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Subliminal Projection: History and Analysis*

By Thomas Albert Bliss**

I
Introduction

All media have great potential to create and reinforce values and opinions of the recipient. Such persuasion may take place consciously or unconsciously. A current example of conscious or supraliminal value creation/reinforcement is the Sergio Valente designer blue jeans advertising campaign. Like countless clothing, automobile and other advertising campaigns, the Sergio Valente advertisements demonstrate that a well dressed man, or in the case of the automobile advertisement, one who drives a "sexy" car, will turn the heads of admiring potential sex partners. This conscious appeal to human needs has been well documented.1

Human behavior can also be manipulated by the unconscious reception of information. When information is presented or projected below the threshold of an audience's conscious awareness, the information is said to be presented or projected subliminally. The process whereby stimuli are subconsciously received is known as subception.

Subliminal projection in the print medium has been thor-
oughly documented.² Wilson Bryan Key, the best known theorist in this field, finds that such information is usually directed at the two basic human needs: sex and death, which are also the bases of most insecurities.³ The theory behind subliminal projection is that by presenting advertisements containing hidden images which suggest sex or death, the unsuspecting audience will relate the product advertised to those needs or insecurities. Later, when faced with a choice, or simply due to a newly constructed "need," the subject will unconsciously choose the product most closely associated with those strongest of emotional stimuli—sex and death. The images must be hidden and the subject unsuspecting because "once the subliminal information becomes apparent to the conscious mind, the persuasive or manipulative potential in the data is destroyed."⁴ Conversely, the more deeply buried the stimuli, the greater may be its effectiveness. Examples of subliminal projection in the print medium are,⁵ to name but a few, hidden images of sexual intercourse in ice cubes,⁶ the word "sex" embedded throughout each and every model's hairstyle⁷ and the word "cancer" hidden in a cigarette advertisement.⁸

A complete discussion of supraliminal projection or subliminal projection in the print media is beyond the scope of this article; however, what is discussed are the techniques of subliminal projection as applied to visual and aural media. Although mention will be made of techniques and incidents in the theatrical exhibition of motion pictures, this article focuses on the application of subliminal projection techniques to broadcast and cable media. The reason for this focus is the prevalence of television and radio in virtually every home thereby providing the potential for a greater manipulative threat.

If subliminal techniques are indeed effective, there exists a great potential for abuse. Interference in the marketplace could be effected by these persuasive techniques. Governments could use media to subliminally indoctrinate their citi-

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2. See W. Key, Subliminal Seduction (1973); W. Key, Media Sexploitation (1976); W. Key, The Clam-Plate Orgy (1980).
4. Id. at 27.
5. See also Richards & Zakia, supra note 1.
zens in a manner favorable to their needs. More important than and implied by these abuses is the basic threat which yields all others: the invasion of a place one otherwise assumes to be the single secure and inviolable realm of total privacy—the mind.

II
Mechanics

Very little legal literature has been written about subliminal projection in visual and aural media. Indeed, few instances of the use of such techniques have been recorded, perhaps due to the expense or impossibility of obtaining recorded film or tape copies of the programming involved. In addition, visual and aural media are ephemeral; there is no time to dwell on the images and examine them for hidden content.

The methods by which information may be transmitted to the subconscious fall into two main categories: subaudible and subvisual. Subaudible transmission occurs when information is transmitted at such a low volume relative to the volume of the conscious program that the recipient cannot consciously perceive it. There are two distinct techniques involved in subvisual transmission. One subvisual technique involves flashing the information for such a brief amount of time that it is consciously invisible. The other subvisual technique involves the continual superimposition of the message onto the visible programming at such a relatively low level of visual intensity via a very faint light projection that it is not visible to the conscious mind.

Whether such techniques are effective in shaping subjects’ responses is disputed. The major problem in determining the effect is the difficulty in isolating the stimuli which are responsible for the various responses elicited by information presented audio-visually. One problem is the fact that subjects have been shown to have innately differing perceptual thresholds. Additional problems include determining the extent to which a given subject is actually persuaded as opposed to having incorporated the subliminal information into his or her own

9. See Bevan, Subliminal Stimulation: A Pervasive Problem for Psychology, 61 PSYCHOLOGICAL BULL. 81, 92 (1964), in which Bevan summarizes that “data supports the conclusion that subliminal perceptual effects are real effects, though so sensitive in production as not to be seriously considered as a technique to be exploited in the interest of consumer sales or other practical goals.”
value system and measuring the extent to which information may not be subthreshold at all but rather may be filtered out by the subject’s perceptual defense system. Effective or not, the use of such techniques presents questions regarding invasion of privacy. It is as if a billboard has appeared in one’s living room, consciously unnoticed but nonetheless uninvited.

III

Empirical Evidence

A. Experimental Applications

There have been several experimental uses of subliminal projection techniques. These uses have yielded mixed results. Perhaps the best known experiment involved the Subliminal Projection Company, Incorporated, which used a tachistoscope that projected the messages “Hungry? Eat Popcorn” and “Drink Coca-Cola” during the presentation of the motion picture “Picnic” on a theater screen in Fort Lee, New Jersey. In that experiment the sale of popcorn was reported to have increased fifty-eight percent and the sale of Coca-Cola eighteen percent.

In another experiment, the British Broadcasting Corporation, in 1956, flashed a brief message during one of its television programs. At the end of the program viewers were asked if they had noticed anything unusual. Two hundred viewers responded, a small percentage of whom identified the exact message. Of course, it is possible that those who recalled the exact message had lower thresholds of consciousness and that the messages were, for them, supraliminal.

10. See Barthol, The Subliminal Rabbit, THE NATION, Nov. 15, 1958, at 357, in which Professor Barthol concludes that “[t]he evidence indicates that the most that subliminal stimulation can do is to affect [slightly] a mood and possibly an attitude. . . . Occasionally, perhaps, it can even indicate an idea. . . . [e]ven the most clearly-structural stimuli are reinterpreted by us to fit in with our value systems.”


12. See infra notes 33-48 and accompanying text.


15. NATIONAL ASSOCIATION OF BROADCASTERS, MEMO ON SUBLIMINAL ADVERTISING at 2 (Nov. 5, 1957).
Additional tests have been performed by various television stations. One local station in the United States is reported to have broadcast a subliminal public service announcement which resulted in several telephone calls. Another station, WTWO of Bangor, Maine, flashed, "if you have seen this message, write WTWO" every eleven seconds for 1/80th of a second, on alternate days, over station promotional announcements. The station reported no attributable increase in WTWO's mail and terminated the experiment. On January 19, 1958, an undisclosed subliminal message was flashed 352 times, alternately for 1/5 and 1/2 of a second during a half-hour Canadian Broadcasting Corporation (CBC) Television Network program carried on twenty-seven Canadian stations. The CBC reported inconclusive results from this experiment. Finally, a major commercial testing research organization has conducted experiments that showed increased subject recall of subliminally mentioned products.

B. Non-Experimental Applications

In many instances, subliminal projection has been used in a non-experimental format. Indeed, it is possible that the following documented uses represent but a small fraction of the total employment of subliminal devices.

In 1957 the Precon Process and Equipment Corporation of New Orleans produced two films, "My World Dies Screaming" and "A Date With Death," which were heavily saturated with subliminal images. Neither of these films were ever publicly released, however, it is not unlikely that motion picture director William Friedkin made use of them in the making of his film "The Exorcist." One of the most dramatic visual subliminal devices used in that film is a cut in which the face of Father Karras, with skin greasy white, mouth a blood red gash and face surrounded by a white shroud, appears as a full-screen death mask apparition. This cut, which appears numerous times throughout the film, lasts only two frames. At twenty-four frames per second, with intermittent black-outs of equal length to facilitate the positioning of the next frame into the

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16. Id.
18. Id. at 2.
film projection gate, and taking into consideration the persistence of an image upon the retina, two frames would be visible for a total of 1/12 of a second. Although sixty-six percent of those in a test audience did not consciously perceive the death mask, these subliminal images very possibly contributed to the tension of the film.

In addition to other brief images such as the face of Father Karras, inter-cut throughout the entire film is a distinct and complete scene of a fox being hunted and finally caught by a pack of dogs. The scene is of such length that it would be clearly perceived and remembered, but for the fact that it is interspersed throughout the length of the film just a few frames at a time.

Friedkin also employed subliminal auditory devices to build tension in “The Exorcist.” Among the many sounds hidden in the auditory background of the film is the sound of an angry swarm of bees, the sound of terrified pigs being slaughtered and the sound of orgasmic vocalization. All these sounds were designed to heighten tension and conscious attention.

There are other applications of subliminal projection in addition to heightening the dramatic tension of a motion picture. In Canada, Quebec radio station CIME-FM broadcast subliminal messages between 11:30 pm and midnight five times a week “to help listeners relax after a long day of stress and tension.” Anti-shoplifting messages have been embedded into department store Muzak. In 1971, Inflight Motion Pictures, Incorporated, which has a monopoly on inflight motion pictures, announced in The New York Times that it would initiate the sale of subliminal advertisements to be embedded in the films that the corporation distributes.

A midwestern United States television station used subliminal projection in an attempt to find a mass-murderer. Thinking that the killer would be interested in the news of his deeds, the station interspersed throughout the news accounts of the murders, at two to three frames per insert, the message “Contact the Chief.” The hope was that the killer, who had been

21. Id. at 102.
22. Id. at 101.
23. Id.
sending notes to the media and authorities but had later stopped doing so, might reestablish contact upon receiving the subliminal suggestion. Unfortunately, this attempt was not successful.\textsuperscript{27}

The only known commercial application of subliminal projection in the broadcast media occurred shortly before Christmas, 1973. Television stations WGN, Chicago, and WPIX, New York, at the very least, carried a commercial that was prepared by the advertising agency Prescott-Adams-Nolan of Canoga Park, California. The advertisement was to promote the sale of a game called “Husker-Du.” Four of the frames of the sixty second filmed commercial contained the words “Get It.” Although the words were perceptible to a few,\textsuperscript{28} it was apparent that the majority of viewers could not consciously perceive them.

IV

The Law

A. Statutory Liability

Since its public beginnings, subliminal projection has drawn the attention of regulating bodies. On January 13, 1958, the Federal Communications Commission (FCC), certain members of Congress, and the news media witnessed a demonstration of subliminal projection by the Subliminal Projection Company, Incorporated, in which messages were flashed for 1/20th of a second every five seconds during a screening of “The Gray Ghost.” The company explained the various techniques to the group and suggested that such communications could not influence, but could only remind.\textsuperscript{29} One month later, on February 13, 1958, the Precon Process and Equipment Company of New Orleans, producer of the previously noted unreleased films “My World Dies Screaming” and “A Date With Death,” demonstrated its process and equipment to the FCC and the National Association of Broadcasters (NAB).\textsuperscript{30}

Subsequent to those demonstrations, on February 8, 1958, and March 12, 1958, Representatives Jim Wright and Craig Hos-

\textsuperscript{28} Letter from Wallace E. Johnson, Chief, FCC Broadcast Bureau, to Senator Howard Metzenbaum (Dec. 30, 1974), (regarding an inquiry by a Miss Ruth Gonze).
\textsuperscript{29} Subliminal Projection, supra note 17, at 7.
\textsuperscript{30} Id.
mer introduced bills H.R. 10802 and 11363, “to make unlawful the use of subliminal advertising on television and [to pre-
scribe] penalties.” Hearings were never held on either bill. Representative Wright, a former advertising man, reintroduced his bill on January 9, 1959. This bill, H.R. 1998, like the others, was referred to but never reported out of committee. To the present day, there is no law dealing with the issue of sublimi-
nally presented material.

B. Tort Liability

Because statutory remedies for subliminal projection are lacking, it is necessary to construct a theory based on the most appropriate form of tort liability in order to ensure that there are at least some private remedies available. An examination of common law reveals that invasion of privacy theory is by far the most appropriate foundation for tort liability.

Invasion of privacy is, according to Dean Prosser, the inva-
sion of something secret, secluded or private pertaining to the plaintiff. Furthermore, “the thing into which there is intrusion or prying must be, and be entitled to be, private.” The Re-
statement defines invasion of privacy as the “unreasonable in-
trusion upon the seclusion of another” and establishes liability on the basis that “one who intentionally intrudes, physically or otherwise, upon the solitude and seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offen-
sive to a reasonable person.”

Case law uniformly holds that an individual has a reasona

32. Subliminal Projection, supra note 17, at 8.
33. The FTC has statutory jurisdiction over deceptive advertising. See Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45 (West Supp. 1980); see infra notes 67-76 and accompanying text. For cases relating to unfair competition, see Evenson v. Spaulding, 150 F. 517 (9th Cir. 1907); and Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S.W. 271 (1904) (regarding intimidation, harassment or annoyance of a competitor’s customers). Finally, although nuisance law almost always applies to interference with real property rights, there is one case dealing with an alarming advertisement: Where a false report about a child-stealer was circulated, the court held that “the publication of an advertisement calculated to alarm the public mind unnecessarily, is a public nui-
sance, and is indictable as such.” Commonwealth v. Cassidy, 6 Phila., Pa. 82, 82 (C.P. 1865).
expectation of privacy when in his home. This expectation of privacy also extends to an individual’s telephone conversations, into which eavesdropping and wiretapping have been held to be actionable wrongs. These types of wrongs involve invading the privacy of another in order to take something, that is, information. What of a situation where there is an invasive giving of something? Professors Fowling V. Harper and Fleming James, Jr. include an “interest in avoiding seeing and hearing what other people do and say” in their definition of an individual’s “interest in seclusion.” Indeed, case law supports this view; it has been held time and again that it is an invasion of privacy to harass a debtor at work or at home by telephone.

It is but a short step to find that subliminal projection is an invasion of the unwitting recipient’s privacy. First, the thing into which subliminal projection pries is the mind, our most private possession. It cannot reasonably be doubted that if an individual’s home, work and telephone lines are considered private, then his mind is also private. Second, the intrusion is intentional because the subliminal information is purposefully inserted into the film. Third, and finally, the intrusion is at least as offensive as harassing telephone calls (where at least the victim knows he is getting the calls) and is at least as unreasonable as eavesdropping (where the victim’s thoughts if not words, remain private). Invasion of privacy, therefore, encompasses subliminal projection.

A defendant in an action for invasion of privacy based upon subliminal projection would be expected to counter with a defense of implied consent, that the plaintiff voluntarily introduced the radio or television into his home and turned it on, thereby consenting to whatever the radio or television might transmit. This defense may be refuted. The eavesdropping and wiretapping cases show that voluntary introduction of a

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38. F. HARPER & F. JAMES, 1 THE LAW OF TORTS 681 (1956).
telephone into an individual's home does not amount to an implied consent to have personal conversations monitored.\textsuperscript{41} Even where the defendant has a right to physically intrude into an individual's private domain, that right "does not authorize exercise of such rights in a violent or insulting manner, regardless of the rights of others."\textsuperscript{42}

Before the defendant in an action for invasion of privacy would need to raise a defense, the plaintiff must set out a prima facie case. As part of the prima facie case, the plaintiff has the burden of proving that the defendant put the subliminal frames in the film, that the plaintiff viewed the film, and the defendant's conduct was a "material element and a substantial factor" in causing the plaintiff's injury.\textsuperscript{43} This burden may be difficult to surmount because the subliminally projected material is below the plaintiff's threshold of conscious awareness. In the past, however, subliminal messages have actually been perceived by the viewer,\textsuperscript{44} as a message which is subliminal for one person may not be subliminal for another. In addition, these messages can be detected by examining a film frame by frame.

Once a prima facie case of invasion of privacy has been made, at least nominal damages will follow.\textsuperscript{45} The plaintiff is not required to plead or prove special damages.\textsuperscript{46} "The fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery."\textsuperscript{47} Furthermore, malice is not necessary. The right to privacy is "distinct in and of itself."\textsuperscript{48} Finally, where the plaintiff can prove actual economic losses stemming from a


\textsuperscript{43} W. Prosser, HANDBOOK ON THE LAW OF TORTS at 240 (4th ed. 1971).

\textsuperscript{44} See supra text accompanying notes 15, 16 and 27.

\textsuperscript{45} See supra text accompanying notes 15, 16 and 27.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} The Supreme Court has ratified the states' rights to protect privacy in Cantrell
subliminal influencing of her choice of products, money damages might follow on that basis as well.

V

The Federal Communications Commission

The FCC first addressed subliminal projection in a public notice issued on November 27, 1957, entitled *Use of "Subliminal Perception" Advertising by Television Stations.* In this notice the FCC described the process, expressed its opinion that subliminal projection was a "matter which vitally concerns the public interest," and proposed to study the issue and "take such action as may be warranted."50

In response to a letter from Senator Charles Potter of Michigan, the FCC explained its basis for regulating subliminal techniques. The Commission's licensing procedures make clear that regulation of radio transmissions must be guided by public interest, convenience or necessity. Furthermore, the FCC suggested that subliminal projection techniques might be subject to the Commission's rulemaking authority under Communications Act section 303 which authorizes the Commission to make rules governing the nature of the service to be rendered by each station, the type of apparatus to be used and the authorization of new and experimental use studies. In addition, section 4(i) of the Act gives the Commission broad authority to make rules and regulations in carrying out its functions and the provisions of the Act.56

The Commission, noting that censorship and content determination are not proper functions of the FCC, holds the position that "it does not appear to be certain that the regulation [of] subliminal material would necessarily constitute censorship." Rather, such regulation may be legitimately founded upon the federal statute which requires broadcasters to dis-
close both a sponsor's name and the fact of sponsorship when a commercial announcement is being broadcast. The Commission has stated that this statute would "prohibit broadcasters from subjecting audiences to messages received from undisclosed sources." Violations of this "sponsorship identification rule" have in fact resulted in declaratory orders for the payment of fines, known as forfeitures, by licensees. However, use of this statute to regulate subliminal material has three substantial drawbacks. The first is that the statute, title 47 United States Code section 317, applies only to messages received from undisclosed sources. Thus, broadcasters may not without the requisite disclosure insert a subliminal ad for one sponsor into the ad of another sponsor, nor may they insert such an ad into news, entertainment or public affairs programming. However, nothing in section 317 prevents broadcasters from inserting subliminal material within an advertisement when the sponsor of both the subliminal and supraliminal messages is one and the same, and that entity is clearly identified as the sponsor.

Second, the scope of section 317 is clearly limited to material broadcast in exchange for consideration. Thus, section 317 fails to prohibit the inclusion of subliminal matter in public service announcements or other unsponsored announcements.

Third, non-licensee persons involved with the production of advertisements or sustaining programs might insert subliminal messages into such advertisements or programs. While section 317 does not foreclose the possibility of sanctions against the advertising agency or the program producer responsible for the inclusion of the subliminal material, it is clear that the FCC is without statutory authority to enforce the section

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58. Communications Act of 1934, 47 U.S.C.A. § 317 (West Supp. 1980) states as follows:

All matter broadcast by any radio station for which money, service or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.


60. In re Liability of Lamar A. Newcomb, Licensee of Station WFAX, Falls Church, Va., for Forfeiture, 1 F.C.C.2d 1395 (1965); In the Matter of Glen Harmon Corp., Licensee of Radio Station KAW, Little Rock, Ark., 1 F.C.C.2d 1478 (1965); where licensees were fined $1000 and $350, respectively, for failing to identify programming sponsor.

against anyone other than the broadcaster.\textsuperscript{62} Regulation of the advertising agencies and the program producers appears to fall within the jurisdiction of the Federal Trade Commission, not the FCC. Thus if subliminal matter is broadcast without the knowledge of the broadcaster, and the broadcaster is somehow chargeable with such knowledge, the FCC is without a basis under section 317 upon which to act.\textsuperscript{63}

Although the Commission could propose a specific rule or entertain an application for a declaratory order, it has never done so, apparently preferring to rely on license renewal reviewers as the forum for regulating the use of subliminal projection techniques. According to the Commission, it will consider determinations that a station has either engaged in fraudulent advertising, or has permitted its facilities to be used for such purposes, during FCC licensing proceedings involving the station.\textsuperscript{64} While subliminal projection has never been at issue in a licensing proceeding, the FCC has clearly indicated its commitment to prohibiting subliminal technology in a recent public notice relating to the subject. "We believe that use of subliminal perception is inconsistent with the obligations of a licensee, and therefore we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not such broadcasts are intended to be deceptive."\textsuperscript{65}

In response to the only known commercial broadcast application of subliminal projection, "Husker-Du,"\textsuperscript{66} which was brought to the Commission's attention by viewer complaint letters, the Commission contacted the National Association of Broadcasters (NAB) Television Code Authority. This inquiry revealed that the NAB Television Code Authority had learned of the use of the subliminal message shortly after its initial broadcast and had received a statement from Prescott-Adams-Nolan, the advertising agency that produced the commercial. In that statement, the agency claimed it was sending telegrams

\textsuperscript{62.} "The Jurisdictional provisions of the Communications Act limit FCC regulation to 'interstate and foreign communication by wire or radio'. . . . No case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in 'communication by wire or radio.'" Accuracy in Media, Inc. v. Federal Communications Commission, 521 F.2d 288, 293 (1975).

\textsuperscript{63.} See id. See also supra note 58.

\textsuperscript{64.} 16 Rad. Reg. (P & F) 714 (1958).

\textsuperscript{65.} FCC Public Notice, FCC 74-78 (Jan. 24, 1974).

\textsuperscript{66.} See supra note 28 and accompanying text.
to all of the stations which had received the commercials authorizing them to delete the subliminal messages from the commercial until such time as the agency would send new prints of the commercial that did not contain such subliminal messages. Despite the NAB Television Code Authority's action, many stations continued to broadcast the commercial with the "Get It" frames intact. Of those stations, most reported that they had never received any telegram from the responsible advertising agency.\footnote{F.C.C. Public Notice, F.C.C. 74-78 (January 24, 1974).} The Commission's final action on this occasion was the issuance of the policy statement regarding the influence of fraudulent advertising determinations in FCC licensing proceedings.\footnote{See supra note 60 and accompanying text.}

It is of interest to note that there appear to be conditions which warrant FCC approval of subliminal projection. For instance, with regard to the "Contact the Chief" message aimed at the mass murderer mentioned previously,\footnote{See supra note 27 and accompanying text.} the television station involved sought and received a one-time authorization to break the FCC policy that disapproves subliminal messages.\footnote{Washington Post, May 12, 1978 at A13.} One can only hypothesize that the FCC felt, in this case, that the public's interest in apprehending the suspect outweighed any interference that such a normally innocuous message might present.

\section{VI
The Federal Trade Commission}

The Federal Trade Commission (FTC) has primary responsibility for regulation of advertising. Section 45(a)(1) of the Federal Trade Commission Act states that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."\footnote{Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45(a)(1) (West Supp. 1980).} Therefore, for subliminal projection to be unlawful it must be considered either unfair competition or deceptive according to FTC standards. Unfair competition, in that it generally relates to intimidation, harassment or annoyance of a competitor's customers,\footnote{See Evenson v. Spaulding, 150 F. 517 (9th Cir. 1907); Standard Oil Co. v. Doyle, 118 Ky. 682, 82 S.W. 271 (1904).} is an inappropriate basis for regulation of sublimi-
nal projection. Deception, however, as defined by case law related to the Federal Trade Commission Act, does appear to encompass subliminal projection.\footnote{73} Furthermore, if the FTC chooses to concur with the Federal Communications Commission's analysis of subliminal projection, it would also find that the technique is "intended to be deceptive."\footnote{74} It is relevant to note here that actual deception need not be proved under section 5. Rather, the "likelihood of deception or capacity to deceive is the criterion by which advertising is judged."\footnote{75}

Section 45(b) of the Federal Trade Commission Act authorizes the FTC to issue cease and desist orders in cases of deceptive advertising.\footnote{76} These orders may range from mere directives to cease offending practices to mandates for corrective advertising.\footnote{77} Section 45(1) further empowers the FTC to punish violators of such orders with fines of up to $5,000 per violation.\footnote{78} The cease and desist orders and penalties for violations thereof may be applied to advertising agencies as well as advertisers.\footnote{79}

The FTC received complaints in regard to the "Husker-Du" advertisement. According to a letter from William B. Ray, Chief of the Complaints and Compliance Division of the FCC Broadcast Bureau to Professor Wilson Bryan Key, the FTC made "inquiry into the matter in light of the statutes which it

\footnote{73} "[I]t is sufficient to find that the natural and probable result of the challenged practices is to cause one to do that which he would not otherwise do." Bockenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943). "The Commission... thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'Wayfaring men, though fools, shall not err therein...'." General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940).

\footnote{74} FCC, Public Notice, FCC 74-78 (Jan. 24, 1974).

\footnote{75} Montgomery Ward & Co. v. FTC, 379 F.2d 666, 670 (7th Cir. 1967); and "nor is it necessary... to find actual deception." FTC v. Balme, 23 F.2d 615, 621 (2d Cir. 1928).


\footnote{77} "The commission has wide discretion in its choice of a remedy deemed adequate to compare with... unlawful practices..." Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946); Atlantic Refining Co. v. FTC, 381 U.S. 357, 376, (1965), rehearing denied, 382 U.S. 873, (1965).

\footnote{78} "Any person, partnership or corporation who violates an order of the Commission [to cease and desist] after it has become final, and while such order is in effect, shall forfeit to the United States a civil penalty of not more than $5,000 for each violation." FTC Act § 5, 15 U.S.C.A. § 45(1) (West Supp. 1980).

\footnote{79} "The proper criteria in deciding a case of this kind as to whether a cease and desist order should issue against the advertising agency is 'the extent to which the advertising agency actually participated in the deception.'" Doherty, Clifford, Steers & Shenfield Inc. v. FTC, 392 F.2d 921, 928 (5th Cir. 1968).
Apparently the FTC was satisfied with the supposed action of the advertising agency in sending telegrams to involved television stations, because there is no record of any formal FTC action concerning the matter.

VII
The National Association of Broadcasters

The NAB has historically been the broadcast industry's self-regulating body, although the validity of its status as "private regulator" is presently in doubt. Nevertheless, since it was a strong force in formulating the broadcast industry's present attitude toward subliminal projection and was depended upon by the FCC to handle the Husker-Du event, a history of the NAB's involvement with the subliminal projection issue is helpful.

The NAB has developed strict policies regarding subliminal projection. From the very beginning of the controversy, the NAB has taken a negative stand on the issue. In November 1957, in its first recognition of the issue, the Television Code Review Board of the NAB recommended to its subscribers that "any proposals to use the television medium in the process called 'subliminal perception' be referred to the Board immediately for review and consideration . . . . Experimentation or use of the process should not be permitted . . . pending such review and consideration." The same month, the NAB sent a six page memorandum on subliminal advertising to its sub-

81. The United States District Court for the District of Columbia Circuit, has held that the NAB cannot regulate advertising policies (in this case, minutes per hour and sponsors per minute) of television stations. Although the Code is "voluntary," the "threat of disciplinary action is effective in maintaining compliance." This interferes with the authority of Congress and the FCC who alone have the power to so regulate. Furthermore, the Code was held not to be advisory but contractual and, as such, is anticompetitive in that it tends to raise or stabilize the price of commercial time. These usurpation of authority and antitrust aspects of the Code Authority place the entire regulatory functions of the NAB in doubt. United States v. Nat'l Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982); 82-1 Trade Cas. (CCH) ¶ 64,567, motion for certification of appeal denied, 1982-1 Trade Cas. (CCH) ¶ 64,705 (memorandum order), vacated as moot, appeal dismissed per stipulation, 1982-83 Trade Cas. (CCH) ¶ 65,049, aff'd, 1982-83 Trade Cas. (CCH) ¶ 65,050 (1982). A new advertising code is being propagated by the NAB. Broadcasting, Feb. 23, 1983.
82. At that time, the Television Code Review Board was called the National Association of Radio and Television Broadcasters (NARTB).
This memorandum describes the process and concludes that the industry should "devise a systematic policy to deal with . . . subliminal advertising." 85

The following January, the Television Board of the NAB added its weight to the policy of the Code Review Board by reaffirming the stand taken by the Code Review Board the previous November. 86 In March 1958, the Code Review Board proposed the following amendment to the Television Code:

The use of the television medium to transmit information of any kind by the use of the process called "subliminal perception," or by the use of any similar technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold of normal awareness, is not permitted. 87

The proposed amendment was submitted to the NAB Television Board meeting in Los Angeles on May 1, 1958, and adopted verbatim. 88 The policy last appeared in the NAB Television Code as follows: "Subliminal Perception. Any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold of normal awareness is not permitted." 89

Since adoption of the amendment, the NAB Television Code Authority has only dealt with the actual use of subliminal projection twice. The first time was the "Husker-Du" advertisement, where the Code Authority received a statement from the offending advertising agency to the effect that all recipients of the offending material would be appropriately notified. No further action was possible because the advertising agency was not a subscriber of the NAB Television Code and the television stations involved were presumed innocent. However, had the television stations been found guilty of a "continuing willful or gross violation of any of the provisions of the Television Code," 90 their "seal of good practice" could have been revoked through well defined proceedings by the Television Code Authority. This seal is coveted by broadcasters; its loss might re-

85. NARTB, Memo on Subliminal Advertising at 5 (Nov. 5, 1957).
result in a decline in advertising revenue, prestige and, ultimately, viewers. Advertising revenue would then, of course, decline further. In addition, the circumstances of the loss of the seal could be detrimental if offered at license renewal proceedings.

The other situation involving the NAB and subliminal projection was the Alpha Sonics Weight Loss Program. Alpha Sonics employed subliminal projection by embedding messages in pleasant music on audiotape cassettes to reinforce its weight-loss program. According to Alpha Sonics' advertisements, "the special subliminal message . . . will be received by your subconscious mind at least thirty times an hour. Tune in your mind to the fantastic benefits of Alpha Sonics' subliminal 'listen thin' suggestions . . . a subliminal suggestion received by your subconscious mind reprograms your eating patterns."\textsuperscript{91} The NAB Television Code Authority had received inquiries from a subscriber and the product's advertising agency regarding the status of the commercials. The Code Authority then requested substantiation of product efficacy and information regarding the subliminal messages supposedly embedded in the recordings. Receiving neither, and basing its opinion on the limited evidence at its disposal of taped commercials on which the supposed subliminal messages were not perceptible by the Code Authority, the Code Authority stated that the product and the commercials for it "appear to raise questions of compliance under the Television Code."\textsuperscript{92} The Code Authority subsequently advised its subscribers of its stand on the product and commercials, and requested "cooperation in this matter [to] help assure the continuing effectiveness of our industry's voluntary system of self-regulation of the public interest."\textsuperscript{93} Nothing more was heard of the Alpha Sonics advertisement. Whether there is more to be heard from the "industry's voluntary system of self-regulation of the public interest" remains to be seen.

\section*{VIII
The Networks

Network policy has followed NAB policy from the beginning.

\begin{itemize}
\item \textsuperscript{91} NAB Code Authority, Memorandum (Jan./Feb. 1976).
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id. at 2.
\end{itemize}
In its first statement regarding the issue, CBS announced, in December 1957, that it would not broadcast subliminal projection in any form on the CBS television network or on any company owned stations.94 ABC made a similar announcement the same month:

Until such time as full and complete information concerning the effect of this technique is available for careful consideration, the ABC Television Network and its owned and operated stations, in keeping with the policy that all commercial announcements should be clearly identified as such, will not broadcast messages utilizing the technique of subliminal perception.95

NBC also concurred with the views of its competitors, stating that the use of subliminal perception would be "improper," that the network "will not accept or use" the technique, and the NBC's position was "in accord with a recent recommendation of the N.A.R.T.B. Television Code Review Board."96

NBC's current position on subliminal projection is clearly spelled out in the Network's Broadcast Standards for Television. Under the heading "Unacceptable Commercial Presentations, Approaches and Techniques" is the statement: "NBC does not accept in advertising: the use of 'subliminal perception' or other techniques attempting to convey information to viewer by transmitting messages below the threshold of normal awareness."97

ABC's current position was communicated by Nanci L. Squeo of the Broadcast Standards and Practices Department, who quoted the NAB statement on subliminal projection and indicated that the network "complies with the spirit and purpose of those standards set forth by the NAB Code." Squeo also noted (hoped?) that "since subliminal techniques are essentially unfair and illegal in both design and purpose, such methods have been essentially discarded for broadcast use by

94. CBS stated that "[t]he legal, social and ethical implications raised by subliminal perception as we understand it are sufficient to preclude it from use in any form on the CBS Television Network and our Company owned stations. Furthermore, it has been and will continue to be our policy to insist that all advertising messages are clearly identified as such to our viewers." 6 NARTB, TELEVISION CODE SUBSCRIBER BULLETIN, No. 8 at 1 (Dec., 1975).

95. Id. at 4.

96. Id.

advertising agencies. The question of acceptability at the network level is, thus, not a consideration at this time. Thus it is clear that the networks are opposed to the use of subliminal projection.

IX
Monitoring

If subliminal projection techniques are being used today they would most likely originate at the advertising agency level, where television commercials are produced. The agencies deny using such techniques today. But they have been used. Either subliminal projection techniques have been discarded or some agencies are using these techniques and lying about it. Regardless of the answer, there still exists the major stumbling block of monitoring subliminal projection.

In 1957, the NAB called attention to the problem of monitoring subliminal advertising. Noting that subliminal projection techniques cannot be monitored by normal procedures, the NAB alluded to the possibility that subliminal advertising could be inserted by an outsider in film or transcriptions supplied to a station and these could be broadcast without the station's knowledge. "New monitoring techniques or devices may therefore be required to permit the detection of subliminal messages." To this date there have been no new monitoring techniques developed to deal with subliminal projection. In fact, there are no indications that attempts were ever made to develop such techniques.

Because subliminal advertisements may originate at the agencies, it would seem most sensible to make the broadcasting stations and cable operators responsible for monitoring. Since there are no new monitoring techniques for revealing subliminal information, such monitoring would require the examination of each frame of a commercial prior to its airing.

99. In my attempt to determine whether advertising agencies have discarded subliminal projection as an advertising strategy, Prescott-Adams-Nolan, producer of the "Husker-Du" commercial, is not talking because the company is defunct. However, without exception, representatives of the advertising industry insist that they do not employ such techniques. But there was "Husker-Du." Interview with Ruth Lear, Advertising Director, Beal's Inc., in Los Angeles (Nov. 6, 1981); see Bennett, Reading Between the Subliminals, L.A. Times, April 28, 1977, § 4 (View), at 1, col. 4.
100. NARTB, Memo on Subliminal Advertising at 5 (Nov. 5, 1957).
This in itself is a mammoth task as there are 720 frames in a thirty second filmed commercial, and only subliminals clearly printed on a single frame or more would be revealed, as was the case with the "Husker-Du" commercial. In addition, problems remain as to detection of messages printed below the conscious visual threshold in terms of intensity. Furthermore, possibly greater problems of detection are presented by subaudible messages embedded in a soundtrack. These techniques are, by their very nature, consciously imperceivable, possibly even to a conscientious reviewer.

If a staff of station employees were to spend time and money searching for subliminal messages, who would be watching for the station's or cable operator's own subliminal promotional messages? Not the FCC, which has stated that while it would "take all necessary steps to protect the listening and viewing public," it "does not now actively seek to detect instances of subliminal projection." The FTC's position, that neither federal nor state law specifically prohibits subliminal projection techniques, is hardly more promising. Therefore it falls upon the consciousness (or is it unconsciousness?) of the listening and viewing public to detect and report instances of subliminal projection to the FCC and FTC, a process which seems somewhat ironic.

X

Summary

At present there is no specific law prohibiting the use of subliminal projection. There is strong broadcast industry policy against such use, but even the strongest policy is useless against an invisible foe. Likewise, there is strong FCC policy against subliminal projection, but because the FCC has no authority over sponsors or advertising agencies, the Commis-

101. In 1969 a Coca-Cola research executive told Professor Key that tachistoscopic techniques were obsolete and described several other techniques, including low intensity light, that were far superior and much more difficult to detect. W. Key, The Clamplate Orgy at 142 (1980).

102. Letter from Wallace E. Johnson, Chief, FCC Broadcast Bureau, to Senator Howard Metzenbaum (December 30, 1974) (regarding an inquiry to a Miss Ruth Gonze).

103. Letter from Bruce J. Parker, Division of National Advertising, FTC, to Wilson Bryan Key, Ph.D. (July 19, 1974).

sion would be virtually powerless in the event that a broadcaster or cable operator unintentionally transmitted such material. If, however, a broadcaster or cable operator intentionally transmitted such material, the FCC could intercede immediately, through the issuance of a declaratory order, or later, at license renewal proceedings. But judging from its policy statement, which defines subliminal projection as deceptive, it seems the FCC would prefer to leave regulation of the subject to the FTC, one of whose responsibilities is to prohibit deceptive advertising. Unlike the FCC, the FTC could take action against an offending sponsor and its agency. Nevertheless, subliminal projection has never been an issue in any formal proceeding by either the FCC or the FTC, nor does it seem likely to be an issue in the foreseeable future. Neither commission is engaged in any active monitoring of broadcast, cablecast or theatrically exhibited material for the purpose of detecting subliminally embedded information.

It is therefore up to the television, radio and theater audiences to detect the undetectable and report it to the FCC or FTC where some action might be taken. If this procedure proves unsatisfactory, perhaps a private action against the broadcaster, cable operator or creator of the material on the theory of invasion of privacy might be considered.

As a practical matter, the public should not be expected nor depended upon to monitor, detect and report instances of subliminal projection. Effective enforcement against subliminal techniques can possibly be accomplished through random sampling, by examining a particular commercial frame by frame. Computers may also become an effective device in detecting subliminal projection. In any case, legislation should be drawn that would clearly prohibit the use of subliminal projection techniques by governments as well as private concerns.

Jef I. Richards and Richard D. Zakia, in their article "Pictures:

105. Whether an unwitting advertiser (principal) would be held liable for the action of its overly zealous agency in such a situation is doubtful. The advertiser would argue that since the subliminally presented information was unauthorized (RESTATEMENT (SECOND) OF AGENCY § 329 (1958)), imperceivable and unknowable (Templeton Construction Co. v. Kelly, 130 Vt. 420, 296 A.2d 242 (1972); RESTATEMENT (SECOND) OF AGENCY § 91 (1958)), and unratifiable as illegal or against public policy (Andrews v. Clairborne Parish School Board, 189 So. 355 (La. 1939), the advertiser could not be held liable.

An Advertiser's Expressway Through FTC Regulation, offer model legislation and would specifically place the issue within the reach of section 5 of the Federal Trade Commission Act:

1. DEFINITION: Subception, also known as Subliminal Perception or Subliminal Projection, is the communicating, transmitting, or picturing of a message to any given audience, of which the attentive viewer or listener will be consciously aware less than fifty percent of the time, or, alternatively, of which less than fifty percent of all viewers will be consciously aware at any time.

2. The use of subception in or affecting commerce by means of visual, auditory, or other medium, thereby "embedding" or hiding one message within the vehicle of a more blatant message, is an "unfair or deceptive act or practice" within the meaning of section 5 of the Federal Trade Commission Act.\(^{107}\)

Even if such a law were to be passed, most instances of subliminal projection would still be undetectable without an elaborate monitoring system. It is unlikely that either a law or a monitoring system will be implemented unless regulators and audiences alike begin to take the issue more seriously. That will not happen until and unless subliminal message disseminators are caught "red-handed," which is unlikely.

In the meantime, the extent to which citizen/consumers are influenced by subliminal projection, if at all, remains unknown, seemingly unknowable. With the continuing communications revolution, the potential for such influence grows daily. In an age ever more dominated by audiovisual media, it becomes increasingly important for people to know not only who is talking to them, but when and how.

\(^{107}\) Richards & Zakia, Pictures: An Advertiser's Expressway Through FTC Regulation, 16 GA. L. REV. 77 at 132 (1981). But note that vaguely defined "message" might not cover the use of subliminal projection in entertainment material.