendant's products, according to standards that need to be specified more formally;

the claim is legally deceptive.

VI. CONCLUSION

This Article has stated two definitions of deceptiveness. The first, the existing definition in section III, is currently applied, although the elements have never been previously summarized formally into a complete statement. The purpose of stating this definition is to provide a more complete understanding of all aspects of the definition than has been previously available.

The second, the augmented definition in section V, incorporates additional elements that are not currently part of the existing definition. The purpose of stating them is to urge regulators to consider their incorporation on the grounds that they fill gaps or inadequacies in the existing definition and reconcile the definition more appropriately with existing knowledge of consumer behavior.