

CHANGING ISSUES, CHANGING AGENDAS:
WINNING FOR THE CONSUMER IN THE NEXT 50 YEARS

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I am happy to be with you today. I am happy because ACCI's 32nd Annual Meeting attests to the durability and vitality of this organization and its members. I am proud today, as I was the first day I became Executive Director of Consumers Union, to be linked with the name and work of Colston Warne.

I would like to pay a special tribute to Colston Warne. If he had done only one thing in his lifetime--steered CU as its founding president in 1936 until he stepped down in 1980--it would have been a remarkable achievement. But Colston was tireless in his search for ways to advance the consumer interest. His efforts, and CU's grants, helped launch many pioneer consumer organizations. The list, to me, is dazzling: IOCU, CFA, ECRI, Center for Auto Safety, Washington Center for the Study of Services, and many smaller ones as well. In an article, Colston details as most notable the founding in 1953 of this outstanding organization in which he was directly involved and CU's grants to ACCI for 20 years.

Those organizations were pioneering, of course, but Colston was the real pioneer because he had the vision to see that they were needed and that he had a role to play in creating them.

CU's 50th anniversary has become more than a celebration at CU. It has propelled many of us to turn our attention from our day-to-day work and concerns, and to pay attention to something that had slipped too much into the background: the history of the consumer movement.

I hope you'll read the historical articles in the January and February 1986 issues of Consumer Reports, and our retrospective articles on products of yesteryear in the current issues. Two Smithsonian museum exhibits will mark our history, one at the Cooper-Hewitt Museum in New York, opening in September, and the other in the National Museum of American History in Washington, D.C., opening in June. The Cooper-Hewitt will feature products and services that have made a difference. The American History exhibit will show how citizen action can protect consumer interests.

And our gala dinner in May will not only celebrate our longevity, but will retell our history and our place as part of the rich fabric of American history.

And so, thinking historically, I asked myself, as I prepared this lecture: Have consumer issues changed much in the last 50 years? Are we facing

formidable new problems, or are today's major issues just a further iteration of those of past years?

Why does it matter? The consumer movement, like all movements, has an agenda, and each consumer organization fashions its own. The total reflects a composite judgment of wrongs that must be righted, threats that must be averted, pitfalls that must be avoided, products and services that must be improved, education and information that must be provided, and so on. Over the years, our movement has had remarkable achievements. We have helped to make products safer, and consumers more informed and more health conscious. We have aided consumers in becoming wiser buyers of goods and services in many different ways. We have fought for the rights of consumers and for legislation to establish those rights. New organizations have sprung up, reflecting the many ways the consumer interest can be perceived and served.

Yet, even with such a record, we need to check from time to time, to see if we are on the right course. Has the consumer movement identified the pivotal issues facing consumers in 1986? Are we focusing our attention where it is most needed? Where it belongs? Do we need to frame new issues?

When Stuart Chase and Frederick Schlink wrote "Your Money's Worth" in the 1920's, they created a new agenda for consumers: impartial product testing to counter the fraudulent and manipulative advertising of consumer products. It sold strongly and was one of many such writings that galvanized the thinking of consumers all over the country. Colston Warne has written that Chase and Schlink deserve the major credit for the invention of what he called "the new social movement," the consumer movement.

Those men, and the people who worked with them and ultimately founded Consumers Union, framed new consumer issues for that time, and created the intellectual ferment, the organizations, and the public support to deal with them.

Of course, that's a task that's never completed. We must take stock continually. We must ask if we're devoting our time, our strengths, and our leadership to the most crucial problems facing consumers. This Annual meeting presents an excellent opportunity to pause and to try to answer that question.

I would like to nominate for your consideration three issues that should be provoking the attention of consumers and their organizations. They need discussion because they are somewhat new, at least in their present forms, although they have

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roots in the past. They are too important to be ignored by the consumer movement, and yet, may not, at first blush seem a perfectly comfortable fit.

The first issue is the consumer's right to be protected from hazardous technologies and the toxic substances associated with them. It is a puzzlement to know where, among all the organizations concerned about human beings and their health and safety, there is a perfect fit for an issue like this. Is it a labor issue? Is it for environmental organizations? A city planning problem? It is all of those; but, it is unquestionably a consumer problem as well and consumers must be part of the solution.

The disaster at Bhopal in December, 1984--where more than 2,000 people were killed and hundreds of thousands injured--should have struck fear into the hearts of any citizen living near a plant involved in hazardous industrial technologies and toxic substances. Perhaps some people believed that the Bhopal tragedy was related to the place where the plant was located--that it was a Third World problem. That false hope was shattered when, many months later, another Union Carbide plant, manufacturing the same deadly methyl isocyanate, had a serious accident as well. That accident did happen here, in Institute, West Virginia. That plant had the most deadly warning imaginable, the example of Bhopal. That plant was surrounded by concerned citizens who tried to engage the company in discussions about protecting the citizens who lived nearby. That plant was owned by a company reeling from the magnitude of the Bhopal disaster, a company that sought to place blame for it on Carbide's Indian managers and workers.

By now, everyone realizes that, indeed, a Bhopal can happen here. The accident at Institute was a warning. Another warning last year was sounded when an accident at Kerr-McGee's uranium processing plant in Oklahoma killed one employee and injured about 30 others. A radioactive compound, uranyl fluoride, escaped from a ruptured container into the plant and the surrounding site. Widescale testing of area residents took place at a nearby hospital.

According to the New York Times, a Nuclear Regulatory official described the safety concerns as "minimal." But were they? The Times reported that many of the nearby residents, about a fifth of them children and teenagers, were exposed to the gas cloud. Residents have raised questions about the company's emergency contingency plans, and about the safety of its maintenance procedures and of its transportation system. Some residents complained about a time lapse between the accident and the spreading of an alarm. A company official said that the first need was to evacuate employees, and that the State Highway Patrol was notified within about 20 minutes. He said also--more than one year after Bhopal--that no special review of procedures had been made as a result of Bhopal, but that because of the Kerr-McGee accident, many changes would be made.

The Kerr-McGee accident had much in common with Bhopal and Institute. It involved transfer from a storage tank, instrument malfunction, untested industrial procedures, and it occurred on a weekend. Most important, in all three cities, local emergency officials said they were either unprepared for the accident or were not informed of it.

No one can predict where, or when, or how the next accident will occur. We know they keep on coming. In the United States, according to government figures, there have been 6,928 accidents involving toxic chemicals, including 139 deaths, during the past five years.

We know, too, that just as Bhopal in India was unprepared for a disaster, so are we in America. For example, in November 1985, a survey was done by the Workers' Policy Project and Dr. Steven Markowitz of Mt. Sinai Hospital in New York, of all acute care hospitals serving the industrial corridor of Northern New Jersey, within 40 miles of Manhattan. The population of the seven counties included in the survey was 3.5 million. This region has the nation's highest concentration of plants using toxic chemicals. Yet, the total number of critically ill patients that could be treated at all the hospitals in the region combined was fewer than 500. A Bhopal-type tragedy would overwhelm such facilities. Worse, the report also found a severe lack of knowledge about toxic industrial chemicals. Industries and their nearby hospitals had virtually no information exchanges. Doctors in emergency rooms had no idea as to what patients in chemical accidents are likely to be exposed to, or whom to contact in the industries for information in the event of an accident. Specific protocols for chemical emergencies have not been written or implemented in the emergency rooms of most of the hospitals surveyed. The report concluded that the accident at Bhopal should serve as a warning to health care providers, workers, industry, and nearby communities.

Shortly after Bhopal, I helped organize several meetings of environmental, labor, church, and consumer groups to discuss what citizens could do, and to work for justice for the victims and the prevention of future disasters. We evolved into the Citizens Commission on Bhopal, which I co-chair with Dr. A. Karim Ahmed of the Natural Resources Defense Council. On the first anniversary of Bhopal we held a conference and released position papers on various aspects of the difficult problems raised by the Bhopal accident.

The most important points we made related to the subject of this discussion. The Commission stated strongly that not only workers, but communities as well, have a right to know what is being manufactured, processed, stored, transported, and disposed of in plants and the surrounding environment. Even more, the Commission said they have the right to be involved in auditing the safety operation. They have the right to assess the risk created by the plant and its activities. We said that a worst-case-risk scenario must be

made available publicly, and that local public health and medical services must submit reports showing how they would respond to a worst-case scenario accident.

Most significant, we said that workers and communities need to be able to act to prevent accidents before they occur. Presently, only government agencies and corporate officials have the power to halt unsafe processes. The Union Carbide and Kerr-McGee accidents, and the many others as well, show us that government regulation is too little or too late, and that corporations cannot be relied upon to protect the safety of citizens. We proposed the deputization of at least one worker inspector and one community inspector in each plant, to check maintenance and to be empowered to halt any process they have reason to believe is unsafe, as well as to obtain independent medical, engineering, and scientific help in making assessments and suggesting alterations.

These proposals would have been perceived as going too far many years ago. Today, one may ask whether these--or any other proposals now being discussed--go far enough in protecting communities and workers.

The consumer movement and Americans generally pride themselves on how far they have come in making life safer and better for consumers. This may indeed be true with respect to products: lawn mowers are safer and so are baby cribs. We have several relatively new federal agencies monitoring safety, and even if they are not effective at this moment in history, the structure exists so that they may again enforce our laws in future times.

But we have traded new dangers for old, and the magnitude of the danger has become greater, not smaller. I was reminded of that last month on the occasion of the 75th anniversary of the Triangle Shirtwaist Company fire in New York City. This fire, described in The New York Times as "a tragedy that echoes still," is credited by the Times with "sparking a nationwide crusade for safer working conditions." There were 500 women sewing cotton blouses, mostly young and immigrants, when flames engulfed the factory. Fire doors had been locked to keep them from leaving the building with stolen goods; 146 workers were killed.

In the 75 years between the Triangle fire and Bhopal, we have not come far enough in worker safety. And the safety problems that once seemed limited to the workplace have now spread from workers to the community as well.

The Triangle fire anniversary stirred The New York Times to review the state of workplace safety in the United States. It noted that the government agency responsible for enforcing safety laws and regulations, OSHA, had 1,328 inspectors in fiscal year 1980, and was down to 1,086 in 1985. Over the same period, inspections in response to complaints plummeted by 46%. And total penalties dropped 44%.

In sum, the safety of industrial plants and their technologies have become consumer problems. They are in the same category as the safety of the food we eat, the water we drink, and the air we breathe. True, they are only beginning to be perceived in that way, and they are not only consumer problems. But their nature and magnitude should propel those of us in the consumer movement and those of us concerned with consumer education to enlarge our frame of reference to incorporate this awesome problem into our agenda, to act, to teach, to think, to show concern.

The world consumer movement has begun to do so. Of course, leading consumer organizations in India have been active. So, too, has the International Organization of Consumers Unions (IOCU). We have organized a Working Group on Hazardous Technologies, working out of our regional office in Penang, Malaysia. We have published materials, and participated in a multinational UN consultation on the problem, speaking for the consumer interest.

We will continue to be involved in national and international efforts to set procedures, standards, and guidelines to help prevent future Bhopals.

The second issue relates to a particular sort of corporate behavior. There is an arrant lawlessness abroad in this country and elsewhere in the world, a pervasive indifference by many corporations to laws, regulations, codes, and minimum standards of human decency. We see it in manufacturing and marketing. We see it from the lowest levels of the corporate ladder to the highest. We read about it in the newspapers with appalling frequency. There seems to be no abatement.

You may have your own examples, but allow me to cite a few.

- The most recent was the finding by OSHA this month that Union Carbide's Institute plant had about 200 alleged health and safety violations. Fifty-five laws were violated. A penalty of \$1.4 million was levied.
- E.F. Hutton was convicted in May, 1985 on 2,000 counts of mail and wire fraud, a felony. The Connecticut State Banking Commissioner said that the safety and soundness of the banks were placed in jeopardy.
- Eli Lilly & Company, the pharmaceutical giant, introduced a new drug, Oraflex, with FDA approval. It never revealed to the FDA that it had received reports from its British affiliate describing adverse reactions and deaths. Lilly's Chief Executive Officer admitted that he had decided to market Oraflex even after seeing reports of the deaths of five elderly women. The FDA called the launch of the drug "less than ethical" and "false and misleading." By the time it was recalled, it had been connected with 26 deaths and over 200 cases of individuals with serious side effects from the drug. The company and one medical officer were

charged with a misdemeanor and fined \$25,000 and \$15,000, respectively.

- Last June, three executives of a company called Film Recovery Systems were found guilty of murder in the death of a worker who died near a vat of cyanide at the company's plant near Chicago--the first time executives have been convicted of homicide in a corporate matter.
- The Wall Street Journal reported last month that job deaths and injuries are increasing as businesses cut corners and the Reagan administration cuts health and safety enforcement.

The above examples tell us who got caught. It's a safe guess that most white collar criminals get away.

I'd like to use a case study today to describe what I believe is the worst corporate criminal--at least on this morning's scorecard. I'm talking about the A.H. Robins Company and its Dalkon Shield, an intrauterine birth control device that has caused many thousands of cases of pelvic infections, some leading to sterility, miscarriage, and even death.

Starting in 1971, in the United States more than 2.5 million Shields were inserted into women by their doctors. Another 1.5 million were distributed in more than 75 foreign countries. From the outset, Robins engaged in deception about the safety and efficacy of the product. Its testing was specious. The company knew virtually from the beginning that the Shield caused pain and infection, and that the low pregnancy rate claimed was false. By concealing that copper sulfate was part of the product as a spermicide, Robins avoided an FDA requirement for proper testing for safety and accuracy. Women in whom the Shield was inserted suffered from pelvic infections, punctured and destroyed uteri, abortions, unwanted pregnancies, and damaged children.

Although Robins halted sales in the United States in 1974, it was not until 1980 that Robins advised doctors to remove devices then in use. By then, countless injuries and some deaths had resulted. Yet, another four years passed before Robins publicly advised women still using the Shield to remove it.

At this point, there are about 250,000 claims against Robins for injuries relating to the Shield. Hundreds of millions of dollars have been paid in compensation and punitive damages in cases now concluded.

In order to avoid making full restitution for the grievous harm it has done, Robins has declared bankruptcy, a ploy now increasingly used by corporations that, either with criminal intent or without, have created millions or billions of dollars of injury to innocent consumers.

It is bewildering to normal people to ask how the people at Robins could have done this. It is scandalous that, even at this point, Robins' recall of the Shield has barely been promoted in

the many countries abroad where it has been sold and inserted. In the countries outside of the United States where the Dalkon Shield goes right on doing its damage, Robins has done the least possible in notifying women of the serious danger and the deadline for bringing claims. Of course, part of the problem is that Robins does not admit that its Shield has done the harm that now seems so apparent.

This sordid tale involves more. Morton Mintz, the notable Washington muckraker, has told the story in a worthwhile book, "At Any Cost." He details how the corporation covered up and destroyed reports of injury and death, and research results that would have interfered with sales. He describes how the corporation ordered its attorney to destroy papers that would have disclosed the truth in court. He details how women plaintiffs were badgered and abused. J.K. Galbraith, in his review, calls the story "truly horrifying" and that is exactly what it is.

All the examples I've given illustrate not one, actually, but two issues that consumers need to address. The first I've described: corporate crime. The second is related. Robins is just one pharmaceutical company engaged in a worldwide trade that markets to Third World consumers products that are unsafe or inappropriate for them.

This is an issue that has preoccupied consumer groups for decades. The world consumer movement has mounted an organized campaign to counter such marketing practices. It has done this through IOCU and the network IOCU helped found, the Health Action International (HAI).

Consumer and health-related organizations throughout the world have joined together to monitor the global marketplace in pharmaceuticals. It is they, more than Robins, who are notifying women to remove the Dalkon Shield, and to file claims before the court-set deadline. They have articulated principles of ethical marketing, principles that would protect consumers from the marketing of unsafe, unnecessary or inappropriate drugs. They have succeeded in driving off the market--after a lengthy global campaign--the harmful drug, clioquinol, and a few others as well.

The task is enormous, and everyone concerned with consumer issues can participate. It begins with strong consumer awareness that there must be ethics in marketing, and that human health and safety must come before profits. Pharmaceutical companies have made a formidable contribution to human well-being, but they have brought death and injury and suffering as well. This latter they must not be allowed to do. Some consumer organizations, and many concerned citizens as well, are examining the weak and inadequate penalties that corporate wrongdoers receive. Our nation's legal structure and its enforcement mechanisms have not caught up with the crimes corporate leaders have been able to commit.

This is an issue where study, analysis and action must be combined. All of us have a role to play.

A third issue has thrust itself upon consumer organizations, and that is the issue of the poor consumer. Certainly poverty is not a new issue, and the consumer movement has never ignored it. In the 1960's, during the war on poverty, considerable attention was paid to protecting poor consumers from unacceptable credit practices and from discrimination in the marketplace. Today, consumer organizations work to assure that necessary services such as banking are vouchsafed to poor consumers. I am pleased to see that at this conference there is a session on lifeline banking.

Consumers Union, when it was founded in 1936, dedicated itself to "decent living standards for ultimate consumers," and recognized that reporting on the quality and price of products alone could not achieve that goal. We said in the very first issue of Consumer Reports, "all the technical information in the world will not give enough food or enough clothes to the textile worker's family living on \$11 a week."

Today, this country, in all its affluence and generosity, is tolerating a poverty reminiscent of the 1930's. The basic needs of consumers-- food, housing, and health care--are not being met for an appallingly large segment of our population.

In the 1960's, the war on poverty engaged our national attention. We perceived ourselves as a nation engaged in a battle to end poverty, and were optimistic about the outcome. We believed that we could end hunger in America and provide for the other basic needs of our population.

We know now that our nation has changed course. From a consumer point of view, we have become two Americas. One segment of our population can live decently, can go shopping with money in its pockets and make decisions about what appliances and cars to buy. It can concern itself with what personal care items and what food brands are most desirable. That part of the population is concerned about how to save its money, about its retirement income, about the cheapest air travel, and about insurance. It consults Consumer Reports. The other America is engaged in a losing struggle to provide for the most minimal necessities. It struggles to get enough to eat or a place to live or adequate health care. In 1984, 33.7 million Americans were poor. The 1984 poverty line for a family of four was \$10,609 in annual income.

Most tragically affected are children. One out of every five children lives in poverty today. This is almost twice the rate for adults. More than half of all Black children under six live in poverty. More than 40% of Hispanic children live in poverty.

From 1968 to 1983 the total number of children in our country decreased by nine million, to 62.1 million. Yet, the number of poor children increased by three million.

Astoundingly, more than a sixth of the poor children--2.5 million--are in families where at least one person works full time. Did we believe that a full-time job prevents poverty? That myth is shattered. Of all persons heading poor families, over 49% work at some point during the year.

A smaller proportion of poor children now receive food stamps and help under Aid to Families with Dependent Children than received them a dozen years before. Poor families with children have fallen further below the official poverty level. In 1968, the poorest fifth of all families had an average of 91% of the income they needed to meet their basic needs. In 1983, they had only 60%.

There is a part of the American dream that is becoming an American myth, and that is, if you get a job and work in this country, you can live decently. Yet, the Center on Poverty and Policy Priorities reports that more than two million people who work full-time year-round don't earn enough to escape from poverty. A stagnant minimum wage has contributed to that fact. Since 1981, prices have risen about 25%, but the minimum wage has not changed. The result is that in 1984 a family of four where one person worked full-time at the minimum wage fell more than \$3,600 below the poverty line.

Another American assumption has been shattered. Most Americans believe, in some vague way, that the current economic recovery is associated with a satisfactory employment level. Some economists believe that the 7.2% unemployment rate is a natural part of our system. But the cold fact is that 8.5 million people who are looking for jobs can't find them. Worse, only about a third of these people are currently receiving unemployment benefits--a record low. And these figures tell us nothing about the large number of people who do not make it into the recorded unemployment statistics because they have given up looking for employment.

Yet another American myth has been shattered in the last few years. That is, that the people of this affluent and generous country will be certain, through its various programs, to take care of its needy. We want so much to believe in the "safety net." But the facts show otherwise. The Physicians Task Force on Hunger in America, sponsored by the Harvard School of Public Health, called hunger a "growing epidemic." This finding was confirmed by the United States Conference of Mayors, which surveyed 25 cities around the country. It reported that in 24 of the cities, requests for emergency food assistance increased by an average of 28% in 1985, but two-thirds of these cities have had to turn away hungry people.

Another American myth that has fallen by the wayside is that we can provide housing for people who need it. This was high on our national agenda when Franklin D. Roosevelt was inaugurated. But today we are a society in which large numbers of men, women, and children are without housing. We

see them sleeping in the streets, in train stations, in doorways, in shelters for the homeless. No one knows the real number. Almost two years ago, the Administration estimated the number between 250,000 and 350,000. Advocates for the homeless estimated between 2 and 3 million.

The largest growing group, according to the Conference of Mayors, is families with children. In many cities the number of young people, mentally ill, and single women are also increasing. And, sadly in over 60% of the cities reporting to the Conference of Mayors, emergency shelters have to turn away people with need.

The Mayors' report carefully listed the causes of homelessness. Some of them are: shortage of affordable housing, problems relating to chronically mentally ill people, unemployment problems, inadequate levels of public assistance programs, and cuts in federal and state assistance programs. And, in none of the cities surveyed had the nation's economic recovery lessened the problem of homelessness. Indeed, to take an example, the city of St. Paul reported that because federal and state governments have tightened eligibility requirements for welfare programs, to aid their own recoveries, thousands of people have been removed from the rolls and have no place to go.

Earlier this year, People magazine published two articles documenting homelessness in America. What was shocking were the faces and the stories that went with the faces. We did not see the derelicts and the mentally ill. We saw a mother from a well-to-do family with three children. We saw another mother who had graduated from college in Chicago. We saw a man who had worked at a Parks Department job for six years in Gary, Indiana. We saw a former businessman, the father of a law student.

When a sizable number of the American people can't get enough to eat or a place to live, that is as much a consumer issue as how to eat or how to live.

In the 1960's, when the problems of low income consumers were an important part of our nation's agenda, specific organizations dedicated themselves to these issues. There was a National Welfare Rights Organization. Federally funded legal service became the defenders and advocates of poor people. Consumer organizations were attentive to the legal rights of the poor, but many of us believed that the overriding issue of the minimum standard of living would be met by federal programs for that purpose. Today, welfare rights organizations are long since gone, and legal service programs valiantly defending the poor are fighting for their own lives because the Administration has tried persistently to abolish them. But, we are still here, and the problems of poor consumers are rightfully placed on our agendas.

We know that federal tax and budget policies in the last few years have brought increased financial benefits to many corporations in the

form of lower taxes. Those policies have made many well-off Americans more affluent; but as they have done so, they have made many poor people even poorer. Hunger and homelessness have followed in the course of those policies. Since 1980 the average real disposable income for families in the lower fifth of the population has declined by 7.6%, while for the richest fifth it increased by 8.7%. This changing landscape needs to be perceived by students and by all of us. We need to understand the nature of poverty and its costs to this country.

We need to see how federal tax and budget policies affect on the basic needs of our citizens. We need to analyze the effects of cutbacks in the various subsidies and aid programs, in the various job training programs.

Let's look at the President's proposed budget for the next fiscal year, for example. It cuts almost every domestic program that could help the poor. It reduces, from current year levels, spending on food stamps, child nutrition programs, Aid to Families with Dependent Children, subsidized housing, aid to cities and counties via the Community Development Block Grant Program, loans to build rental housing for the elderly and handicapped, training and employment programs, and more. The proposed budget is a heartless assault on our poor children and poor people in general. It will increase and intensify hunger and homelessness and other indicia of poverty.

I know that for consumer educators the issue of the poor consumer as I have described it may not fall easily into the traditional categories of consumer education. I know how much dedicated work has been done by consumer educators to assist poor consumers in the wiser spending of the money they have. But a certain amount of additional thinking is timely today to see the issue in another framework.

When government action is responsible for an increase in hunger and homelessness, those policies should be probed and analyzed by students. Their fairness and wisdom should be evaluated. Their long-term consequences--to the poor and to the rest of the country--should be studied. Students need to grapple with fundamental questions of economic and social justice, and work to ameliorate injustice by engaging in debate and action to change the course of national policy.

And not only students, of course. I have urged that consumer organizations take on the specific food, housing, and health care problems of poor people that fall within their bailiwick. Consumer organizations in developing countries must deal with these issues--the basic needs of consumers--as matters of great urgency. And so must American organizations. The issues are very much the same, whether in affluent America or in the Third World.

Consumers Union, which has always paid some attention to these issues, will step up its own

efforts. We're planning a major conference in November, and a publications program.

Business can make a contribution, too, realizing it is in its own interest--as well as just--to operate in a nation with a trained work force and an expanding base of people who can buy products. Business can do more than contribute to charity. Business can affect national policy. This is the time for corporate leaders to join in the fight against hunger and homelessness, to tell our Administration and Congress that the policies that favored them so well have gone further than justice and decency should allow.

The three issues I've described this morning--hazardous technologies, corporate crime, and poverty--have some common characteristics:

- They enlarge and redefine the more traditional consumer agenda.
- They are among our most pressing national issues at this very moment.
- They are complex.
- They are health and safety-related issues.
- They are global.

If the consumer movement is to be successful in the next 50 years, these are the issues we will have to address. These are the areas where the consumer interest must be successfully protected.

When I urge attention to these issues by consumer organizations and educators, I am not in the least denigrating the issues and studies that have been at the core of the consumer interest for so long. But, as Colston Warne taught us, agendas shift, enlarge, change, re-shape, adapt. We must keep pace.

The consumer movement we know today was launched by thinkers, writers, and doers who defined new issues and founded new organizations to pursue them. Our movement has kept its vitality for more than half a century because its founders--like Colston Warne, for example--recognized those new issues and galvanized people into thinking and acting. And as those issues ripened, our movement continued to keep its vitality because new leaders emerged to push, yet again, the definition of the consumer interest.

In "Your Money's Worth" in 1927, the authors, after detailing the many wrongs, said "it's the consumer's move." I like that, because it told us that if we were active, we could change the way consumers were treated. Today, I urge everyone here to think that it's his or her move. As Anwar Fazal said when he delivered the Colston Warne lecture in 1983, "ACCI represents an intellectual blood bank unsurpassed in the world." Your knowledge, your skills, your experience are an invaluable asset to the consumer cause. If you apply them to the issues I've discussed today, you will have linked arms with Colston Warne in his lifelong quest for economic and social justice.

Richard L.D. Morse, Kansas State University¹

ABSTRACT

Deregulation of interest rates stimulated rate competition offering consumers unparalleled choices. The quoted rates, however, are not sufficiently described for savers to make accurate comparisons or to predict earnings.

This study analyzed 28 advertisements published in one newspaper on one day. There were 75 different rates using 11 different names. And the yields, which were frequently given, were identified by at least 9 different names. The absence of standardized terminology introduces uncertainty when comparing savings plans. Also, diversity of methods of compounding and computing interest requires skills of a finance professional to equate, for example, continuous compounding on a 356/360 basis with daily, monthly or annual compounding. The Cents-ible Interest® rate was computed for each rate putting them on a comparable standard of daily compounding on daily balances. The ability of consumers to make correct choices of rates presented in this unconventional manner has been documented; such rates are not confusing.

Although the study is limited to one market at one time, it provides ample evidence of the problems which would be even greater in magnitude if broadened to include more newspaper ads.

A more significant limitation of the study is that it deals with only four of the basic elements governing the amount of earnings paid on savings; discovery of others would require verification of actual accounts. The need for full disclosure of all of the basic elements is offered as justification for a Consumer Savings Disclosure and Verification Act which is referenced, but not discussed in this paper.

The purposes of this paper are: (1) To document the variety of the choices offered in one market at one time. A complete analysis of all the rates advertised in The Washington Post Washington Business for the week of Monday, August 6, 1984 is presented. This same week the U.S. House Banking Committee held hearings on HR 2282, the Truth in Savings Act. (2) To demonstrate how such a variety of complex rates can be reduced to a single comparable standard rate form. (3) To develop positive proposals for addressing the problems revealed by this complete analysis of the complex rate forms in current use.

The study excluded from consideration advertisements of investments in bonds, stocks, treasury bills, and money market mutual funds. It included advertisements from savings institutions and a few money market funds likely to be identified as a savings option.

Included were 28 advertisements of 23 institutions as listed in Table 1. Three institutions were non-insured, 5 were insured by MSSIC [Maryland Share Saving Insurance Corporation] and 15 were insured by FSLIC [Federal Savings and Loan Insurance Corporation] and one by FDIC [Federal Deposit Insurance Corporation]. So the consumers' right to safety of their funds was clearly identified, leaving the consumer responsible to assess the risks between non-insured, state or federally-insured savings programs. The three non-insured institutions were investment or quasi investment institutions. Nineteen of the 20 insured institutions were savings and loan associations and only one was a bank. Most banks were not using this media to advertise for savings. Thus this study does not reflect the full array of choices available to savers in this one market of Washington D.C.

INTRODUCTION AND PURPOSE

Twenty-four years ago President Kennedy proclaimed The Rights of Consumers: to safety, to be informed, to choose and to be heard. The right to choose among rates paid on savings instruments was limited for many years by regulations limiting the rate paid on many savings accounts to 5 1/2%. But with passage of The Depository Institutions Deregulation Act of 1980 (PL 96-221) there has been an orderly and rapid deregulation of rates. The result has been an avalanche of new rates and rate forms which may become even more volatile after March 31, 1986 when all the regulated rate ceilings are fully phased out.

Table 1. Savings advertisements in Washington Post "Washington Business, Week of Monday, August 6, 1984."

Institution	Insurance	Page nos. of advertisements	Number of rates advertised
D = Dominion FS&L	FSLIC	6	3
S = Standard FS&L	FSLIC	8, 52	2
C = Continental Federal	FSLIC	10	4
FM = First Maryland S&L	MSSIC	11, 26	2
FR = Friendship S&L	MSSIC	11, 32, 34	6
SF = Sunrise Federal S&L	FSLIC	16	5
PS = Providence S&L	FSLIC	19	6
USA = USA Savings	MSSIC	22	3
MAX = Maximum S&L	FSLIC	24	4
FF = Family Federal S&L	FSLIC	24	1
SU = Suburban Bank	FDIC	25	1
CF = Columbia First	FSLIC	27	6
CC = Chevy Chase	MSSIC	30	1
NP = National Permanent	FSLIC	30	3
FST = First Federal S&L	FSLIC	32	1
FED = Federally Insured Network	FSLIC	33	1
GIT = Government Investment Trust	NONE	36	6
TRP = T. Rowe Price	NONE	36	1
BFS = B. F. Saul	NONE	36	3
GMT = Community S&L	MSSIC	37, 54	7
PER = Perpetual S&L	FSLIC	38	2
EQ = Equitable FS&L	FSLIC	39	6
MC = McLean S&L	FSLIC	53	2
		23 institutions	78 rates
		28 advertisements	78 rates

¹Professor of Family Economics

ANALYSIS OF ADVERTISED RATES

The quoted rates ranged from 5.25% to 15.5%. Of the 78 rates, only 3 were the same, giving consumers 75 different rates from which to choose.

A full analysis of these different rates was made to deduce the non-advertised, but basic elements of the savings programs being offered. The basic elements consisting of annual rate, annual yield, compound frequency and day base are presented in Table 2. The quoted rates are used to array the data from the low of 5.25% to the high of 15.5%.

The frequency of the various compounding and day base computing methods is summarized in Table 3. The "Cents-ible Interest" or its equivalent, as discussed below, is computed for each advertised rate. It is shown in Table 2, and again in Table 4 where it is used as the basis for making the array of Cents-ible Interest® rates ranging from the low of 1.458 cents to the high of 3.952 cents.

Compound Frequency and Day Base

The facts given in the advertisements were checked for internal consistency, such as whether an advertised yield of 5.47% could be obtained from a nominal 5.25% rate as advertised. By this process, related facts given about compound frequency and day base were confirmed. If the facts were not given, this same process was used to deduce what facts should or could have been provided in such a situation. Such deduced information is distinguished from explicitly revealed information by the use of parentheses. For example, CF's advertised 5.25% could yield the advertised 5.47% only if a 365/360 day base were used. But because the day base was not disclosed in the advertisement, it appears on the first line of Table 2 in parenthesis to show that 365/360 was information supplied by the researcher. However, USA's 7.50% would yield the advertised 7.79% with the advertised daily compounding with 365/365 day base. Since a 365/365 day base is assumed to be "normal" or "expected", the space in Table 2 for USA's 7.50% is blank in the column headed "Day-base if other than 365/365".

Verification Procedure. The yield was verified by using an inexpensive Texas Instrument BA-35 "Student Business Analyst" pocket calculator. Set in the finance mode, the procedures were: First, enter the number of compounding periods in a year as N; Second, divide that number into the quoted annual rate to compute the "periodic percentage rate" and enter it as %i; Third, enter \$100 as the Present Value PV; and Fourth, press the CPT key followed by FV to compute the Future Value. The difference between the computed Future Value FV and the Present Value PV is the amount of earnings on \$100 for a year which is the Annual Percentage Yield. These words and concepts are consistent with those defined in "Table Terminology" on page 8 of Check Your Interest, (1978) as defined in the Model State Truth in Savings Act, (1980) and as used in Chapter 8 of Business Analyst Guidebook (1985).

Table 2. Advertised savings rates, arrayed by quoted nominal rate.

Institution	Quoted Rate %	Yield %	Compounding frequency	Day-base other than 365/365	Cents-ible Interest* c/100/Day
CF	5.25	5.47	DY	(365/360)	1.458
USA	7.50	7.79	DY		2.054
CF	8.00	8.45	DY	(365/360)	2.222
FR	8.50	8.92	(M)		2.592
USA	9.50	9.96	DY		2.602
C	9.75 3 mos.	10.39	CONT	(365/360)	2.706
TRP	9.87	10.36	(DY)		2.701
EO	9.90	10.56	CONT	(365/360)	2.750
ST	10.00	10.51	DY		2.739
CF	10.10	10.79	DY	(365/360)	2.905
GIT	10.20	10.68	MO		2.783
GIT	10.24	10.74	MO		2.793
FF	10.25	10.79	(DY)		2.808
CF	10.25 1-3 mos.	10.95	DY	(365/360)	2.847
PS	10.44 3 mos.	11.00	DY		2.859
C	10.50 6 mos.	11.23	CONT	365/360	2.917
SF	10.55	11.08	MO		2.860
GIT	10.75	11.30	MO		2.832
CF	10.75 6 mos.	11.51	DY	(365/360)	2.966
CO	10.80	11.35	(M)		2.846
S	10.85 30-day	11.40	MO		2.859
PER	10.85 6 mos.	11.46	DY		2.872
PS	10.89 6 mos.	11.50	DY		2.893
GIT	10.90	11.46	MO		2.873
FR, FN	11.00	11.57	MO		3.000
USA	11.00	11.63	DY		3.013
SF	11.15 30-day	11.74	MO		3.041
C	11.25 1 yr.	12.08	CONT	365/360	3.125
MAX	11.24	12.00	Q		3.108
SF	11.40 6 mos.	11.90	Q		3.080
C	11.50 1.5-5 yrs.	12.37	CONT	365/360	3.194
FST	11.50 180-day	(11.83)	(SA)		3.065
CMT	11.80	12.24	(M)		3.153
CF	11.85 1 yr.	12.17	Q		3.066
EO	11.70 1 yr.	12.59	CONT	(365/360)	3.250
D	11.75 90-180 days	(12.28)(12.10)	(Q)(SA)		3.173/3.128
MC	11.75 90-day	(12.28)	(Q)		3.173
CF	11.75 12 mos.	12.55	DY	(365/360)	3.283
PER	11.80 1 yr.	12.52	DY		3.292
EO	11.80 2 yrs.	12.71	CONT	(365/360)	3.278
PS	11.83 3 yrs.	12.56	DY		3.241
CF	11.80 24 mos.	12.82	DY	(365/360)	3.305
PS	11.91 1 yr.	12.85	DY		3.283
CMT	12.00 1 mo.	(12.80)	(M)		3.271
EO	12.00 90-day	(12.55)(12.00)	(Q)(A)		3.239/3.105
MAX	12.00 12 mos.	12.55	(Q)		3.299
PS	12.00 5 yrs.	12.75	DY		3.287
CF	12.00 36 mos.	12.94	DY	(365/360)	3.333
GIT	12.08	12.77	MO		3.283
PS	12.22 10 yrs.	13.00	DY		3.347
NP	12.25 90-day	(12.82)	(Q)		3.307
MAX	12.25 15 mos.	12.92	(Q)		3.306
EO	12.25 5 yrs.	13.22	CONT	(365/360)	3.403
CMT	12.50 2 mos.	(13.16)	(2/12)		3.380
D	12.50 90-180 day	(13.10)(12.89)	(Q)(SA)		3.373/3.323
NP, ED	12.50 180-day	(12.89)(12.50)	(SA)(A)		3.322/3.227
MAX	12.50 24 mos.	13.08	(Q)		3.372
SF	12.50 24-48 mos.	13.10	Q		3.372
FN	12.50	13.10	Q		3.372
MC	12.75 90-365 days	(13.37)(12.75)	(Q)(A)		3.459/3.288
FR	12.75 6 mos.	(13.16)(12.75)	(SA)(A)		3.386/3.288
NP	12.75 12 mos.	13.08	(Q)		3.288
SU	12.75 60 mos.	13.52	A		3.475
FR	12.875	12.875	A		3.318
CMT	13.00 3-5 mos.	(13.64)(13.49)	(3M)(5M)		3.505/3.468
BFS	13.00	13.00	(A)		3.348
FR	13.00 1.5 yrs.	14.09	(DY)	(365/360)	3.611
FR	13.125 2.5 yrs.	14.23	(DY)	(365/360)	3.645
CMT	13.25 6-8 mos.	(13.68)(13.53)	(6M)(8M)		3.515/3.478
CMT	13.375 9-11 mos.	(13.59)(13.44)	(9M)(11M)		3.492/3.457
CMT	13.50 12-16 mos.	(13.50)(13.08)	(12M)(16M)		3.459/3.368
FED	13.69	(14.58)	Q		3.730
D	14.00 4-7 yrs.	(11.75)(10.25)	(4Y)(7Y)		3.046/2.673
GIT	14.51	15.52	MO		3.952
BFS	15.00 2 yrs.	(15.00)	(A)		3.829
BFS	15.50 3-10 yrs.	(15.50)	(A)		3.948

Notes: See Notes to Table 4.

Most of the advertisements quoted a yield along with the rate, thus enabling one to deduce the method of compounding and day base if these were not explicitly stated. Various combinations of day base and compound frequency were used until one was discovered that brought the rate and yield into harmony. If the yield was not quoted and the computing method not fully stated, one can only speculate about the true facts. For example, FST advertised "APR, Simple Annual Rate" of 11.5% for a 180-day term without designating the day base. If the day base is 360/360, then 180 days is one-half a year, and the yield from semi-annual compounding is 11.83%. A similar yield would be obtained if they were on a 365/365 day base. But if they were on a 365/360 day base, the yield would be 12%, reflecting the higher yield from the five extra days. Similar problems arise in interpreting D's 11.75% which could be semi-annual or quarterly compounding, and CMT's 12% one-month plan. For these and similar situations, an annual yield was calculated and the figure shown in parentheses.

Some institutions consider it unethical to quote the yield for a full year when in fact the term of the certificate is less than a year. Indeed, several advertisements footnoted such yields with these cautionary words: "These annual yields assume reinvestment of principal at maturity at the same rate". In the opinion of this author, such apprehension reflects a misunderstanding of the hypothetical nature underlying the annual percentage yield concept. The yield tells how much interest would be earned on \$100 if held for one year even though the actual duration is but 7 days, one month, or 7 years. It is a rate which is valid regardless of the specific time span. For example, a speedster ticketed for driving at the rate of 60 miles per hour in a school zone, would find no sympathy for his defense that he did not travel the full 60 miles in the school zone, nor remained in the zone for one hour. Yield and speedometer readings are rate concepts which are valid regardless of the specifics of the situation. Ambiguity also arises because the word annual does not necessarily mean 365 days. That it a separate problem discussed elsewhere by the author. (Hearings, 1979) In this paper, annual and 365 days are synonymous.

Terminology. Even though information was given as to the compounding method or day base, the true meaning was often difficult to ascertain. For example, an institution which compounded monthly advertised: "And you'll earn a bonus rate on your entire balance everyday". That same institution also advertised for another offering: "Dividends earned daily, compounded monthly". This may or may not be the same method as advertised by another institution: "Interest compounded and credited monthly," which obviously is different from, but might be identified with "Compounded daily and credited monthly".

And although an advertised "average daily rate" suggests daily compounding, the quoted yield was deduced to be based on monthly compounding. Other expressions used in advertisements included "simple interest," "continuous compounding 365/360," "monthly compounding," "quarterly compounding," "compounded daily" (but without reference to 365/360 day base used).

The frequency of advertised rates by compounding methods is summarized in Table 3. Not shown in this table, however, is the frequency of whether the facts were disclosed in the advertisement or discovered by the researcher. Of the 18 rates using the most favorable 365/360 method, only 4 advertised that fact. And of the 25 rates compounding daily, 4 did not so disclose. However, 13 of the 16 rates compounding monthly and 6 of the 7 compounding quarterly were disclosed. Only two of the 22 annual rates were so described.

Rate Terminology

The most frequently quoted rate is what is technically known as the nominal (in name only) annual (generally, but necessarily, a 365-day year) percentage rate. It is often referred to in savings as the "simple annual rate", or "annual rate of simple interest", and in credit as the

Table 3. Compounding and day-base computing methods

Compound method	Day-base method	Rates advertised
Continuously	365/360	8
Daily	365/360	10
Daily	365/365	15
Monthly	----	16
Quarterly	----	7
Semi-annually	----	0
Annually	----	22
ALL		78

"APR" or "Annual Percentage Rate". Regulations have required that this yearly rate be as prominent or more prominently displayed. That is, the yield rate should not predominate.

The rate actually paid, however, is the "periodic percentage rate" or PPR. When the PPR is annualized by multiplying it by the number of compounding paying periods in a year, it becomes the "Annual Percentage Rate". The yearly rate and the pay-rate are the same if there is annual compounding. The pay-rate is almost never disclosed in advertisements. But the State of New York does require its disclosure in literature given inquiring consumers and in the savings contracts where it is essential for validating the actual interest paid. New York does not require its disclosure in advertising. [Truth in Savings, A Comparative Analysis of the Model State Act and The New York State Act and Regulations, 1980]

The yearly rate was variously advertised. Of the 28 advertisements, 9 stated a number with or without a percentage sign, but with no descriptive name. The nomenclature used in the other 19 advertisements is listed below with multiple frequency noted in parentheses:

"Current Rate" (4)
 "Rate" (3)
 "Annual Interest Rate" (2)
 "Annual Rate" (2)
 "Interest Rate"
 "Interest Rate per annum"
 "per annum Simple Interest"
 "Bonus Rate"
 "APR Simple Interest"
 "Annual Percentage Rate"
 "Average Daily Rate"
 "Current Yield"

In summary, there were 11 different expressions of presumably the same concept, which in the Model State Truth in Savings Act (1980) is defined as "Annual Percentage Rate".

The yield expresses as a percentage the amount of interest that hypothetically \$100 would have earned in a 365-day year. It need not be quoted. But if it is quoted, Regulation Q prohibits its being in greater prominence than the nominal rate. The seven advertisements not quoting the yield were not compounding so the annual yield was the same as the quoted rate. One debatable exception was an offer to pay interest monthly "for a higher yield". The yield was most frequently expressed as:

"Effective Annual Yield" (9)
 "Annual Yield" (6)
 "Yield" (5)
 "Annualized yield"
 "Current Yield"
 "Effective Yield"
 "Compounded Yield"
 "Consistent Average Yield"
 "Taxable Equivalent Yield"

All of these suggest the same meaning; but the validity of such a conclusion would require additional information, such as responses to the 13 questions listed in Check Your Interest (1978).

In summary, there were 10 different expressions or non-expressions of what is defined in the Model State Truth in Savings Act (1980) as "Annual Percentage Yield".

Choosing Between Rates

With 75 different rates and only 3 duplicates, savers in the Washington area had many opportunities from which to choose. Rates, of course, are not the only determinant of where to save. Prior consideration must be given to safety of principal, convenience, minimum deposits, fees, miscellaneous charges, and time constraints on liquidity along with penalty for early withdrawals. Beyond these considerations, the saver is confronted with balancing rate questions with incomplete and variously expressed information about compound frequency, day base and yield. For example, a quick comparison of three savings instruments advertised as paying 11.40%, 11.34%, and 11.25% would suggest them to be in the correct order of priority. But if they are compounded quarterly, daily and continuously 365/360, the yields would be 11.90%, 12.00% and 12.08%, respectively. So the correct yield priority is just the reverse of the nominal rate priority. Likewise, 12.75% would clearly seem to be preferable to 12.00%, yet the amount of interest earned from each might be the same or even greater from the 12%. If the essential factors are undisclosed and unavailable, choices are likely to be based on speculation at best. But even if the essential facts are disclosed, the question remains of how to weigh such factors and draw valid conclusions. With an estimated 7.8 million different ways of computing interest (Morse, 1984) making correct choices is beyond the ability of most savers, even if assisted with a calculator. A means of providing some simplification is demonstrated in the next section.

Cents-ible Interest® has been proposed to provide a standard for comparing rates. It expresses in Cents per \$100 per Day the rate which if compounded daily would generate the earnings advertised. For example, 12% compounded daily at 3.288 cents per \$100 per Day will pay the same amount of interest as 12.75% compounded annually.

This rate format was challenged on the basis that it was unconventional and it would confuse consumers. This conjecture was rejected on the basis of results from over 2,000 tests administered in 20 states. (Morse, 1984)

Cents-ible Interest® values are calculated by reversing the process described for verifying yields or deducing the basic computation method. First, the yield rate is added to \$100 and entered as the Future Value (FV), thus reflecting the growth from the \$100 Present Value (PV). The growth is the result of compounding for 365 days (N) at the to-be-computed daily percentage rate (%i). This daily rate, multiplied by 100, gives a read out of Cents per \$100 per Day or Cents-ible Interest®. Thus, a yield of 12.75% is the result of compounding daily at the daily rate of .03288% or 3.288 cents regardless of how, in actual fact, it may have been compounded. [The computation steps are as follows: FV (112.75), PV (100), N (365), compute $\% i = .03288 \times 100 = 3.288$ cents.] Another example is a 90-day 12% CD which would yield \$3.00 in one-fourth a year. Growth to \$103 from \$100 in 90 days has a Cents-ible Interest® Equivalent of 3.284 cents. [FV (103), PV (100), N (90), compute $\% i = .03284 \times 100 = 3.284$ cents].

The 78 rates from the 23 institutions are listed in Table 4 in order of increasing Cents-ible Interest®, ranging from 1.458 cents to 3.952 cents. Cents-ible Interest® rates are directly comparable because they share the same standard; the quoted rates are not comparable.

Technically speaking, there are two kinds of Cents-ible Interest® figures shown in Tables 2 and 4: (1) those which are the true pay-rate, that is, the rate used in daily compounding on daily balances, and (2) those which are the Cents-ible Interest® Equivalent rates; that is, the Cents-ible Interest® rate needed to generate the annual yield produced by any method of computing interest other than daily compounding of daily balances. For example, because 12% compounded daily yields 12.75%, the daily rate for it would be the same as for 12.75% compounded annually. To distinguish them, the word "equivalent" or subscript "e" is appended. Thus, the "equivalent" serves fair warning that although the instrument's earnings are equivalent of that daily rate, they are actually paid other than daily.

DISCUSSION

Table 4. Advertised savings rates arrayed by Cents-ible Interest®.

Institution	Cents-ible Interest® c/\$100/Day	Yield %	Compounding frequency	Day-base other than 365/365	Quoted rate %
CF	1.458	5.47	DY	(365/360)	5.25
USA	2.054	7.79	DY		7.50
CF	2.222	8.45	DY	(365/360)	8.00
FR	2.592	9.92	(MO)		9.50
USA	2.602	9.95	DY		9.50
D	2.673	(10.25)	(7Y)		14.00 4-2 yrs.
TRP	2.701	10.36	(DY)		9.87
C	2.708	10.38	CONT	(365/360)	8.75 3 mos.
ST	2.739	10.51	DY		10.00
ED	2.750	10.55	CONT	(365/360)	9.90
GIT	2.783	10.69	MO		10.20
GIT	2.793	10.74	MO		10.24
CF	2.805	10.78	DY	(365/360)	10.10
FF	2.808	10.79	(DY)		10.25
CF	2.847	10.85	DY	(365/360)	10.25 1-3 mos.
PS	2.859	11.00	DY		10.44 3 mos.
CF	2.860	11.08	MO		10.55
C	2.917	11.23	CONT	365/360	10.50 6 mos.
GIT	2.932	11.30	MO		10.75
CC	2.946	11.35	(MO)		10.80
S	2.959	11.40	MO		10.85 30-day
PER	2.972	11.46	DY		10.85 6 mos.
GIT	2.973	11.46	DY		10.90
PS	2.983	11.50	DY		10.89 6 mos.
CF	2.986	11.51	DY	(365/360)	10.75 6 mos.
FR, FH	3.000	11.57	MO		11.00
USA	3.013	11.63	DY		11.00
SF	3.041	11.74	MO		11.15 30-day
D	3.046	(11.75)	(4Y)		14.00 4-7 yrs.
FST	3.085	(11.81)	(SA)		11.50 180-day
SF	3.080	11.90	Q		11.40 6 mos.
ED	3.105	12.00	A		12.00 90-day
MAX	3.106	12.00	DY		11.34
C	3.125	12.08	CONT	365/360	11.25 1 yr.
D	3.129	(12.10)	(SA)		11.75 90-180 days
SF	3.146	12.17	Q		11.65 1 yr.
CMT	3.163	12.24	(MO)		11.60
D	3.173	(12.28)	(D)		11.75 90-180 days
MC	3.173	(12.28)	(D)		11.75 90-day
C	3.194	12.37	CONT	365/360	11.50 1.5-5 yrs.
NP, EQ	3.227	12.50	A		12.50 180-day
PER	3.232	12.52	DY		11.80 1 yr.
ED	3.239	(12.55)	(Q)		12.00 90-day
MAX	3.239	12.55	(Q)		12.00 12 mos.
PS	3.241	12.56	DY		11.83 3 yrs.
ED	3.250	12.59	CONT	(365/360)	11.70 1 yr.
PS	3.263	12.65	DY		11.91 1 yr.
CF	3.263	12.65	DY	(365/360)	11.75 12 mos.
CMT	3.271	(12.68)	(MO)		12.00 1 mo.
ED	3.278	12.71	CONT	(365/360)	11.80 2 yrs.
PS	3.287	12.75	DY		12.00 5 yrs.
MC	3.288	12.75	A		12.75 90-365 days
FR	3.288	12.75	A		12.75 6 mos.
NP	3.288	(12.75)	A		12.75 12 mos.
GIT	3.293	12.77	MO		12.08
CF	3.305	12.82	DY	(365/360)	11.90 24 mos.
MAX	3.306	12.82	(Q)		12.25 18 mos.
NP	3.307	(12.82)	(Q)		12.25 90-day
FR	3.318	12.875	A		12.675
NP, EQ	3.322	(12.89)	(SA)		12.50 180 days
D	3.323	(12.89)	(SA)		12.50 90-180 days
CF	3.333	12.94	DY	(365/360)	12.00 36 mos.
PS	3.347	13.00	DY		12.22 10 yrs.
BFS	3.348	(13.00)	(A)		13.00 1 yr.
CMT	3.388	(13.08)	(18M)		13.50 12-18 mos.
SF	3.372	13.10	Q		12.50 24-48 mos.
FM	3.372	13.10	Q		12.50
MAX	3.372	13.09	(Q)		12.50 24 mos.
D	3.373	(13.10)	(Q)		12.50 90-180 days
FR	3.386	(13.15)	(SA)		12.75 6 mos.
CMT	3.390	(13.16)	(E/12)		12.50 2 mos.
ED	3.403	13.22	CONT	(365/360)	12.25 5 yrs.
MC	3.439	(13.37)	(D)		12.75 90-365 days
CMT	3.457	(13.44)	(11M)		13.375 3-11 mos.
CMT	3.469	(13.49)	(5M)		13.00 3-5 mos.
CMT	3.489	(13.50)	(12M)		13.50 12-18 mos.
SU	3.475	13.52	MO		12.75 60 mos.
CMT	3.479	(13.53)	(8M)		13.25 6-8 mos.
CMT	3.492	(13.59)	(9M)		13.375 9-11 mos.
CMT	3.505	(13.64)	(3M)		13.00 3-5 mos.
CMT	3.515	(13.68)	(8M)		13.25 8-8 mos.
FR	3.611	14.09	(DY)	(365/360)	13.00 1.5 yrs.
FR	3.645	14.23	(DY)	(365/360)	13.125 2.5 yrs.
FED	3.730	(14.58)	MO		13.69
BFS	3.829	(15.00)	(A)		15.00 2 yrs.
BFS	3.948	(15.50)	(A)		15.50 3-10 yrs.
GIT	3.952	15.52	MO		14.51

- Notes: 1. Information supplied by researcher is in parentheses.
2. * Cents-ible Interest®. If the savings is other than daily compounded on daily balances, the values shown are the Cents-ible Interest® Equivalent.
3. When multiple time periods are quoted, the Cents-ible Interest® Equivalent is for the option reflected in the compounding frequency column.
4. All computed values are truncated. Advertised values may have been rounded.

It will be noted that the yield rates, if quoted, follow in the same order as the order as the Cents-ible Interest® rates.

This is to be expected since the two are mathematically related:

$$APY = 100[(cents/10000 + 1)^{365} - 1]$$

However, this is true only within the context of this paper. If "annual" refers to a calendar year, the exponent might be 366 every fourth year. And some computer services might use other numbers of days. So until "annual" is defined in terms of a specific number of days, annual yield cannot be used as a reliable standard.

Secondly, many of the yields quoted in Table 2 are speculative on the part of the researcher. The practice of quoting and publishing yields varies considerably from city to city. Thus until yields become a defined and required disclosure, the consumer cannot rely upon the yield quotation in making comparisons. [An earlier study reported by Butts (1975) reviewed yield quotations in newspaper advertisements and institutions' leaflets from across the nation, and information on yields is irregular at best.]

Thirdly, yield is a hypothetical, non-functional figure. Only if it is consistently defined and disclosed, could it serve as the standard for comparing options.

But comparison shopping is only one of the consumer's needs; the other is to be assured that the earnings paid are in conformity with the earnings promised. That is, the saver needs to be able to validate whether the amounts actually yielded are at the same rate as that projected for one year. Of course, if the savings contract is exactly for one year, the yield rate, which is for \$100, can be used to verify the yield of the actual principal amount of the contract. But if the contract matures at some time period other than one year, as is very frequently the situation, the APY can not be used easily to calculate the amount of earnings for such odd periods of time. For example, the yield for six months is not half the APY, nor is the yield for 90 days 90/365ths of the APY. The validation process requires knowledge of the Periodic Percentage Rate, that is, the actual pay-rate. This rate must be supplied by New York State chartered banks.

Cents-ible Interest® Equivalent rates, however, can be used both as a reliable standard for comparing rates, and for validating the amount of earnings paid. For example, 3.27188 cents compounded daily will yield \$12.6825 in 365 days which is the yield of 12% compounded monthly. It will compute a yield of \$1.00 for one month of 30.4111 days, which is exactly the amount of interest expected from 12% compounded monthly at the end of one month [if all months are assumed to be of equal length]. And, it can be used to compute the yielded amount for any number of days.

In summary, the Cents-ible Interest® or its equivalent provides a standard for making accurate comparisons, and a rate which can be used to validate whether the interest paid is consistent with the saving contract terms. The significance of this in terms of consumers' ability to discern and use this unconventional format is documented favorably in an earlier ACCI paper. (Morse,1984)

LIMITATIONS

This discourse is limited in several respects. These are identified and discussed:

First, the data base is limited to one market area and one time period. This is readily apparent. Yet, the great diversity exposed in this limited study, could only be greater within an enlarged data base. It could never be less.

Secondly, all of the facts presented in parentheses are subject to errors of interpretation by the researcher. This limitation can be eliminated only with full disclosure, using standardized rate terminology and concepts that are clearly defined. Either until passage of the Model State Truth in Savings Act or its equivalent, or unless otherwise secret and private records of financial institutions are made available to researchers, this problem of inadequacy will remain.

Thirdly, nothing in this study touched on how much interest will actually be paid to the saver. The distance between what is advertised and what is practiced by the financial institutions remains unknown. For example, no inquiry or discussion is made of "D. Balances on which interest is paid, E. Grace Days; F. Dead Days; G. Amounts Included; H. Rounding Policy; I. Minimums; J. Miscellaneous Rules" as listed on page 11 of Cents-ible Interest® (1984) along with the other components that make up the 7.8 million different ways to compute interest. The only research study that uncovered these variants was that conducted by the New York State Banking Department (1982) using bank inspectors to verify each bank's declared procedures against actual payment practices.

RECOMMENDATIONS

The Consumer Savings Disclosure and Verification Act (H.B. 2380, 1985 Kansas Legislature) may serve as a model for establishing disclosure and computation procedures which meet the limitations revealed by this study. It would require prominent disclosure of the Cents-ible Interest® rate or its Equivalent. Disclosure of all factors bearing on the amount of interest paid would be required, but only for those savings instruments not compounded daily on daily balances and not liquid daily.

These disclosures would be printed not only in the savings contract, but in the periodic account statements sent to savers detailing the dates and

amounts of account activities. If the earnings paid are other than would be expected from applying the Cents-ible Interest® rate to the daily balances, the savings institution would compute and report the effective Cents-ible Interest® Rate Equivalent for the period. Differences between the rates promised and paid would alert savers to deviant practices and their impact on earnings.

The information would enable savers to verify account activity and interest computations. And the Act would encourage verification by awarding savers a \$100 bounty for their public service in detecting and reporting errors.

Finally, the Act sets forth standards not only for disclosure, but for accuracy. It establishes a tolerable "error" of one-tenth of a cent in favor of the financial institution for every day a transaction is entered. For example, an account with 30 activity days for deposits, withdrawals or other entries would be allowed no more than 3 cents less than the amount that would have been paid had all computations been carried out to 10 decimal places.

SUMMARY AND CONCLUSIONS

The first purpose of the paper, to document the variety and complexity of interest rates as advertised, was met by an intensive analysis of the 28 advertisements appearing in just one day's newspaper in a metropolitan area. The 23 institutions represented but a minor portion of all the savings institutions, yet 78 advertised rates reflected a great diversity of rate methods in use. They ranged from the most favorable continuous compounding on a 360-day basis to annual compounding, with quarterly, monthly and daily compounding on 360- and 365-day bases. The diversity in rate and compounding forms illustrated some of the 7.8 million different ways interest can be computed.

The absence of standardized terminology invites obfuscation. There were 11 different expressions for what the author would call "annual percentage rate" and 9 different expressions for what the author would call "annual percentage yield".

The second purpose, to demonstrate a comparable rate form, was achieved by reducing all rates to a standard expression of Cents per \$100 per Day, called Cents-ible Interest®. All of the advertised rates were then arrayed by rates based on this standard. Previously reported research had confirmed the usefulness to consumers of the Cents-ible Interest® format over rates expressed in conventional terms.

The third purpose, to develop a positive proposal, was provided by reference to a specific legislative bill. It provides for disclosures using the Cents per \$100 per Day format in advertising and preliminary discussions with savers, in the savings contracts, and in periodic reports to savers of account performance.

In conclusion, Cents-ible Interest® holds great promise of making savings advertising more valuable to consumers, both in providing more useful information and in eliminating wasteful publication of misleading and confusing literature. Furthermore, by the introduction of standard terminology, essential facts can be communicated in an easy way which would advance the efficiency of consumer education efforts, benefiting financial institutions, professional educators and laymen.

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ABSTRACT

The development of commercial speech and its importance in the marketplace is best illustrated by the use of third party product critiques in advertisements, against the wishes of the person making the product critique. In Consumers Union of United States, Inc. v. General Signal Corporation, the Second Circuit of the United States Court of Appeals held that the court would not enjoin the defendants from broadcasting two commercials for Regina vacuum cleaners that quoted ratings published in the plaintiff's magazine CONSUMER REPORTS despite Consumers Union's "no commercialization policy". The case is the first of its kind to be decided against Consumers Union (CU) and presents important issues dealing with the First Amendment, its interplay with the "Fair Use" defense in copyright law, and the requirement of truthfulness under the Lanham Act.

INTRODUCTION

The legal issues involved in this case focus on two separate conflicts under the First Amendment. The first conflict is the right of the copyright holder to the fruits of his labor versus the rights of a user of copyrighted material. In the second conflict, the Lanham Act is designed to prevent false and misleading inducements from corrupting the basic structure of commercial information in the marketplace. The Court of Appeals relied heavily on its own precedent in Harper & Row, Publishers, Inc. v. Nation Enterprises, when it decided GENERAL SIGNAL CORP. Subsequently, HARPER and ROW was reversed by the Supreme Court, so the current status of the law in this area is in doubt. The purpose of this discussion is to determine the present state of the law with regard to the "no commercialization" policy, and whether any additional legislation is needed or would be effective in upholding such a policy. While the First Amendment issues are clearly important, the typical practice is to examine the statutory issues first, to see whether constitutional interpretation is necessary.

FACTS OF THE CASE

CU, a non profit foundation, published a report in its July 1983 issue of CONSUMER REPORTS rating various lightweight vacuum cleaners. The Regina powerteam vacuum cleaner received a check-rated rating, awarded when a product is evaluated by CU

to be of superior quality and price in relation to non-check-rated models. CU also broadcast the test results over the CBS radio network and distributed them to between 300 and 400 newspapers.

Regina Company, a division of General Signal Corporation, (hereinafter Regina) decided to run an advertising campaign for Regina vacuum cleaners utilizing CU's evaluation of its product and prepared three 30 second television advertisements. The first advertisement does not mention CU's evaluation in CONSUMER REPORTS and was not challenged in the actual litigation.

The second advertisement stated that the Regina Powerteam vacuum cleaner:

[was] the only lightweight that CONSUMER REPORTS says, Quote, was an adequate substitute for a full-sized vacuum. Consumers Union v. Gen'l Signal Corp. 724 F.2d 1044, 1047(1983). (hereinafter CU v.GSC)

Accompanying the voice-over announcer was a superimposed statement on the screen for the entire time CU was quoted stating that:

CONSUMER REPORTS is not affiliated with Regina and does not endorse products. CU v. GSC, p.1047.

The advertisement was broadcast on all three major networks starting September 27, 1983.

The third advertisement included several quotations by Consumer Reports that were displayed on the screen and read by the voice over announcer. As with the second commercial, each time CU is mentioned, a disclaimer appears that CU is not affiliated with Regina and does not endorse products. The disclaimer appears in the third advertisement for a period of 14 seconds out of the total 29.5 seconds. The third commercial was never actually broadcast.

CU publishes its "No-commercialization policy" in its monthly magazine CONSUMER REPORTS:

We accept no advertising and buy all the products we test on the open market. We are not beholden to any commercial interest. Our income is derived from the sale of CONSUMER REPORTS and our other publications, and from nonrestrictive, noncommercial contributions, grants, and fees.

Our ratings and reports are intended solely for the use of our readers. Neither the Ratings nor the reports may be used in advertising or for any other commercial purpose. Consumers Union will take all steps open to it to prevent commercial use of its materials, its name, or the name of CONSUMER REPORTS." CONSUMER REPORTS, NOVEMBER

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Regina Company gave notice to CU that it planned to broadcast the Powerteam commercials using the CU material. On September 30, 1983, CU demanded that Regina cease and desist from airing these commercials. Regina responded to CU's demand but was told that CU had already commenced an action for injunctive relief. CU demanded a temporary and permanent injunction, compensatory damages of \$5 million, and punitive damages of not less than \$5 million, alleging violations of the Copyright Act, the Lanham Act and New York state law.

On October 3, 1983, the District Court granted a temporary restraining order prohibiting Regina from utilizing the advertisements. Regina, in response to CU's motion, changed the disclaimer to state that "CONSUMER REPORTS is not affiliated with Regina and does not endorse Regina products or any other products." The voiceover in the second commercial was also changed to include the word "unquote" at the end of the quotation from CONSUMER REPORTS. The District Court issued a preliminary injunction prohibiting the broadcast of the Regina Powerteam advertisements that utilized the ratings by CONSUMER REPORTS. The District Court only addressed the copyright issues, and denied Regina's claims under the First Amendment and the fair use defense, determining that the elements of copyright infringement had been established.

Regina appealed, arguing that the commercials are a fair use of copyrighted material and that ratings are facts that are not protected by the copyright laws. Regina also asserted that the Lanham Act and state law did not provide a basis as a matter of law to enjoin truthful and accurate reporting of CU's test results of its products. Regina also asserted that consumers and the public interest would be adversely affected, and that Regina would suffer irreparable injury if the injunction was allowed to remain in effect.

The appellate court reversed the issuance of the preliminary injunction, holding that CU did not establish a likelihood of success on the merits of the case based on copyright law, the Lanham Act, and New York state law. The court held that Regina's use of CU's ratings constituted fair use, an exception to copyright infringement. The appellate court relied on HARPER & ROW, PUBLISHERS, INC. v. NATION ENTERPRISES, 723 F.2d 195 (2 Cir. 1983) which approved a fair use defense in a case involving the unpublished works of President Ford's memoirs. This case was later reversed by the Supreme Court in HARPER & ROW, PUBLISHERS, INC. v. NATION ENTERPRISES, 105 S. Ct. 2218 (1985). The precise status of the fair use defense is thus unclear.

The court also held that CU did not demonstrate that the advertisements would create a likelihood of confusion under the Lanham Act due to the adequacy of a disclaimer contained in the commercial messages. The court also found that the legislature of the State of New York did not intend that a New York statute that prohibits the use of a name of a non-profit corporation would

apply to a non-profit corporation whose business was the evaluation of products and the wide dissemination of those results, since the purpose of the statute was the protection of privacy of the non-profit corporation.

CU petitioned for an en banc hearing by the entire Court of Appeals for the Second Circuit. While the request was denied, a dissent was filed. The dissent noted the Congressional determination that the copyright laws should be subordinate to the First Amendment. The dissent argued that the en banc hearing should have been permitted because the "use of 'commercial free speech' to justify a fair use defense to copyright infringement stands either on copyright law or the First Amendment on its head." The dissent goes on to claim that the opinion holds that commercial use:

[is] more entitled to the fair use defense than a use that is not. At the very least the panel opinion reads the presumption against the fairness of commercial use out of the statute. Doing so in the name of the First Amendment, I fear, cheapens that Amendment's coin. 730 F.2d 47,50 (1984). (Oakes, Circuit Judge, dissenting).

COPYRIGHT LAWS AND PRODUCT CRITIQUES

Article I, Sec. 8, of the Constitution provides that:

The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The law of copyright grants a limited monopoly over the exclusive work of the author for a limited period as a reward for the creative ability of its creator. Such a monopoly is also deemed to be of high social value to the general public. The limited monopoly also ensures that the public will be allowed access after exclusive control of the work has expired.

The monopoly is not absolute. The Copyright Act does permit some use of copyrighted material without the owners consent. Numerous decisions established a doctrine of "fair use" of copyrighted material. These decisions are codified in the Copyright Act:

[T]he fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching ... , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or

value of the copyrighted work." 17 U.S.C. Sec. 107 (1982).

The various types of usage which can be considered fair use include but are not limited to criticism, comment, news reporting, scholarship and teaching. These examples are not a complete list of accepted uses, but are meant to exemplify those uses considered fair. The uses do not share any common characteristic. Some are commercially oriented, others are not. Some uses by their very nature are required to copy the expression, others are not. The courts decide each case based on its own merits and facts, helping the doctrine to evolve over time.

The purpose of the fair use defense is to ensure that social values protected by other legal and statutory protections and the First Amendment are not eliminated by the use of the copyright law. The Copyright Act does not go as far as the constitutional provision might permit. Since the copyright provision and the First Amendment are both in the Constitution, it is possible that Congress could have prevented any use of copyrighted material. It is clear that Congress has not done so. The Copyright Act was designed to give courts power to permit some uses of copyrighted material without consent of the copyright holder. Courts recognize that a balancing test exists with the fair use doctrine. The copyright issue presented in the Regina case is whether the advertisements fall within the Section 107 fair use exception. If so, Regina's use of the information is permitted despite the copyright protection under the Copyright Act.

Answering the question of "Fair Use" requires examination of the four section 107 factors.

Purpose and Character of the Use

This factor examines the use of the copyrighted material. The communication by Regina cannot be said to be one of "criticism" or "comment" as the advertisements extol the virtues of the Regina Powerteam vacuum cleaner, directly copying CU's comments on the product without analysis.

The advertisements may or may not constitute news of a newsworthy event, e.g., ratings of an unbiased evaluator in the lightweight vacuum cleaner industry. Fair use does not require that the user of the copyrighted material (Regina) be in the news business. Fair use requires that the subject of the report be newsworthy. "The issue is not what constitutes 'news', but whether a claim of news reporting is a valid fair use defense to an infringement of copyrightable expression." citing Patry, *The Fair Use Privilege in Copyright Law*, 119 (1985) in *HARPER* 105 S.Ct. 2231 (1985). The Supreme Court has stated:

[T]he news element -- the information respecting current events contained in the literary production -- is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. *INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS* 248 U.S. 215, 234 (1918).

Certainly a news report that CU had rated a product unacceptable would be protected as fair use if published in the New York Times. The crucial question is whether the advertisements constitute a news report of a product's rating even though broadcast as an advertisement.

What distinguishes this case from most newsworthiness cases is that CU as the copyright holder actually created the newsworthy event for publication. As a practical matter, the CU publication is the event which is news, rather than the evaluation. Since the taking of the heart of a publication is normally considered a violation of the Copyright Act, such a use would tend to be unfair.

The second prong of this element is commercialization. In the *SONY* case the Supreme Court stated "that use of copyrighted material solely for commercial purposes is presumptively unfair". *SONY CORP OF AMERICA v. UNIVERSAL CITY STUDIOS* 464 U.S. 417, 104 S. Ct. 774, 808 & n. 32, 809, 813 n. 40 (1984). Perhaps this principle is better stated that non-commercial use is presumptively fair, since the holding in *SONY* was that the non commercial use was fair use under the Copyright Act. The court in *REGINA* held that while the purpose of the use was clearly commercial, the advertisements also conveyed useful information to consumers that is protected under the commercial speech doctrine of the First Amendment as recognized in *VIRGINIA STATE BOARD OF PHARMACY V. VIRGINIA CITIZENS CONSUMER COUNCIL, INC*, 425 U.S. 748 (1976) (*VIRGINIA PHARMACY*).

In *REGINA*, the court claimed that such a use would only increase the exposure of CU's ratings to the public at large thus bestowing a "significant public interest" and that "[S]ince the purpose is to report factual information ... it is more conducive to the concept of fair use." *CU v. GSC*, 724 F.2d 1044, 1049 (1983).

Advertising is subject to a large degree of control, even though protected by the First Amendment. While the boundaries of control of advertising have not been fully explored, restrictions which protect an orderly marketplace have been upheld.

Despite the appellate opinion, the purpose and character of the use would tend to support a finding that the use by Regina was not fair use. The primary argument is that the heart of the copyrighted work was appropriated simply to promote a product.

Nature of the Copyrighted Work

The second factor considered with the fair use doctrine is the nature of the copyrighted work. Characterization of the ratings by CU as fact, opinion, news or as research data could be essential in determining whether copying CU's expression constitutes fair use. The Copyright Act does not protect the underlying idea, only the expression of that idea. The problem occurs when the expression is the idea. The court in *REGINA* stated that "implicit in that decision is an

acknowledgement that, where accurate reporting requires use of verbatim quotations, fair use will be liberally applied." p. 1050.

The suggestion is that the "idea" is the actual rating of the vacuum cleaner, while the expression is the copyrighted story. Permitting CU to control use of the actual rating would be akin to allowing them to control the flow of news. The idea/expression dichotomy embodies the competing interest between copyright protection and the First Amendment.

It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself. ... This principle attempts to reconcile two competing social interests: rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter. MAZER v. STEIN, 347 U.S. 201, 217-18, (1954) in SID AND MARY KROFFT TELEVISION v. MCDONALDS, 562 F.2d 1157, 1163 (1977). As noted in KROFFT:

[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his work in that it renders his "ideas" per se unprotectable, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue." KROFFT, p.1170.

In HARPER a copyright infringement action was brought arising out of unauthorized publication of quotations from President Ford's unpublished memoirs, in an attempt to "scoop" the news story. The published account used numerous direct quotes from a pirated copy of the manuscript to add verisimilitude to the story. The Court of Appeals approved a fair use defense based on the fact that the content was factual and contained subjects of important public significance. The Supreme Court reversed, holding that the unauthorized publication of verbatim quotes from the "heart" of unpublished material effectively supplanted the copyright holders right of first publication, and thus did not constitute a fair use with the meaning of the Copyright Act, Section 107.

The Supreme Court in HARPER was clearly willing to give great deference to the financial incentives built into the copyright scheme, even at the cost of keeping facts of clear public interest concealed. HARPER can be distinguished from REGINA in that President's Ford's memoirs had yet to be published, while the information from CU had been disseminated in both the print and broadcast media. This distinction may have been critical in the court rejecting CU's request for an injunction, since the commercial value of the particular magazine that rated lightweight vacuum cleaners was not affected at the newsstand.

Since the interests so vigorously protected by Harper was the right of first publication and its attendant financial benefits, HARPER is of limited value in analyzing Regina.

If CU was in the commercial business of rating products, then it could establish any terms desired prior to accepting a product for rating, including limitations on how its rating was to be used. Terms would be a simple issue of contract law. CU, by choosing a non profit, non commercialization policy for its business is unable to control the way its copyrighted publication is used. The copyright law is a limited monopoly. The holder of the copyright cannot prevent a purchaser from buying multiple copies of the favorable publication and giving them away in stores. Acceptance of the benefits of the copyright law also means acceptance of its burdens, including the burden that the underlying idea disclosed in a copyrighted work is unprotected.

Quantity of the Work Taken

The third factor in determining whether the fair use doctrine is applicable is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The concept is that brief excerpts of a play or novel can be copied without violating the copyright of the work as a whole. Works that are naturally broken down into smaller pieces present additional problems. It is unclear whether the "whole" is the entire issue, the ratings of all lightweight vacuum cleaners, or simply those sections devoted to Regina Vacuum cleaners. This element illustrates the weakness of using the copyright law to protect CU. It is not the expression that CU is trying to protect, it is the fact of the rating. As the Court stated:

[i]n truth, CU is not really objecting to Regina's copying CU's expression. The statement of policy in its magazine and its position in its brief before us is that any mention of CU in commercial advertising will diminish its effectiveness as an unbiased evaluator of products. CU v. GSC, p. 1050.

This factor is of little assistance in determining whether Regina's use is fair, since again it is the underlying idea of CU's approval that is the target of CU's lawsuit.

Effect on Demand for the Product

The fourth factor is the effect of the use upon the potential market for or value of the copyrighted work. This factor is deemed to be the most important. CU v. GSC, p.1050.

This factor was the heart of CU's case. The District Court accepted CU's argument that commercial use of the article could "be the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as [an] unfair tester of products." CU v GSC, 83 Civ. 7209 (S.D.N.Y. Oct. 12, 1983) at 11 (trial court opinion).

The Court of Appeals determined that the district court erred in its conclusion since the fourth factor is aimed at a copier who is attempting to usurp the demand for the original work, e.g., the specific issue of CONSUMER REPORTS. Since CU had already published its test results on lightweight vacuum cleaner products, it is difficult for CU to establish harm since advertising of those results occurred after publication of the magazine. Since CU is sold at newsstands and by subscription, it may be impossible to establish any reduction in sales. The Court of Appeals distinguished the case where the copyright owner and the copier are competitors in the market for the copyrighted material. CU and Regina are not competitors. The Court of Appeals found that CU did not even allege in its complaint harm to any work currently copyrighted, but rather the value of harm to future issues of CONSUMER REPORTS. However, the copyright law protects only individual cases of expression, not a way of doing business.

The Court of Appeals recognized that the only damages being asserted under the copyright claim were to CU's future publications:

The only alleged injury which CU truly presses is that Regina's use may lead to public perception of endorsement. Truthful excerpting of CU's ratings cannot hurt CU unless the public perceives that CU sponsored the use. CU v. GSC, p. 1051, n. 7.

Even if the Copyright Act could be read as covering future issues along the same theme, it is questionable whether widespread advertising of CU's test results and unbiased reporting in CONSUMER REPORTS by manufacturers/retailers would usurp publication demand. It could be suggested that the widespread adoption of CU's ratings would lead to greater, not less, influence over the marketplace. Underwriters Laboratories, another nonprofit testing laboratory, dominates the field of electrical product testing despite the exact opposite approach to publication as CU. Its labels appear on all its listed products. In Europe, testing labels from consumer organizations are found on many products.

On the other hand, widespread advertising of test results for a wide variety of products may arguably usurp the demand for CU's publication since those who advertise will generally be those with the most favorable ratings, therefore making it unnecessary for subscribers to purchase the magazine due to alternative sources of the same information. While this argument may be somewhat speculative, the decision presumes that the effect of Regina's use upon the potential market for the copyrighted work is de minimis, as consumers are able to order back issues of the magazine. However, widespread advertising for a particular product that receives a favorable rating by CU eliminates the need for the consumer to order any such back issues. At best, the opinion may take too narrow a scope of the market demand issues.

FAIR USE AND PRODUCT CRITIQUES

The use of copyright law by CU to prevent

republication of their opinions is virtually unique since CU, in a sense, is trying to suppress truthful commercial speech to protect its own independence. This attempted suppression clearly conflicts with the usual interpretations of the Copyright Act. CU is not attempting to protect its economic well being, but is attempting to preserve a particular method of doing business. This is not the purpose of the copyright law.

Copyright laws and the First Amendment represent competing interests in a free market economy that values information in a "marketplace of ideas." The ultimate issue under fair use is whether the public interest in truthful discussion, even in the commercial marketplace, outweighs other concepts which try to restrict truthful advertising to protect other values. For the most part, the Supreme Court has rejected that position. The fair use section is essentially the accommodation of copyright to First Amendment requirements.

The Supreme Court in VIRGINIA PHARMACY extended First Amendment protection to commercial speech, citing the strong public interest in the dissemination of truthful and accurate commercial information:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. (cites omitted) And if it is indispensable to the proper allocation of resources in a free enterprise system it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. VIRGINIA PHARMACY, p. 765.

The Court has reaffirmed repeatedly the role of the First Amendment in the marketplace:

Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospects of pecuniary reward. CENTRAL HUDSON GAS AND ELECTRIC CORP. v. PUBLIC SERVICE COMM'N OF NEW YORK, 447 U.S. 557 (1980).

The Supreme Court in BOLGER v. YOUNGS DRUG PRODUCTS CORP., 463 U.S. 60 (1983) examined a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. The advertisement included not only the particular vendor's products, but informational pamphlets discussing the availability of prophylactics in

general. The Court found that the mailings constituted commercial speech notwithstanding the fact that the pamphlets contained discussion of "important public issues" such as venereal disease and family planning. The Court unanimously declared the statute unconstitutional, affirming its support for the most robust type of commercial debate, even when the debate is offensive to some listeners, or might expose children to what are normally adult topics: "The level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." BOLGER, p.74.

Given that fair use is designed to accommodate the First Amendment interests of a speaker, and given special role of advertising in our marketplace, CU's desire to be "above the marketplace" cannot survive the changes in the field of advertising law over the past few years. Doctors, lawyers, pharmacists and other professionals now advertise in the marketplace just like plumbers and auto dealers. The economic marketplace is regarded as important to citizens' well being as the political campaign. CU desires to influence the marketplace, while not being part of it. The Copyright law simply will not stretch that far. If CU is to find protection, it must be in another quarter.

LANHAM ACT

Truth in Advertising

CU also asserted claims under Sec. 43(a) of the Lanham Act which prohibits express and implied false representations made in connection with the sale of goods. Those who misrepresent can be held liable to those damaged by the misrepresentation.

One of the most important limitations on commercial speech is the requirement of truth. While commercial advertising does receive First Amendment protection under VIRGINIA PHARMACY and subsequent cases, it is clear that misleading advertising does not fall within the ambit of the First Amendment. The government is also free to ban commercial communication that is more likely to deceive the public rather than inform it. FRIEDMAN v. ROGERS, 440 U.S. 1, 13, 15-16(1979).

Under the Lanham Act, Sec. 43(a) covers not only those advertisements that are blatantly false, but also those that embrace "innuendo, indirect intimations, and ambiguous suggestions." AMERICAN HOME PRODUCTS CORP. v. JOHNSON & JOHNSON, 577 F.2d 160, 165 (2d Cir. 1978) in VIDAL SASSOON, INC. v. BRISTOL-MYERS CO., 661 F.2d 272, 277 (1981). The court in SASSOON held that "where depictions [in advertisements] of consumer test results or methodology are so significantly misleading that the reasonably intelligent consumer would be deceived about the product's inherent quality or characteristics, an action under Sec. 43(a) may lie." SASSOON, p. 278.

In MENNEN v. GILLETTE, 565 F. Supp. 648 (1983), the district court held that under Sec. 43(a) of the Lanham Act "the plaintiff [only] need establish that a non-insubstantial number of

consumers would be misled" and that the "capacity to deceive is not tested by reference to the average consumer but rather must be construed to protect the vast multitude which includes the ignorant, the unthinking and the credulous." MENNEN, p. 655.

The standard for commercial speech under the Lanham Act is therefore a high level of truth. Many of the commercial uses of CU's ratings have been false or misleading. There is no question under the Lanham Act that those uses can be effectively suppressed. AMANA REFRIGERATION INC., v CONSUMERS UNION OF THE UNITED STATES, 431 F.SUPP. 324 (1977).

Disclaimer

In REGINA the most important misrepresentation claimed by CU was that CU evaluates products in general and does not endorse certain products in particular such as Regina vacuum cleaners, and that the disclaimer by Regina was not sufficient to dispel the misrepresentation.

The Court of Appeals determined that the disclaimer used in the advertisements was sufficient to eliminate the possibility of a likelihood of confusion regarding the source or sponsor under the Lanham Act. Disclaimers in commercial advertising may be required in order to insure accurate commercial information.

In BATES v. BAR OF ARIZONA, 433 U.S. 350, (1977) the Supreme Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like might be required" in promotional advertising. BATES, p.384.

In BROOKLYN UNION GAS, 478 N.Y.S.2d 78 (A.D. 3 Dept. 1984), the New York court held that a requirement that a gas utility in an advertisement based on the price advantage of natural gas include a disclaimer that such an advantage may deteriorate as a result of deregulation did not violate the gas utility's constitutional right of expression. The requirement of a disclaimer was determined to be constitutional even though the advertisement was not deceptive in the absence of the disclaimer and was therefore protected by the First Amendment under the commercial speech doctrine. The state was held to have a substantial interest in providing complete information to consumers. The court also found that the restriction directly advanced the state's interest in complete information for a regulated industry and was limited and carefully drawn to remedy the situation that the regulatory body sought.

In BETTER BUSINESS BUREAU OF METROPOLITAN HOUSTON, INC. v. MEDICAL DIRECTORS, 681 F.2d 397 (5 Cir. 1982), the court held that an advertisement that a "BBB" spy had concluded that a weight loss clinic "really works" was misleading, but held that an injunction forbidding all use of the words "Better Business Bureau" violated the First Amendment. The injunction was modified to require a disclaimer that the BBB did not endorse the clinic.

The question in REGINA is whether the disclaimer was sufficient in order to dispel any semblance of misleading the consumer. A "complete" disclaimer which essentially included a copy of CU's entire non-commercialization policy would clearly be non-deceptive and truthful. The question remains whether anything less than a display of the entire non-commercialization policy is truthful advertising. If the disclaimer is determined to be insufficient, and therefore the advertisement is misleading, the advertisement does not fall within protection of the First Amendment.

Like the Copyright Act, the Lanham Act provides only limited protection to the CU position. Under the Lanham Act, truth is the standard, not protection of CU's independence.

CONCLUSION

Consumers Union's non-commercialization policy was adopted and flourished during the era when commercial speech was highly regulated. The deregulation of commercial speech under Virginia Pharmacy has opened a new era in First Amendment analysis of the marketplace. The fair use doctrine of the copyright law is sensitive to developments in First Amendment analysis. The more protection given to advertising under the First Amendment, the more fair will be the use of truthful relevant information. While Congress could amend the Copyright Act to give greater protection to CU, until that time CU will need to use means other than injunctions to protect its independence and enforce its non-commercialization policy.