HANDLING THE "NEWS": A PROPOSED APPROACH FOR THE FEDERAL TRADE COMMISSION

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The word "new" is commonly used as a tool to set one product apart from its competitors.[1] In American society, the fact that a product is new is perceived as giving it a competitive advantage. For the very reason that the term "new" can be an effective competitive tool, its use can also be deceptive or unfair. As such, it falls within the jurisdiction of the Federal Trade Commission [FTC].

In spite of the term's marketing importance, the legal standards governing when and for how long a product can be described by the term "new" are surprisingly scarce. The FTC has jurisdiction over these questions, but has given little guidance in this area. And the guidance that has been given covers only a few of the possible uses of the term.

Although one commonly thinks of the term "new" as referring to something recently invented or discovered, arguably there are at least eight other legitimate uses of the term. Through FTC Advisory Opinions and one litigated case, it can be determined generally how six uses of the term are viewed. The other three are in a grey area.

It is the purpose of this Article to analyze the uses of the term "new" and the FTC positions on its uses, and to extrapolate from that analysis a general theory to determine when the use of the term "new" is legally proper. That theory involves a short trip into the philosophy of language. As a result of that analysis, we discover that the FTC's

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1. The term "new" is used here in the sense of not previously available. This Article does not deal with the question of when a product must be identified as used or rebuilt.

view of its role is erroneous, and we can outline what should be the proper role in this area.

THE POWER AND MEANS OF THE FEDERAL TRADE COMMISSION TO REGULATE THE USE OF THE TERM "NEW"

As originally enacted in 1914, section 5 of the Federal Trade Commission Act[2] authorized the FTC to ban only "unfair methods of competition."[3] Under that language, consumer exploitation or deception alone was not sufficient to establish a violation; the practices had to be shown to injure competitors.[4] In 1938 the Wheeler-Lea Amendment added the phrase "unfair or deceptive acts or practices" to the text of section 4.[5] It thereby gave the FTC the power to focus on the protection of the consumer from such acts or practices, without regard to the impact on competitors.[6] In protecting the consumer, the FTC is required to prove not that the challenged practice has actually deceived or injured anyone, but only that the practice has the capacity to deceive.[7] The capacity to deceive is tested by examining the impression that a representation is likely to have on the general population.[8] The population, however, includes both the ignorant and credulous, and representations have been tested by examining their likely impact on those who are especially trusting and innocent members of the public.[9]

Still, there is a limit to the FTC's approach. For example, it refused to enter an order against an advertiser who had proclaimed that a swimming aid was "invisible."[10] Instead it took the reasonable view that the term was used to mean "inconspicuous."[11] This breath of common sense is crucial for the topic under consideration. Arguably, a product ceases to be new when it is one day old. To take that view, however, would be to ban the use of the term entirely. As it will be seen, this is not the approach that has been chosen.

The FTC judges a representation by examining the general impression that it creates, rather than by using a technical argument as to

2. Act of Sept. 26, 1914, ch. 311, § 5(a), 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45(a) (1976)).
3. *Id.*
4. *See* FTC v. Raladam Co., 283 U.S. 643, 653 (1931).
5. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111. Section 5(a)(1) of the Act now reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1976).
6. *See* Pep Boys-Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 161 (3d Cir. 1941).
7. *See* Shafe v. FTC, 256 F.2d 661, 663-64 (6th Cir. 1958).
8. *See* Feil v. FTC, 285 F.2d 879, 895 (9th Cir. 1960).
9. *See* FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937). A good general discussion of this area is contained in Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944).
10. Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).
11. *Id.*

the meaning of each word or phrase.[12] A representation is deemed deceptive if it is susceptible to two or more meanings, one of which is false.[13] In advertising the law provides some latitude for puffing that does not amount to affirmative claims subject to measurement. It was under this rubric that the claim that the swimming aid was "invisible" was preserved.[14]

In determining the meaning of a challenged phrase, the FTC need not get testimony from any consumer; it may rely entirely upon its own review.[15] This procedure is justified by the fact that showing an actual deception is not required under the statute. If there is actual deception, however, the fact that it is of a small amount may be deemed irrelevant and the representation condemned. In *Benrus Watch Co. v. FTC*[16] the respondent produced a survey showing that eighty-six percent of the questioned customers believed the representation to be accurate.[17] The FTC used the results to establish that the representation was deceptive, although only fourteen percent of the customers so believed.[18] Still, the FTC cannot act irrationally. On some occasions its evaluation of a claim has been overturned because the FTC completely or intentionally ignored all of the material on the record.[19]

In the typical case, once the FTC has determined the meaning of the representation, it then must prove that the representation is untrue.[20] In cases where the term "new" is used, the second step is not really appropriate. Rather, the problem with "new" is definitional: There is generally no factual claim to be evaluated. The common understanding of the word is sufficiently broad to let almost any unused product to be considered new under some circumstances. The question is defining the appropriate circumstances for its use.[21] If one person claims that a product is new, and another claims that it is not, they may

12. *See* Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).
13. *Id. See also* FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).
14. Heinz W. Kirchner, 63 FTC 1282, 1290 (1963).
15. *See* Bakers Franchise Corp. v. FTC, 302 F.2d 258, 261 (3d Cir. 1962).
16. 352 F.2d 313, 319 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).
17. [1963-1965 Transfer Binder] TRADE REG. REP. (CCH) ¶ 16,541 (1963).
18. *Id.*
19. *See* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 589 (D.C. Cir. 1970).
20. One enormous exception to this rule is the doctrine arising out of Pfizer, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,056 (1972), which declares that an advertising claim is *per se* unfair if the company making it does not have a reasonable basis for believing that it is true. *Id.* ¶ 22,033. What is a "reasonable basis" is still evolving. In some instances, it may mean that the manufacturer has competent scientific tests on file to back up the claim. *See* 44 Fed. Reg. 41,214, 41,218 (1979) (consent agreement between FTC and National Media Group, Inc., concerning claims for the product "Acne-Statin"). *See also* 44 Fed. Reg. 23,090, 23,091-92 (1979) (consent agreement requiring J. Walter Thompson Co., an advertising agency, to have evidence before making certain claims in ads for certain clients).
21. This is unlike the situation where a company claims that a product has a certain nutritional value, where evidence can be produced as to whether or not that value exists. *See* Ocean Spray Cranberries, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,981 (1972).

well have no dispute over the facts at all. The question is whether the term "new" can be applied under the circumstances. In other words, what we are dealing with here is the question of whether a word can properly be used in a certain context, which is really a philosophical inquiry.[22]

"NEW" USES AND LAW

There are least nine ways in which a product may be described as new. To aid in the analysis, we will assume the hypothetical case of a liquid car care product called "X-TROL," which is added to motor oil. X-TROL arguably could be described as "new" under the following circumstances:

1. Recently invented/discovered (New X-TROL);
2. recently marketed;
3. recently marketed broadly [after test marketing];
4. recently improved/changed (New formula X-TROL);
5. recently changed use form (New X-TROL tablets);
6. recently introduced in a geographic area;
7. recently introduced by this company (New from X Company, X-TROL);
8. recently marketed for this use (X-TROL, new gas saving wonder); and
9. recently introduced to this type of market (before it was only available to gas stations, now it is available to the public generally).

These nine examples may not be exhaustive, but they provide a basis for analysis of the area.

The general law in this area began in 1967.[23] In Advisory Opinion No. 120[24] the FTC opined as to the permissible period of time during which an advertiser could continue to describe a product as "new."[25]

22. *See generally* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1971).

23. The prior cases focused narrowly on the facts and circumstances at issue, providing little or no general guidance. *See* Allied Enterprises, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,849 (1967); Dollar Vitamin Plan, Inc., [1965-1967 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,602 (1966).

24. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,914 (1967). In addition to its adjudicatory process, the FTC has devised a procedure whereby any business may request an Advisory Opinion concerning a course of action that it proposes to pursue. Any matter subject to the FTC's jurisdiction may properly be the subject of an Advisory Opinion. 16 C.F.R. §§ 1.1, .2 (1979). The FTC may at any time reconsider, revoke, or rescind an Advisory Opinion. *Id.* § 1.3(b). If it does, it must notify the requesting party so that he may promptly discontinue the practice. *Id.* It must be remembered that an Advisory Opinion is a statement by the FTC that, based upon the evidence presented no action is needed to stop the proposed practice. If the facts are not fully disclosed, or if the actual practice does not follow the proposal, the Opinion may give little or no comfort.

25. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,914 (1967).

In the preface to that opinion, the FTC decided that the term "new" could properly be used only if:

1. The produce was entirely new; or
2. the product had been changed in a functionally significant and substantial respect.[26]

Having provided a definite answer about a question that was not asked (the definition of the term), the FTC then became vague as to the time limits on the use of term. Admitting that there was little precedent on the question, the FTC stated that the time period depended upon the circumstances surrounding the particular product.[27] Accordingly, the FTC would not set a rigid time, but stated that it would be "inclined to question use of any claim that a product is 'new' for a period of time longer than six months."[28]

Ironically enough it was six months later that the FTC elaborated on its criteria. In Advisory Opinion No. 146[29] the Commission confronted a request to reconsider and revise the earlier opinion. It was urged that the FTC either not specify any time limit, or specify a period of at least one year.[30] The FTC rejected this request.[31] It took note, however, of the fact that six months is not an adequate time for the test marketing of a new product in many cases.[32] Accordingly, the FTC advised that the six-month rule would not apply to bona fide test marketing of a new product, as long as the program did not cover more than fifteen percent of the population and did not exceed six months duration.[33] If those terms were met, the six-month period during which a product could be called "new" would not begin to run until the product had been introduced to the "general market."[34]

Again, the Commission was vague on the question asked, but specific on a question that was never raised. The reticence which overcame the FTC in setting a firm time limit for the use of "new" vanished when setting limits on the proper period for test marketing. It is somewhat unclear why the FTC felt it necessary to be so specific concerning the test marketing area. It is also unclear whether test marketing periods can be tacked on to each other (that is, whether a test could be run in one small area and then another test run in a second area, neither thereby triggering the six-month period for the use of the term "new").

26. *Id.*
27. *Id.*
28. *Id.*
29. [1967-1970 Transfer Binder] TRADE REG. REP. CCH ¶ 18,088 (1967).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

The most recent FTC language on point came in *Mather Hearing Aid Distributors, Inc.*[35] Sellers of hearing aids were ordered to cease and desist, *inter alia*, from representing that the merchandise was a new invention when in fact it had been marketed regionally in the United States for more than one year.[36] The hearing examiner in the case had determined that the respondents could represent their hearing aid as a new invention, provided that the representation was limited to a one-year period from the date that the product was introduced into the given market area.[37] The FTC found that the one-year period was appropriate, in light of the infrequent technological development in the industry.[38] Nevertheless, it rejected the idea that something can be called new simply because it had not appeared in the geographic area before.[39] In so holding, the FTC elaborated on what it believed was meant by the term "new": "In advertising 'newness' the implication is that the product is new, i.e., 'recently invented, discovered or developed,' not that it is new to the marketing area."[40]

The result of the FTC's actions is that if a product is new, the FTC will be flexible on how long the advertiser can make use of the term. On the question of what is a new product, however, the FTC clearly looks to the goods themselves, irrespective of whether they are new to any particular group of customers. With these criteria in mind, the nine uses of "new" set forth previously may be analyzed.

1. *Recently invented/discovered*

This use clearly fits under the language of Advisory Opinion No. 120 and *Mather*. Absent special circumstances, it would be proper, then, to refer to such a product as "new" for six months.

2. *Recently marketed*

This use is also permissible under the language of Advisory Opinion No. 146 and the FTC's finding in *Mather*.

3. *Recently marketed broadly* (after test marketing)

This is specifically covered by Advisory Opinion No. 146, assuming that the test marketing meets the criteria set forth.

35. [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,627 (1971).
36. *Id.* ¶ 21,673.
37. *Id.* ¶ 21,677.
38. *Id.*
39. *Id.*
40. *Id.*

4. *Recently improved/changed*

Under Advisory Opinion No. 120, the change must be functionally significant and substantial. It is puzzling, however, that the opinion says that a product may not be called "new" if only the package has been altered "or some other change made which is functionally insignificant or insubstantial."[41] A change in the product might not change the function of the product. In the case of our hypothetical product, new chemicals could be added to make X-TROL more effective in doing what it already does but this does not change its function. In such a case, it seems safe to say that the FTC would not raise the technical argument about functional insignificance. What is clearly aimed at is a miniscule change (really none at all) intended specifically for the purpose of permitting the product to be called new.[42]

5. *Recently changed use form*

This use, again, is covered under Advisory Opinion No. 120. It seems that a change in a product from liquid to tablet form (as in our hypothetical case) would be significant and substantial enough to justify calling the tablet version "new." The reason is that format is significant to the product, as a change in format may necessitate different manufacturing processes or require regulatory approvals.

6. *Recently introduced in a geographic area*

This use was specifically rejected in *Mather*.[43] Nevertheless, it has a certain intuitive plausibility. We normally would not feel deceived if somebody described a restaurant in our area as "new" even though the restaurant is simply the latest unit of a national chain. That particular unit of the institution would still be new to us.

The FTC, however, takes the view that this construction would retard full market disclosure of new products.[44] This is a puzzling con-

41. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,914 (1967).

42. Some commentators would not agree with this prediction. In 2 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 26.02(2) (1978) the authors interpret the opinion to mean that the product improvement *cannot* be signified by use of the word "new." *Id.* They argue that the position expressed by the FTC mitigates against manufacturers making beneficial changes in their products, since they will be unable to capitalize upon them in advertising. *Id.*

Neither the premise nor the conclusion of this argument is acceptable. First, it seems clear what the FTC is driving at: those changes that make the description "new" not literally false. Second, even conceding the premise that the FTC would not allow a substantially changed product to be called "new," the conclusion that manufacturers will be discouraged from improving their products does not necessarily follow. Other language could be used to highlight the change. The marketing advantage in having a better mousetrap should still be sufficient incentive to improve products, whether or not the improved version can be called "new."

43. *See* text & notes 35-40 *supra*.

44. *See* Mather Hearing Aid Distribs., Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,627 (1971).

clusion, unless we realize that the FTC no longer is defining the term "new" as part of its role of protecting consumers from deception or unfairness, but has moved into the role of guardian of the economy. To encourage full market disclosure of new products, the term "new" is being given an artificially restricted meaning.

7. *Recently introduced by this company*

This is a problematical use. It is not the product itself that is new, but the fact that it is being sold by a particular company. Accordingly, the wording would have to be handled very delicately. A headline, "New From X Company—X-TROL" might be permissible. "New X-TROL from X Company" or "X Company's New X-TROL" might not be acceptable. The point is that the claim must honestly reflect that the product itself is not new, but rather that its status as coming from a particular company is what justifies the use of the term.

It may be suggested that the FTC's position is that "new" must relate to the product itself, and to nothing else.[45] Under that view, the fact that a product has just been introduced by a particular company cannot justify the use of the term "new." This argument is plausible, and the case is by no means clear cut.

Obviously, there is something new going on. X Company is now selling something that it did not sell before. At the same time, the product has been out on the market already (we will assume for more than six months), and so is not "new" for FTC purposes. Although this is a grey area, the solution to the problem would seem to lie in recognizing the limited scope of this article's inquiry.

A true statement that does not state or imply that the product itself is of recent origin may include the term "new." This conclusion follows not because the statement fits within the FTC position, but rather because that position is not applicable to the case at all. The problem with this use is that it may not be possible to avoid an implication of newness about the product. Given this understanding of the legal rules at work, the matter is one best left to the advertising copywriters.

8. *Recently marketed for this use*

Again this use involves a situation where the product itself has not changed.[46] Also, by hypothesis, the same company is still marketing the product. To say "New gas saving X-TROL" probably would be proscribed, even though X-TROL had never been marketed as a gas saving product in the past. Similarly, if it is discovered that aspirin

45. *See* text & note 40 *supra*.
46. That the purpose of the product has changed may not be determinative.

cures cancer, this would not allow advertisers to call those reassuringly familiar little white tablets "new" products.[47]

9. *Recently introduced to this type of market*

In this use the product has previously been sold only to gas stations, and now is to be made available to the public generally. Still, the product has not changed at all. Thus, even if it is the first time that a product has been advertised to consumers, it appears that the FTC would not find it appropriate to describe the product as "new."

Obviously, synonymous language could be attempted. For example, it would seem truthful to say "Now available to the general public for the first time." "Now" and "first time" carry the connotative freight that would have been borne by the term "new." But these terms do not run afoul of the law because they do not imply that the product has never been in existence.

All of the above leads one to conclude that the term "new," in the eyes of the FTC, does not refer to the availability of a product to specific customers, nor its use for specific purposes. The term is used as a description of the existence of a tangible object (product).

TOWARDS A GENERAL THEORY

The rationale in the Advisory Opinions and the *Mather* decision, seems to be that the period a product stays new varies with the type of product and the industry involved.[48] The FTC is also willing to recognize that a product can be "new" even though it has already been test marketed.[49] Although there are some unclear points,[50] the general impression is one of fair consistency. Absent special circumstances, a new product maintains it legal virginity for six months.[51]

When we return, however, to the logically prior question of what

47. This discussion is limited to the FTC regulation of advertising. The aspirin example could result in a "new" drug under the Food, Drug & Cosmetic Act. *See* 21 U.S.C. §§ 321(p), 355 (1976).

48. *See* text accompanying notes 28, 35-40 *supra*. For example, an automobile might reasonably remain "new" for the model year (more than six months), but certainly not beyond that. If a dealer in 1980 advertised "new" cars, but only offered unused 1979 models, we would reasonably feel misled in light of the meaning of "new" in that context. In the same vein, some things never come within normal usage of "new," even if they fit its literal definition. For example, if an author republishes an existing book under a different title, we would not say that he had published a "new" book. And our refusal to say so would have nothing to do with any six-month period.

49. *See* text accompanying note 29 *supra*.

50. For example, is there any flexibility in the test market criteria? How does one measure the 15% exposure? May one "tack together" several market tests?

51. Although not stated by the FTC, one such circumstance probably would be the case of a product which is out less than six months only to be superceded by another product of the same company intended for the same use. If X-TROL is replaced by SUPER X-TROL, it probably would be found by the FTC to be misleading to continue advertising X-TROL as new, even though it has been out for less than six months.

justifies calling a product "new," we are deprived of much of our certainty. The FTC tells us that "new" means recently developed or introduced into the market generally. The term "new" does not mean, however, that a product is new to any particular consumer or group of consumers. As long as the product had been introduced into the "general market"[52] more than six months previous, it is no longer new anywhere.[53] Anything that has been marketed except under limits of the test market exemption would be deemed introduced to the "general market."

Yet, there seems to be no deception in allowing the term "new" to be used when what is new is the geographic region involved.[54] Suppose that a major bank opens a branch in a previously untapped territory. An advertisement heralding "The New Kid on the Block" hardly seems to be deceptive. Similarly, a product that has been unknown in the geographical area would be considered new when it is first introduced there, whether or not it is so advertised. The company would have all the problems of marketing a truly "new" product, such as dealer reluctance to stock the product and the need for heavy advertising. In light of this obvious tension between the normal concept of when a product is considered new, and the FTC's restraints on that concept, it becomes necessary to scrutinize the FTC's rationale for not allowing the language to take its normal course.

But before the FTC's rationale concerning the normal course of language can be analyzed, it must be determined what is that normal course. This proves to be a rather interesting inquiry, for the term "new" occupies a somewhat peculiar niche. Its use is not what one would initially imagine it to be.[55]

First, the term "new" is not an ordinary description.[56] It does not represent a quality of a thing. It does not make sense to say that I have a 1980 unused car, which also is new. The addition of the term "new" does not add anything to the description. Also, if the term were

52. *See* text accompanying notes 29-34 *supra*.

53. It is no longer new at least within the United States. The FTC does not monitor advertisements in foreign countries, but quaere the effect of the introduction into the United States of a product already established in another country. Given problems such as customs and import duties, it seems reasonable to say that something is new when first introduced in the U.S. market.

54. *See* text accompanying note 44 *supra*.

55. For purposes of this Article, it is sufficient to note that in a large number of cases the meaning of a word is the same as its use in the language. *See* L. WITTENSTEIN, *supra* note 22, § 43. Although such an analysis is fruitful, and will be followed here, the philosophical offspring of Wittgenstein have to avoid the trap of considering it to be the only possible valid approach. *See* J. SEARLE, SPEECH ACTS 147-49 (1967).

56. It is not an ordinary predicate except in the sense of something being unused or not rebuilt. *See* note 1 *supra*. *See* L. WITTGENSTEIN, *supra* note 22, § 1 on the word "five." No metaphysical inquiry into the meaning of the word "five" is needed; one simply needs to know how the word is used.

describing a quality, we could reasonably ask what would happen without the quality, how did the quality get there, and how can it be removed? None of these inquiries make particular sense under the circumstances.[57] Yet just such an approach underlies the FTC's view and opinions.

Accordingly, since "new" is more than a simple description, we have to ask what it is and how it acts. In other words, its performative status must be analyzed. Without getting too deeply into the philosophy of the language at this point, a performative generally:

1. Does not describe or report anything, it is not "true" or "false"; and
2. is used as part of an action.

For example, a pure performative would be the phrase "I bet" in the statement "I bet you $5.00 that my team wins the game Saturday." It is both a statement and the act of wagering.[58] By uttering the statement, the act is performed.

This duality is what makes performatives odd to handle. We are conditioned to believe that words say things about actions or objects. Thus, the FTC views "new" as saying something about a product in terms of the time period after its discovery or introduction into the market. Yet some expressions, "new" being one among them, do not simply describe objects or actions. Such words, in the proper contexts, perform acts. As Austin noted:

> When I say 'I name this ship the *Queen Elizabeth*' I do not describe the christening ceremony, I actually perform the christening; and when I say "I do" (sc. take this woman to be my lawful wedded wife), I am not reporting on a marriage, I am indulging in it.[59]

Of course, language being the rich and supple thing that it is, even straight performatives have implications that can be true or false. For example, when someone says "I do take this woman to be my lawful wedded wife," he is implying that he is not already married, that he is capable of getting married.[60] These implications make up the context or convention under which the performative statement is valid and proper.

Nevertheless, the term "new" is not a pure performative. The word does not always perform anything that plausibly could be called an action. As will become clearer below, however, the ways in which the term "new" functions and malfunctions, within our society, fit more

57. These inquiries do make sense, however, when we describe the car as being red.

58. Persons interested in pursuing further the general theory of performatives should explore J. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); J. AUSTIN, PHILOSOPHICAL PAPERS 233-52 (2d ed. 1970) (hereinafter cited as PHILOSOPHICAL PAPERS).

59. PHILOSOPHICAL PAPERS, *supra* note 58, at 235.

60. *Id.* at 237.

comfortably under performative terms than under any others. It is not crucial, or even overly significant to the analysis whether performative status is totally appropriate. The label drops off in the final view. Still "new" does not merely report a fact, but rather is used to influence people.[61] Hence, it has a perceived potency in advertising. Still, it may be suggested that all language (or at least all language in advertising) is designed to influence people. "New," it could be argued, influences by its descriptive force, not by any performative attributes.

This argument is not without force, but it misses the point of the analysis. The term clearly has a descriptive function, as does most language. It is not irrational to say, as in the ship christening example, that the language both performs and describes the act. The power of the performative analysis lies in the fact that it forces the listener to focus on context. A performative functions as such only in a proper context.

For example, the words used to christen a ship do not perform that act unless the circumstances are proper: The speaker must be appointed to name the ship and it must be the time for the christening. Similarly, for "I do" to perform the act of marriage, the speaker must be either the bride or the groom, and the words be spoken at the right time—during a marriage ceremony.

Discovering the context in which a performative can operate is thus a social function, an endeavor which the FTC should undertake for the term "new." Such a determination, however, should not be made apart from an analysis of how the term actually functions in society, and it is to that which the article now turns.

When a product is called "new," groups of expectations are established at various levels of the distribution chain. The term influences consumers to try the product (the inference being that it is better than what currently exists). This may be called the consumer-impactive sense of the term. For wholesalers and retailers, the term triggers a different matrix of responses. It means handling an additional product that is without a sales history in such a manner so as to predict how well it will sell. In this sense, the term can be called distributor-impactive. The term for the manufacturer entails a certain effort to overcome wholesaler and retailer reluctance, plus an effort to inform the public of the existence of the item.

The point here is that the word functions differently at various levels in the distribution chain. At the consumer level, it can be deemed an implied claim or even a lure. At the same time, it functions

61. *Id.* at 234.

as an inhibition at the wholesaler and retailer level. Calling a product "new" may attract customers, but how many?

It is significant that it is at the wholesaler and retailer level where the manufacturer actually responds to the impact of the term. To the manufacturer, it means that he must "sell in"[62] the product, offer incentives, and place advertising. This bears only a secondary relation to the consumer-impactive sense of the term. To the manufacturer, "new" is used because of its impact on consumers, but requires action because of its impact on distributors.

The FTC has given no indication whether it recognizes this point. It purports to view the term "new" only in the sense that consumers might be deceived by it. But, at the same time, the FTC does take into account the use of the term at other levels of distribution. In *Mather*, the FTC took the policy stance that it wanted to encourage full marketing, and therefore refused to allow a product to be called "new" when the product previously had been on the market somewhere else in the country. The FTC's reasoning deserves examination in full:

> However, under the examiner's order, if a product is "new" in a marketing area but not known in another, a company can presumably advertise the product as "new" in the latter area for a period of one year after its arrival. This construction on the concept of "newness" is strained. In advertising "newness" the implication is that the product is new, i.e., "recently invented, discovered or developed", not that it is new to the marketing area. This latter construction is wholly unfounded and an order reflecting this construction retards full market disclosure of new products, thereby denying some consumers the prompt benefits of innovations.[63]

Allowing regional use of the term new, according to the FTC, would have the following effects:

1. It would retard full market disclosure of new products; and
2. it would thereby deny some consumers the prompt benefits of innovation.

Since the Commission purports to derive statement two from statement one, if number one is invalid then the conclusion falls.

The kind of manufacturer assumed by the FTC in point one is the one who even though he could afford a national market introduction at the start, cannily moves his marketing from one area to another, milking the "new" character of the product in each area. Otherwise, it

62. "Sell in" means to put a product in the distribution chain so that wholesalers and retailers will stock it.

63. Mather Hearing Aid Distrib. Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 19,627, 21,677 (1971).

makes no sense in saying that there would be "full market disclosure" of new products if orderly regional marketing is prevented. And it certainly makes no sense to say that consumers would be denied the prompt benefits of innovation if regional marketing were allowed, unless the manufacturer could afford to go national all at once.[64]

The FTC seems to believe that if it allows the term "new" to be used in regional marketing, it would be hindering full market disclosure. Although this analysis of "new" focuses on its impact and performance, it is hard to determine at what persons the analysis is aimed. If there is a benefit to the consumer in having a new product available as such, the Commission approach may well be counterproductive.

A manufacturer who does not want to go national need not do so. He can have regional marketing under the FTC's rule, but he may not use the term "new." Consumers will not be aware that the product is new, and therefore might not try it, thus losing its benefits. So it appears that the FTC is not really looking at the consumer-impactive sense of the term.

The FTC also is not looking at the distributor-impactive sense of the word. The distributors will know by its attributes that the product is new: the product will not be in stock and there will be no sales history on it. The distributors will also be reluctant to carry the product because the manufacturer cannot attract consumers to it by using the word "new."

Finally, the FTC does not seem to be looking at the impact on the manufacturer from its use of the term "new." Under the FTC's theory, the manufacturer has two options:

1. Go national immediately, and use the term "new"; or
2. go regional, with all of the problems of introducing a new product, but without the advantage of being able to call it new.

Framing these options in this way serves to discourage the introduction of new products[65] but without any compensating benefits. Even if the FTC rule did allow the regional use of the term, a manufacturer still might immediately market the product nationally, to preempt any competitor who might copy the product. But he also would have the option of proceeding more slowly, intelligently positioning the product in light of market feedback.

The FTC purports to view "new" in its consumer-impactive sense. But the *Mather* proscription of regional use is not justified in that sense.

64. Or after a 15% of population, six-month test.
65. The disincentive obviously is not complete. *See* note 42 *supra*.

By purporting to analyze the impact and use of the term, but actually ignoring the way the term operates, the FTC is defeating its own goal.

CONCLUSIONS

It now is appropriate after the above analysis to ask what general rules should guide the FTC's regulation of "newness" claims.[66] We will assume that the FTC is concerned with the consumer-impactive sense of "new," and wants to prevent possible deception.[67]

First, before taking any regulatory steps the FTC should explore how the word actually functions. In the case of "new," the FTC has held the view that the term is entirely descriptive. It has been argued here that this view is incorrect, that the word is more in the nature of a mixed descriptive-performative.

Second, the FTC should look to how the word functions at all levels, not simply at the consumer level. It may be that a proposed limitation has little impact at the consumer level, but hinders a desirable goal by its operation at the distributor or manufacturer level.

Because the FTC looked only at the consumer level, and viewed the term "new" as being entirely descriptive, it asked whether that description corresponded with reality. How long is something still "new"? Is something new in New York when it is first introduced there, even if it had been known in Los Angeles previously? These are the questions that the FTC sought to answer. But because "new" is not solely descriptive, there are no pat answers available. Therefore, the length of time something may be considered was held to depend on the circumstances.[68] The question of geographical use was settled by fiat (with essentially a non sequitor thrown in as a justification).[69]

Had the FTC viewed the term in its full, mixed aspects, I believe that all nine uses discussed in the Article would have been allowed. In each case, consumer usage would justify use of the term. Because "new" is not solely descriptive, the fact that its use is flexible does not mean that any one use is false.[70] In attempting to protect consumers from some "news," the FTC has ignored the real story. As mentioned

66. The analysis applies to all claims, but this Article focuses on claims of "newness." For the sake of clarity, the Article does not generalize its analysis.

67. *See* text accompanying notes 6-7 *supra*.

68. *See* Advisory Opinion No. 120, [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 17,914 (1967); Advisory Opinion No. 146, [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 18,088 (1967).

69. *See* Mather, Hearing Aid Distribs., Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,627 (1971). See also text accompanying notes 63-65 *supra*, concerning the lack of logical justification for the rule.

70. A pure performative is not subject to being true or false, although it can misfire or be abused. *See* J. AUSTIN, *supra* note 58, at 16-24. The automobile hypothetical, see note 48 *supra*, comes close to a misfire.

earlier, that real story is the definition of the context or convention within which the term properly can operate. Again, performative analysis provides a starting point. Austin sets out two very general rules governing performatives:

1. The convention invoked (marrying, christening ships, etc.) must exist and be accepted; and
2. the circumstances in which the procedure is invoked must be appropriate for its invocation.[71]

If there is no existing convention, there can be no act. If one is in a society where marrying is unknown, saying "I do" cannot get one married. Clearly, this rule is satisfied in the case of the term "new." The use of the term is accepted in our society.

In addition, the circumstances must be appropriate for the invocation of the procedure. Saying "I do" in response to the question of the correct time does not get one married. The circumstances are not appropriate for the invocation of the performative status of the word.[72]

In the case of "new," problems which arise and with which the FTC deals are of just this type. They relate to the proper context for the invocation of the term's performative status. When the FTC says that "new" cannot be used when a preexisting product is being introduced into a new geographic market,[73] it is not really saying anything at all about the meaning of "new."[74] The FTC really is saying that the context is improper for the use of the term.

The intuitive feeling that a product just introduced to an area is "new" is correct. The FTC's decision, on its own terms, is wrong. The reason that such a judgment can be made is that there is a criterion for correct usage of the term, but the FTC has ignored it. That criterion is customary practice.

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71. J. AUSTIN, *supra* note 58, at 237.

72. There are more conditions to the proper use of performatives than these two. Austin sets forth six:

(A.1) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances; and further,
(A.2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked.
(B.1) The procedure must be executed by all participants both correctly and
(B.2) completely.
(G.1) Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further
(G.2) must actually so conduct themselves subsequently.

J. AUSTIN, *supra* note 58, at 14-15 (footnote omitted). It is not necessary to get into these refinements for the purposes of this Article.

73. *See* Mather, Hearing Aid Distribs., Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,627 (1971).

74. *See* text accompanying note 63 *supra*.

In general, the fundamental criterion for determining whether someone understands a word is in how he uses that word.[75] To know whether a person understands the word "five" does not require (or want) an explanation of the philosophy of mathematics; rather, the person is asked to count, to use the word. But, obviously, not just any use will do. If the person is asked to add 5 to each number in the sequence 10, 20, 30, . . . 100, and he replied by writing 15, 25, 35, . . . 105, we would say that he understood the use of the number 5. On the other hand, if he wrote 15, 30, 45, . . . 150, we would say that he did not understand what he was doing. In each case he has used 5, but only in the former case do we say that he used it correctly in the given context. The criterion for the correct use is customary practice.[76]

This point may appear to be obvious, but some will reject it. To these people (who include, one might note, the FTC) a word has a prescribed definition. Deviation from that definition is misuse.[77] Such a view is harmless, if it recognizes that the definition itself reflects and is based upon usage.[78] To reject that recognition is to lead quickly to nonsense.

How can a word be used deceptively, unless its meaning arises out of its use in a context? Under the prescriptive view noted above, deceptions cannot exist; a word either means "X" or it does not. Improper use could not deceive anyone, any more than calling an octopus a cinder block could deceive people.

Here a distinction from legal performatives must be noted. When it is said that the statement "I do" marries one under certain circumstances, some of those circumstances are defined by law (such as what is a valid marriage ceremony). There is no comparable legal definition of the context of the term "new." Marriage is a legal institution; newness is not. The Federal Trade Commission Act does not, by any stretch of the imagination, empower the FTC to write a legal dictionary.

Instead the Act requires the FTC to determine which uses of a given term are deceptive.[79] Deception means generally that someone is

75. L. WITTGENSTEIN, *supra* note 22, §§ 143, 185-197. *See also* Strawson, *Review of Wittgenstein's Philosophical Investigations*, in WITTGENSTEIN—THE PHILOSOPHICAL INVESTIGATIONS: A COLLECTION OF CRITICAL ESSAYS 22, 35 (G. Pitcher ed. 1966).

76. Strawson, *supra* note 75, at 37; L. WITTGENSTEIN, *supra* note 22, § 199.

77. *See* HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION ii (11th ed. 1967), refusing to recommend a particular dictionary because it is "insufficiently prescriptive."

78. This view risks the wrath of orthodox linguistic philosophers. With some justification, they believe that meaning is use. To set meaning apart, even to a limited extent, is to encourage just the sort of futile speculation that Wittgenstein tried to explode. To such criticism, one can only reply that dictionaries exist and serve a function; thus, definitions also must exist, and serve a function.

79. *See* note 5 *supra*.

lead to believe something that is untrue. Thus, if the term "new" were an ordinary descriptor, the FTC could simply look to its usage and determine that in certain cases the description is false, and bar those uses. But, as noted earlier,[80] the term does not function as a simple descriptor: It has a descriptive-performative function. Thus, to fulfill its role, the FTC must analyze usage without the words "true" and "false" as guideposts.[81] It must determine which contexts are appropriate for use of the term, a far more subtle inquiry. The criteria for determining the appropriateness of a term are the common understanding and usage of the particular term in question.

Both the statute and case law[82] suggest that the FTC has the power to define the proper context under its general power to prohibit acts that have the capacity to deceive.[83] What gives the term "new" such capacity is its use in an inappropriate context. A car dealer could be prohibited from advertising in 1980 "new" cars, which turn out to be unused 1979 models.[84] This is not because the cars are not "new" in some sense, but rather is because the context of selling the prior year's model makes the use of the term "new" inappropriate.

The FTC seems to feel that its job is to determine some possible uses of the term, to then determine the theoretical perception of one affected group, and finally to make normative judgments that a use is deceptive. As this Article has tried to point out, a more appropriate description of the FTC's role is available. The FTC should determine actual uses of the term "new," determine the actual perception of all groups affected, and then determine which uses do not coincide with general usage and perception.

In making such descriptive judgments, the FTC would be fulfilling its consumer protection function,[85] with minimal disruption of normal business expectations.[86] Because it has not recognized the descriptive-contextural nature of its own role, the FTC has complicated and confused the news about "new."

80. *See* text accompanying notes 20-21, 56-61 *supra*.
81. *Cf.* L. WITTGENSTEIN, *supra* note 22, § 85, 198.
82. *See* text accompanying notes 5-9 *supra*.
83. *See* text accompanying note 7 *supra*.
84. *See* text accompanying note 48 *supra*.
85. This is a somewhat less exhalted role than guardian of the economy, *see* text accompanying note 44 *supra*, but a more realistic one. The FTC should not be torturing word usage to promote nonstatutory economic goals.
86. *See* text accompanying note 65 *supra*.