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MEDIA PANEL

MS. FAIR: My name is Lesley Fair. I'm an attorney with the Division of Advertising Practices. I am here with my colleague, Laura Sullivan, who is also an attorney in that office, and I have made a pledge that this is the first event you've attended in years that starts, finishes and keeps on time. So, thank you very much.

I have promised our esteemed panel today that today's session dealing with issues involving effective ad clearance is going to be run on what I call a McLaughlin Group format, minus the yelling and screaming. I've brought my horn-rimmed glasses just in case so we can get started. The first issue, I think, is to simply go around and introduce ourselves, and if I could start on the far end with Mr. Kimball. If each panelist could identify themselves and the organization they represent and give us 25 words or less about your interest and experience in this area. Mr. Kimball.

MR. KIMBALL: My name is John Kimball. I'm the Senior Vice President and Chief Marketing Officer of the Newspaper Association of America. We are the trade association for the 2000 plus daily and weekly paid newspapers in the United States. Our interest in this is one of, A, education, interested in the proceedings

1 themselves, and also what role the newspaper industry can
2 play in ensuring, as we have our credibility at stake,
3 maintaining that.

4 MS. LEVINE: I'm Ellen Levine, Editor-in-Chief
5 of Good Housekeeping Magazine. For those of you who have
6 heard of us, we're 118 years old. Our interest in this,
7 as Good Housekeeping has always been in the forefront of
8 helping American families, and American women in
9 particular, maintain their health, the creator of the
10 Good Housekeeping Seal, and the reason we are
11 particularly interested in this is that health and
12 family's physical well-being is of primary interest not
13 only to the editors, the publishers, but also to the
14 readers of the magazine.

15 MR. McLEMORE: I'm Don McLemore, Vice President
16 of Standards at New Hope Natural Media. New Hope
17 produces the two largest natural products trade shows in
18 the U.S., plus Natural Products Expo Europe and Natural
19 Products Expo Asia. Additionally, we have five
20 publications within the natural products arena.
21 Virtually the distribution goes to everybody within that
22 segment of the natural products industry, including raw
23 material suppliers, manufacturers, retailers and
24 consumers.

25 About eight years ago, we started our own

1 standards program and implemented it, and we did it to
2 help support industry self-regulation in the first place,
3 but mostly to ensure the integrity and quality of
4 products within our immediate trade shows and
5 publications. And while the program is not perfect, it
6 allows us to be relatively successful at screening ads.

7 DEAN NORTON: I'm Will Norton. I'm from the
8 University of Nebraska. I'm interested in this subject
9 because of the size of Nebraskans. Actually, I also, in
10 addition to being on the faculty at the College of
11 Journalism at the University of Nebraska, am a partner in
12 a newspaper in Mississippi, or two or three publications
13 in Mississippi, and so this is of interest to me because
14 of how we want to be responsible in our community.

15 MR. OSTROW: I'm Joe Ostrow, President of the
16 Cabletelevision Advertising Bureau. Our primary function
17 in life is to drive more advertising to our members'
18 media, and they represent about 95 percent of the ad-
19 supported cable networks and about 90 percent of the
20 systems around the country that take advertising.

21 My interest is not for the State of Nebraska,
22 but for myself, if you would like me to stand up, I'll
23 show you why. The reality is we, in 1996, did some
24 voluntary guidelines that we did with the advice and
25 counsel of the FTC and we would like to continue to make

1 progress and go forward.

2 MR. PASHBY: Good afternoon, I'm Michael
3 Pashby. I'm Executive Vice President and General Manager
4 of Magazine Publishers of America. We represent about
5 250 publishing companies comprising about 1,100 to 1,200
6 consumer magazines which account for about 80 percent of
7 the dollar volume of the magazine industry. Our interest
8 is that we -- magazines were mentioned recently
9 prominently in the report produced by the FTC and we
10 wanted to listen to these hearings and to try to help
11 develop a practical solution.

12 PROF. ROTFELD: My name is Herbert Rotfeld.
13 I'm a Professor at Auburn University in Alabama and I'm
14 currently also the Editor of the Journal of Consumer
15 Affairs, which is published by the American Council in
16 Consumer Interest.

17 My reason for being has nothing to do with
18 either of those credentials, but rather for the last 20
19 years now, I have been studying and writing about media
20 standards for acceptable advertising and how various
21 vehicles decide what advertising they will accept and
22 publish. As I was listening to things for the day here,
23 like most academics, my mind is on my most recent writing
24 accomplishment -- Lesley said I'm allowed one plug for
25 the day -- which is in my --

1 MS. FAIR: And only one.

2 PROF. ROTFELD: Which is in my book, Adventures
3 in Misplaced Marketing, published by Quorum Books, where
4 I talk at length about self-regulation, government
5 interest and also abuses of marketing by various types of
6 companies.

7 PROF. SCHAUER: I'm Fred Schauer. My title
8 explains why I am here. I am the Frank Stanton Professor
9 of the First Amendment at the Kennedy School of
10 Government at Harvard University. I also regularly teach
11 the basic First Amendment course at the Harvard Law
12 School and have been visiting Professor of Law in the
13 last several years at the University of Chicago, the
14 University of Virginia and the University of Toronto.

15 I'm not here representing anyone. I do not
16 practice law. I haven't for a quarter of a century. I
17 do not consult. I do not sign briefs. I am here at the
18 unsolicited invitation of the Commission.

19 MS. FAIR: In the spirit of John McLaughlin,
20 let me start off the panel by saying, Issue One, survey
21 evidence. Herb, I know it's tough for an academic or
22 anyone else to capsulize a quarter of a century of
23 research in about three minutes, but I think if anybody
24 can do it, you could. You've done a number of surveys in
25 this area in the late '80s, early '90s. What can you

1 tell us about the results of what you found about media
2 clearance practices?

3 PROF. ROTFELD: Down to five minutes for what
4 I'm giving 30-hour-and-a-half lectures during next
5 semester on this topic. First of all, let me say I'm
6 absolutely certain that everyone here today wants to see
7 deceptive ads stop by some mechanism or another, and a
8 lot of the speakers, both this morning and I'm sure we'll
9 hear in this group, fear a liability or cost for some
10 sort of activity they feel they don't deserve. What I've
11 been doing for many years is talking to various types of
12 media managers at magazines, at television stations,
13 radio stations, cable companies. We've been expanding it
14 right now and spent a good part of the last few nights on
15 the phone -- the reason I'm on at night is I'm talking
16 with people in Australia because we're talking about the
17 organizations there and how they make decisions.

18 And the basic thing we're talking about here is
19 the advertising content, and I think we should be clear
20 with something. Also, that most vehicles make a very
21 broad distinction. There's the editorial content or
22 we'll call it entertainment content, which is what they
23 put in, and the advertising content, which somebody else
24 pays them to carry. There is no requirement for the
25 vehicles to carry anything they don't want to have in

1 there and no vehicle accepts absolutely everything that
2 comes in the door. They do reject some things. Some
3 vehicles reject a lot. Most reject very little. There's
4 no correlation -- contrary to a lot of presumptions,
5 there's no correlations between how much they reject and
6 the size of the vehicle and its profit line.

7 I've been sometimes surprised to find a very
8 small vehicle, television station, radio station,
9 regional magazine located in the middle of nowhere which
10 tells me how -- well, we call up to people, a local
11 university, if we have any doubts and they're always
12 happy to help us out and will screen things. And then
13 I'll talk to a big organization and they'll say,
14 basically, well, we reject just about everything.

15 Just to back up, I'll say what started me on
16 this because it might make it a little bit shorter in
17 saying this. About 20 years ago, I contacted a magazine
18 that is known for its investigative studies of business
19 practices. They are a business critic, slightly to the
20 left of Fidel sometimes, this organization is known for
21 being critical of a lot of things that businesses do.
22 And I saw an ad in their pages that was clearly false. I
23 had the data, I sent them the data. They said, we accept
24 everything under a First Amendment rationale and then
25 they gave me the list of things they don't accept. But

1 they said, we accept everything under a First Amendment
2 rationale.

3 Then a former student of mine sent me the media
4 kit which is what their advertising sales people use to
5 sell this vehicle to advertisers, and the front of the
6 media kit had in big, bold letters a statement that
7 readers trust us. So, they were selling to the
8 advertisers the trust in the editorial content, but
9 saying they'll carry everything.

10 I wrote back to the publisher who sent me the
11 initial letter saying that she accepted everything and I
12 said, well, this is very interesting. I discussed it
13 with my students in my advertising regulation and ethics
14 class and they thought it would be really great if she
15 had a statement up front that told everybody about this,
16 and she wrote back and said, I'm not discussing this with
17 you because you showed my letter to someone else without
18 my permission, and that was the end of that.

19 More typically, I contacted a bicycling
20 magazine that had an ad -- a small ad, small revenue, but
21 for a lot of big sales and -- without going into details
22 on the product, and it said, lowest prices anywhere in
23 the U.S.A. And through certain circumstances, I ended up
24 getting details on a lot -- them and their competitors.
25 They had the highest price of anyone. Now, they were

1 lowest prices of any product made in the U.S.A., but
2 that's because they were the only one made in the U.S.A.
3 Everyone else was an import, but they didn't say lowest
4 price of any product made in the U.S.A. They said,
5 lowest prices period.

6 I sent it to the magazine publisher. She wrote
7 back and said, I'll stop the ads only if you show me a
8 survey of our readers that says that they feel they were
9 harmed. I feel that that last story exemplifies
10 everything I keep finding over the last 20 years, and
11 that is the most common reason for rejecting ads is they
12 feel it would offend their readership. If they feel they
13 will lose their audience, their viewers, their listeners,
14 their readers, that is the single most common reason for
15 rejecting. Less than 1 in 20 television stations will
16 ask advertisers ever to substantiate claims. It's even
17 smaller for radio stations. I can't speak about anything
18 recently on cable companies or cable networks.

19 There is an exception to this. The rate of
20 vehicles that actually ask the advertisers for
21 substantiation and say the most common reason for
22 rejecting of misleading ads is newspapers. Newspapers
23 are generally more likely to say to me they're more
24 likely to reject ads for being misleading than the
25 others. But, again, I find many newspapers that would

1 rather not be bothered. From the consumers' point of
2 view, you have no idea who these people are.

3 Lesley?

4 MS. FAIR: Let me just turn it over to the
5 media trade associations, especially, and anyone else who
6 wants to jump in. I realize it's impossible to
7 characterize such a large industry in, again, just a few
8 minutes, but how would you characterize the current state
9 of what clearance practices are in your industry? And I
10 would turn this over to either John or Joe and/or
11 Michael.

12 MR. KIMBALL: I can start. The newspaper
13 industry is interesting in that it's not called the daily
14 miracle for no reason, and the process by which
15 advertising is processed and accepted, editorial copy is
16 put together and a newspaper is printed and delivered
17 every day is, indeed, rather miraculous. And I think you
18 have to understand in some context, the organized chaos
19 that exists in that process where advertising is laid out
20 without regard to where those stories editorially are
21 going to be, and a layout or a dummy, as it's called, is
22 delivered to the newsroom, the newsroom writes and edits
23 copy in conjunction with that, again, without knowing
24 precisely what advertising is running on any given page.
25 Then, the newspaper is printed and delivered.

1 In that process, there are some generally
2 accepted standards that, as I said earlier in my remarks,
3 the newspaper industry lives upon the credibility that we
4 have in the local communities that we serve. So, no one
5 is interested in running ads that are knowingly false or
6 deceptive or misleading. There are generally accepted
7 guidelines that most newspapers, if there is a question
8 about advertising, it is -- and the individual who's
9 taking that ad, whether it's on the telephone or in
10 person or opening the mail, if they have a question or a
11 concern, they generally take it to a manager or some
12 newspapers have advertising review boards, some
13 newspapers have advertising acceptability committees.
14 They may be large or small. It may be the publisher at a
15 small newspaper, if that is the case, or it may be
16 advertising managers at larger newspapers.

17 The process is informally formal and I think
18 that, as was suggested, I think, for the most part,
19 newspapers do a pretty good job of trying to identify
20 those advertisers and advertising that is blatantly
21 misleading or fraudulent or illegal. We don't catch it
22 all, but we try very hard.

23 It is a -- and I need to emphasize, it is a
24 process that happens every single day totally differently
25 than the day before, you know, in a very short,

1 compressed period of time, and what we do today has no
2 relevance to what we will do tomorrow in terms of that
3 content of that material.

4 So, it's a difficult process, it's very
5 deadline intensive and it is very compressed in an
6 extremely short period of time.

7 MS. FAIR: What is the -- I mean, the person
8 who's actually looking at the ad before it's going to be
9 inserted, what are the typical guidelines that he or she
10 is given with regard to what they should be looking for?

11 MR. KIMBALL: Well, there are some newspapers
12 that have entire categories of advertising that they
13 don't accept. So, those are easy. A newspaper may not
14 accept tobacco advertising, or firearms, or alcoholic
15 beverages or adult movies or something like that. Those
16 are easy.

17 Other claims sometimes can be difficult but
18 they may be things like if, for instance, there was a
19 material that showed up and there was a price in the ad
20 and the price was all zeros, and that happens sometimes,
21 obviously those things are pretty obvious and someone is
22 going to catch that, get back to the advertiser probably
23 and say there's no price in this ad, although you mention
24 one.

25 It's difficult to substantiate claims of

1 percentages off or quantities for sale or VIN numbers on
2 automobile ads. There are also fairly standard
3 guidelines for acceptability in terms of taste,
4 obscenity, things like that. The rest of them, it's very
5 difficult to substantiate in a single sheet of paper that
6 these are the nine things that we will do and these are
7 the ones that we won't. It really goes by an ad-by-ad
8 basis. It goes to the expertise of the individual who's
9 taking the ad. Ultimately, of course, it's the
10 publisher's option to accept or reject advertising. So,
11 that's where it generally ends up.

12 MS. FAIR: What about in the magazine or cable
13 television industry?

14 MR. OSTROW: Well, as I mentioned earlier, we
15 did issue some voluntary guidelines in 1996. We
16 reexamined them in 1998 and then again in 2000. I did a
17 study just recently of about half of our network members
18 which showed that about 17 percent of them used our
19 guidelines, about 83 percent used something other than
20 our guidelines, with the vast majority using their own
21 guidelines, which tended to be even more specific.
22 Because what we have in the cable industry is a great
23 deal of variability in terms of the programming formats
24 and the audiences that we appeal to.

25 It's quite different in terms of what the

1 advertising that is allowed to run might be on a
2 religious channel as opposed to a children's channel as
3 opposed to a music channel, just to name three different
4 varieties.

5 We also know that there are standards in
6 practices departments at about 75 percent of the network
7 that we surveyed and, indeed, there are quite a number of
8 networks that carry advertising that are neither members
9 of our trade association or others, they carry very
10 little in terms of dollar amounts, and therein may lie
11 part of the problem.

12 MS. FAIR: Michael, what about from the
13 magazine publishers?

14 MR. PASHBY: I think ad clearance almost
15 presupposes that there is a formal process that goes on
16 and that's not actually the case. I mean, it's a very
17 loose term 'ad clearance.'

18 Certainly, in some magazines, some magazines
19 have forbidden certain categories from appearing in their
20 publications from a philosophical or age reason, whether
21 that be tobacco, liquor. Some magazines will forbid mail
22 order advertising and certain magazines will require
23 certain additions to advertising. For instance, on mail
24 order advertising, some magazines require there be a
25 money back guarantee. So, they may look at an ad or

1 insist -- or they may not even look at it, but they may
2 tell the advertiser it should have a money back guarantee
3 and it should have the means of receiving that.

4 I think beyond that, if you're talking about ad
5 clearance, you're presupposing that people are actually
6 reading the ad. I don't think that is common within the
7 magazine industry. They look at the ad. They look at
8 the ad for suitability of placement, particularly -- I
9 mean, the obvious thing is nudity, that was mentioned
10 before. For certain publications, that's perfectly
11 acceptable to find nudity within advertisements. In
12 others, it's absolutely not. And it's an easy thing to
13 notice and to reject.

14 MS. FAIR: In the interest of time, let's go
15 directly to weight loss advertising since that's --

16 PROF. ROTFELD: Lesley, we were talking about
17 codes, if I may. One thing I'd like to add about when I
18 talk with various vehicles about codes, in their industry
19 or what they have there, I often will say, do you follow,
20 and I'll talk about a related code to their industry or a
21 particular area, and they'll always say, oh, yes, we do.
22 Then I'll ask specific questions. Well, we don't have a
23 copy. No, I haven't read it in a while. No, I think
24 it's around here somewhere. And then you ask them
25 specifics of what they're doing and they're not exactly

1 following the code that they said that they were
2 following in the first place. I find a lot of vehicles
3 are code sayers, as I would put it.

4 The best example is not too long ago after the
5 new movies have been coming out from the major comic book
6 companies, I was contacting some of them saying, tell me
7 your guidelines and how you decide what advertising is
8 acceptable. And they all send me a copy of the Comics
9 Code Authority Seal of Practices promulgated in the '50s
10 and updated, I think, last time in the '70s, and they all
11 sent me a copy of it. But you go out to any magazine
12 rack or any comic book store and there's a lot of things
13 from their own company that doesn't follow this code, at
14 least on editorial content, I can't say on advertising.

15 We're talking here about what a lot of
16 different companies do and the phrase that I always come
17 back to is, everyone I talk to tries to tell me, this is
18 standard in the industry, this is standard in the
19 industry. Everyone says that what they do is the
20 standard, even though they all will do different things.

21 I was trying to talk to some television
22 stations on different types of ads and this small station
23 in Macon, Georgia says to me, well, you've got to
24 understand, Dr. Rotfeld, before it comes to us, it's
25 played in the big cities, it's been on the networks, it's

1 been on the cable networks, and so by the time it gets to
2 us, a lot of other stations and cable companies have
3 looked at it.

4 So, I'm talking at a big station at a major
5 market and they say, well, you've got to understand, Dr.
6 Rotfeld, before it comes to us on a spot buy, it's been
7 on the cable companies, it's been in several small towns
8 and the networks might have looked at it, too. Then I'll
9 call up the cable company. You've got to understand, Dr.
10 Rotfeld, before it comes to us and so on and so forth.
11 Everybody was referring to someone else. And if I had
12 asked them specifics on standards, they're all doing
13 something different, but what we do is standard.

14 MS. LEVINE: Lesley?

15 MS. FAIR: Let's talk about something that's
16 not standard.

17 MS. LEVINE: I'm in a very unique position,
18 Good Housekeeping Magazine, and I've worked around lots
19 of magazines and a couple of newspapers. And we are very
20 specific. And we, at Good Housekeeping, since the seal
21 came into being in 400 years, every single ad is read,
22 every claim is verified. Approximately \$2.4 million is
23 spent through the Good Housekeeping Institute to work on
24 the veracity of the advertising. Not just in the
25 category of weight loss. In 1952, the magazine stopped

1 taking cigarette advertising. So, I would like to say,
2 in this sense, that the magazine is way ahead of the
3 curve. It's earned its position in the United States as
4 a magazine that really does represent trust.

5 However, it is unique. And as I have worked
6 other places, as Michael Pashby has said, there are
7 different points of view and guidelines. This is the
8 only magazine that I am aware of in the United States
9 where the advertising goes through the editorial
10 department before it is printed. And what I thought I
11 would be happy to share with you and with anybody else
12 who would be particularly interested are the 16 points
13 that diet and weight loss programs and plans and meal
14 replacement/weight control products must get through
15 before they appear in the magazine.

16 MS. FAIR: We can certainly put that on the
17 event website.

18 MS. LEVINE: Yes.

19 MS. FAIR: Could you give us a highlight of a
20 few of the most appropriate?

21 MS. LEVINE: Well, they're very specific and to
22 the point that you made earlier. If I were on a 24-hour
23 turnaround, it would be much more difficult. Here is an
24 example.

25 On request, a diet program plan must provide

1 documentation that the program plan is nutritionally
2 adequate and safe without the need for physician
3 monitoring. If an advertising claims a typical weight
4 loss, implicit or explicit, for participants of the
5 program, this claim must be based on a sample of all
6 persons who have participated in the program plan. So,
7 we're looking for very firm documentation. They cannot
8 be research studies from Sweden on five people in the
9 north of the country.

10 Consequently, it's not an easy program to
11 administer, but it has kept us safe in this arena, as it
12 has in accepting electronic products, all the products
13 that appear because they do carry the warranty.

14 MS. FAIR: Now, certainly you've mentioned ads,
15 you know, reviewing the science and substantiation. Are
16 there some ads that have crossed your desk over the years
17 that didn't take much scientific evaluation for Good
18 Housekeeping to make the decision that it did?

19 MS. LEVINE: Well, yes, Lesley, there are. So,
20 I actually brought 10 pounds per week, the Turbo Protein
21 Diet, stop yo-yo dieting forever. This was a 1-800
22 number. It didn't take much thinking to understand that
23 this wasn't going to work, dream though we might that it
24 would. And we turned down millions of dollars of
25 advertising. In this particular category, it really

1 rarely passes above the level of the advertising
2 department. They know it's not going to be accepted, so
3 they do not bring it up. And ultimately, our publisher
4 is sitting here, we've probably lost millions of dollars
5 in this, but it's appreciated by the readers.

6 MS. FAIR: What are the tip-offs? When your
7 folks are giving it that initial scrutiny, what kinds
8 of things do they say to themselves, I'm not even going
9 to --

10 MS. LEVINE: Extreme weight loss in a short
11 period of time, you can eat all you want of high calorie
12 foods without exercise, sit still and lose weight. And
13 we were just coming back from lots of focus groups around
14 the country and we put our editorial through the same
15 process. They know very well, the women out there, that
16 diet isn't easy. So, yeah, there are a lot of tip-offs,
17 but it gets more complicated when you get into the
18 nutritional diet drinks and that takes a lot of scrutiny
19 and scientific evaluation, and we have nutritionists on
20 the staff and chemists.

21 MS. FAIR: Let me turn to Don McLemore. Could
22 you describe, certainly in the area of weight loss, what
23 your organization does?

24 MR. McLEMORE: The real --

25 MS. FAIR: If you could talk into the mike,

1 please.

2 MR. McLEMORE: The blatant claims really never
3 get to my desk in the standards department. We've
4 trained our ad sales reps what would be accepted and what
5 won't be.

6 MS. FAIR: And what are those? How do you
7 train them and what are those -- what are they told?

8 MR. McLEMORE: For example, the diet slippers
9 are not -- it's not a product that would appeal to our
10 constituency or our readers, so our ad salespeople
11 immediately reject that. Additionally, the seaweed soap
12 that allows you to scrub away three or four pounds every
13 time you take a shower does not work. So, those don't
14 get past -- the ad salespeople reject those immediately.

15 Generally, the types of ads that end up on my
16 desk and end up for review -- in fact, we review all our
17 ads for acceptance into our publication -- are ads that
18 are subtly misleading. For example, just last month, we
19 received an ad for a product that compared itself to
20 three pharmaceutical drugs, Xenical, Meridia and Fastin.
21 It was a dietary supplement that said it had the same
22 effects as the pharmaceuticals without any side effects.
23 Additionally, that they promoted the product as a
24 treatment for obesity. So, that initiated a conversation
25 with the advertiser. The advertiser said that, in fact,

1 that product was FDA-approved and had been cleared by the
2 FTC.

3 MS. FAIR: Oh.

4 MR. McLEMORE: And that they felt that we had
5 no right to ask them to remove those claims. So,
6 therefore, we lost about \$50,000 worth of advertising for
7 that particular ad. So, that's just an example of one
8 time.

9 MS. FAIR: How are your staff people trained in
10 this area?

11 MR. McLEMORE: I have two colleagues that work
12 with me and basically they have science backgrounds. We
13 review every ad that goes past our desk, and for the most
14 part, we're looking for false and misleading claims as
15 well as egregious claims. And, in fact, we see more
16 egregious claims than we do false and misleading claims.
17 We ask for substantiation in cases where it's needed and
18 we ask for changes and revisions to ads that make
19 egregious claims.

20 MS. FAIR: The weight loss report that the
21 Commission issued in September raised two phenomena that
22 I think we are kind of curious for the panel's insight as
23 to what's happened. In the same decade, as the Chairman
24 said, where the Commission brought close to 100 cases, at
25 least our observation is, is that the percentage of these

1 ads making what we would consider scientifically
2 infeasible claims has increased as has the fact that a
3 number of them are moving from the back of the book, so
4 to speak, smaller or, you know, other kinds of media into
5 mainstream media outlets. Any thoughts in the past
6 decade what may have caused this phenomena?

7 PROF. ROTFELD: Marketing.

8 MS. LEVINE: I'll add to that.

9 MS. FAIR: We have a --

10 PROF. ROTFELD: This is market-driven in a
11 sense. We have a nation of people that's guilty of
12 gluttony and sloth and they want to be thin while
13 remaining gluttonous and indolent. I mean, that's really
14 what's driving it here. And there's a lot of people that
15 desire this. I mean, in a historical context, 150 years
16 ago, a little bit less than 150 years ago, this is why
17 magazines started carrying ads from the patent medicines.
18 Their readers wanted information on all of these patent
19 medicines. And the reasons we had infomercials, in part,
20 besides cable companies and television stations wanting
21 to fill some time and the FCC removing restrictions,
22 people were watching these programs. They were
23 interested in the things that are going on there.

24 Consumer Reports not too long ago had a story
25 about Dr. Scholl's now putting magnets in a line of shoes

1 and commenting to the Consumer Reports people saying,
2 yes, we know they don't have effects, we know that they
3 don't do anything, but people are interesting in buying
4 this product, so we feel we should offer it.

5 MS. LEVINE: I think there's another issue.
6 When times are difficult economically as they are right
7 now and the advertising base melts away, not the fat, but
8 the advertising base, then there is room -- you said in
9 what we call the front of the book. So, the advertising
10 that would have been relegated to the bad paper in the
11 back of the book has had an opportunity to move forward
12 and some of these are what we call PI ads.

13 MS. FAIR: Could you explain what you mean by
14 that?

15 MS. LEVINE: A PI ad is a per inquiry ad so
16 that the publisher is paid not simply a rate base for
17 placing it, but they are paid on each one of the sales of
18 the product through the magazine. So, it's another
19 profit line to the publisher.

20 MS. FAIR: How common are PI ads?

21 MR. PASHBY: I don't believe they're common at
22 all. In fact, a survey of the discussions that we had
23 with our magazine members indicated -- not one of the
24 publishers we spoke to indicated that they were accepting
25 any PI ads at all. That's what I was told.

1 MS. FAIR: I'm sure.

2 MR. PASHBY: And, actually, I'd just like to
3 point out -- you asked a specific question. Of the ads
4 that you surveyed, you did indicate that 60 percent of
5 the ads you had no problem with at all. That it was 40
6 percent of the ads that there was a problem with.

7 MS. FAIR: Well, I think the phrase 'had no
8 problem with at all,' I think we might not go that far as
9 to say.

10 MR. PASHBY: Okay. But they were not deceptive
11 ads.

12 MS. FAIR: Well, I think the statement was that
13 they were facially, plainly, kind of patently false ads.

14 MR. PASHBY: When I look at the report that you
15 put out, I mean, the one thing that does stand out in
16 there is that a number of product areas within the diet
17 area advertising has actually decreased. The number of
18 products being advertised over the last decade has
19 decreased. And the one area which has increased
20 substantially, in fact, from zero to 12 products, is the
21 dietary supplements. Prior to 1994, those products
22 weren't allowed to be advertised because they hadn't been
23 approved by the FDA. After 1994, they didn't require FDA
24 approval.

25 So, the mere fact that more products are coming

1 onto the marketplace will create more advertising. I
2 think that is something we really have to understand
3 here. That it's not just an increase in advertising of
4 these products. There's products being allowed onto the
5 marketplace unchallenged.

6 MS. FAIR: Other thoughts? Dean Norton,
7 anything from your point of view about what may have
8 caused this change?

9 DEAN NORTON: I agree with what he's saying.
10 It seems to me that this is very similar to the cigarette
11 smoking problem that existed for decades. It took us a
12 long time to understand that nicotine was addictive.
13 Remember, we had a whole bunch of executives sitting
14 before Congress saying that it wasn't addictive, and we
15 weren't even sure that they weren't answering us
16 correctly when they said that.

17 I think, similarly, your report is going to
18 make a difference out there in the media once the media
19 gets informed about what a big problem being fat is in
20 America.

21 MS. FAIR: Do you think it's a matter that
22 isn't currently well-known?

23 DEAN NORTON: I don't think people understand
24 that it's one of the leading causes of death until this
25 report came out. So, I think it just takes a while for

1 the information to be disseminated among people and I
2 think you'll have all sorts of investigative reporting
3 stories done locally at different newspapers and
4 different magazines about this.

5 MS. LEVINE: I'd like to throw in one other
6 situation. The infomercials are -- we report constantly
7 on the television infomercials, and our experience has
8 been when we evaluate the products that are being sold
9 over the infomercial, which is a different form of
10 advertising, they are very litigious. So, if you say
11 anything negative about them in print, you very often end
12 up in a battle of the attorneys. So, they do get a
13 certain amount of free reign because they are quite
14 threatening on the other end and not all publishing
15 companies want to go there.

16 MS. FAIR: Are you referring to free reign on
17 the editorial side or --

18 MS. LEVINE: No, free reign in general. I
19 mean, if you begin to attack them, you are attacked right
20 back. The Ab Energizer might be one of those.

21 MS. FAIR: What about -- let's take an ad --
22 again, we've talked about weight loss soap an awful lot
23 or the FTC's Slim America ad. I think the claim in this
24 litigated case that resulted in a judgment and about \$8
25 million back for consumers, blast off 49 pounds in only

1 28 days -- I'm sorry, 29 days. I'm sure that last day
2 was crucial. No doubt. When an ad -- and this was an ad
3 that ran in a number of major media outlets.

4 Obviously, we don't have personal knowledge
5 about this particular ad, but what are the factors that
6 are leading ads like that to be run? Is it a question of
7 no screening being done, folks that do the screening
8 aren't aware of the difficulties that they might be
9 encountering with these kinds of claims? Is it a
10 question of ad meaning or ad interpretation? What makes
11 this a tough job for media screening personnel?

12 MR. PASHBY: I think now that that -- now that
13 you have a judgment, that ad is not going to run. I
14 mean, magazines --

15 MS. FAIR: Well, no, we have 44 pounds in 30
16 days. So, you know --

17 MR. PASHBY: But the point is, you have a
18 judgment, that has been publicized, that has been told
19 to the industry and the industry is now aware that this
20 ad -- there is a violation. It is not going to be run.

21 MS. FAIR: But, Michael, what about other ads,
22 again, from other companies that say, again, blast off 51
23 pounds in 36 days?

24 MR. PASHBY: I think when you talk about
25 something like that, that is -- we're talking about the

1 extreme. The issue that I see, and I think most of the
2 magazines see, is that Ellen does have a department there
3 where she spends \$2.4 million, which is more than the
4 total revenue of 90 percent of all the magazines that are
5 published in this country. But she is spending that
6 money quite rightly as a marketing program for her
7 readers.

8 MS. LEVINE: We prefer not to call it a
9 marketing program.

10 MR. PASHBY: Oh, I'm sorry, I'm sorry.

11 MS. LEVINE: I think spiritual and religious.

12 MS. FAIR: Well, I think --

13 MR. PASHBY: I think what happens when you
14 start to look at ads and you try to make a judgment, what
15 a publisher will tend to do is to categorically reject
16 advertising; i.e., reject it by category. So, rather
17 than try to make a judgment of saying this is correct and
18 this is not correct, Slim America is correct or is not
19 correct, Slim Fast is correct or is not correct, they
20 will reject all of this type of advertising, all
21 advertising within the weight loss category.

22 And if we know that 60 percent of the products
23 that are being advertised are indeed legitimate products,
24 then actually we're denying advertising to those areas.
25 I know it's a difficult problem, but I think that is the

1 issue that most publishers face.

2 MS. FAIR: Herb, I think you were next.

3 PROF. ROTFELD: Well, I was going to say, you
4 were asking why these are going in, and as long as you're
5 talking about Good Housekeeping, we could bring in
6 another magazine that has also been noted for doing a lot
7 of work in this area and that's Modern Maturity and
8 screening a number of things keeping them out. But the
9 basic concern has to come down to the people that are
10 making decisions, the final arbiter of the decision of
11 what is acceptable is a person whose job description and
12 job performance is defined by revenue. They lose their
13 job if revenues drop in many instances. And their
14 concern is how much ad lineage you have.

15 So, decision-making in part -- and these are
16 not my words. These are words from people who make these
17 decisions. They said the decision comes down to a mix of
18 greed and fear. Greed in that I want the money and fear
19 in that, well, if I accept it, what's the ramifications
20 of something going wrong. You have a judgment on ads
21 that are clearly deceptive. Well, now they're running
22 into a problem that -- okay, now I'm knowingly carrying
23 something that's false and I could be liable for
24 something else. We have another thing happening here.

25 But the fear, also, many times is, well, if we

1 carry an ad and it causes our readers to go elsewhere,
2 then our circulation goes down, our circulation goes
3 down, we charge less per ad, we charge less per ad,
4 revenue goes down. If we have an ad that's offensive to
5 a large number of our advertisers, which is rarely a
6 basis for decisions, though they mention it now and then,
7 again, they lose revenue. But it's this mix of greed and
8 fear.

9 The publishers and station managers at
10 television stations and radio station managers are very
11 upfront about it. This is their words when they say this
12 to me. I'm not putting my color on things when I say
13 that. They are concerned about having the revenue.
14 Because if ad lineage drops, if their income drops,
15 they're out of work.

16 MR. KIMBALL: I need to suggest for a moment
17 here that a newspaper publisher or a magazine publisher
18 who used that as their sole standard of acceptability
19 would be losing their job for another reason.

20 PROF. ROTFELD: Well, I didn't say sole.

21 MR. KIMBALL: I think that we need to get to
22 the issue of how advertising -- by what measure are
23 things evaluated and by what measure does the newspaper
24 publisher or the advertising representatives working for
25 that publisher make the decisions about what to accept or

1 not accept and I can assure you that the sole revenue
2 model that the decisions are being made by whether the
3 lineage is up or down or whether the revenue is up or down
4 and that drives the sole decision about the acceptability
5 of advertising, is categorically not true.

6 MS. FAIR: What else -- you know, if not solely
7 revenue, then what it is, John?

8 MR. KIMBALL: Well, I mean, I said before, the
9 newspaper model, not unlike the magazine model, is one
10 where there are two sides to the business. We have a
11 social responsibility and an editorial mission that
12 builds upon either the setting or the gathering together
13 of those that help set the agenda within a local market,
14 and that is a very serious consideration. It is why
15 there is a fence or a wall or a gate or whatever you want
16 to call it between the newsroom and the advertising
17 department, and I think it is the model upon which the
18 American newspaper business has been built.

19 And I will assure you that there are many, many
20 times when advertising or that news stories run about
21 advertisers that had the advertising department been able
22 to, they would have not wanted that story to run and I'm
23 sure there is advertising that runs occasionally in
24 newspapers that the newsroom wish didn't run, especially
25 if it is about an advertiser that they're writing about.

1 But the mission is two-fold. Certainly,
2 there's a business mission of the newspaper and they have
3 to sell advertising and sell circulation and deliver an
4 audience to their advertisers. That's the model upon
5 which the business model is built and the funding upon
6 which the newsroom operates.

7 But the two missions are very separate and
8 distinct and they are taken extremely serious in the
9 business. The advertising model, I will tell you, does
10 not drive the editorial mission, nor is it the sole
11 mission of the newspaper.

12 MS. LEVINE: I'd actually like to add two
13 points to that. I've worked many places and I'm very
14 fortunate to be at Good Housekeeping, which works by its
15 own standards. But I have never been in a position where
16 the advertising department, when asked about a particular
17 ad that was egregious, stuck with that ad. I haven't
18 seen that representation of the combination of greed and
19 fear, although I imagine in publications that are
20 threatened and may not see a future, that might be. I
21 have not seen that.

22 But I do think there's another point here,
23 Lesley, another community that needs to be reached, and
24 that is the advertising community, because when we talk
25 about these easy ones to understand, when you get into

1 the more difficult claims, when a word here and there can
2 move a consumer in a direction that is clearly
3 misleading, that's more difficult, and the agencies
4 themselves often feel a need to be original to move the
5 product a little further along, to have a line, a jingle
6 that's different than everybody else's, and the message
7 that you're putting out there needs to reach those
8 agencies as well.

9 MS. FAIR: We've talked about the costs of
10 screening. Don, what about some of the benefits? What
11 led your company to decide to start the program that it
12 did?

13 MR. McLEMORE: Well, the demographics of our
14 reading audience, for the most part, they're fluent,
15 educated, they believe in health products. Just for our
16 consumer magazine alone, we have a million loyal monthly
17 readers, and we feel that if they don't trust in our
18 editorial they're not -- if they're not going to trust in
19 our advertising, they're not going to trust in our
20 editorial.

21 Sixty-three percent of those readers buy some
22 product from our magazine, either by reading an article
23 or reading the advertisements. So, we feel that it's our
24 responsibility to give them truthful and not misleading
25 advertisements.

1 MS. FAIR: I think, Joe, you had mentioned
2 briefly the CAB guides. Could you talk about a little
3 bit more -- I think you had said 17 percent, am I
4 correct?

5 MR. OSTROW: Seventeen percent of our members
6 use our guides, 83 percent use their own. There are
7 people who, I think, would probably have a little bit of
8 trouble with what Professor Rotfeld said. They are
9 called the people in the standards and practices
10 departments at the networks or the legal affairs people
11 who are constantly looking at commercials. The problem
12 is, it's not a static medium.

13 We have 13 million television advertisements
14 run on the cable networks each year. If you want to
15 think about the concept of running through each one of
16 them, and we do in the main, but without a level of
17 expertise that is required to cover I don't know how many
18 different industries. We cannot get a doctor for every
19 specialty. We cannot get a dietician for every product.
20 But, in fact, in our guidelines, there are four or five
21 pages on the subject of diet products that are available
22 for our members to look at and they do follow it to some
23 degree, and the degree varies in terms of the editorial
24 environment that the programming represents on each and
25 every network.

1 If you want to talk about 10-year-old research,
2 I think you have a problem with 10-year-old research as
3 it relates to, if nothing else, the cable industry was
4 hardly in existence 10 years ago.

5 The reality is that we cannot get information
6 because credible researchers like the Nielsen Company and
7 like CMR will not research local cable because local
8 cable, for example, runs 2.7 billion units of advertising
9 every year.

10 Now, if you want to talk about cost
11 effectiveness, I think you run the risk of really making
12 that into a total sham.

13 MS. FAIR: But, obviously, only a very small
14 percentage of that is weight loss advertising, would that
15 be a fair statement?

16 MR. OSTROW: Indeed it is. But if we were to
17 screen for just one category, the question is when we
18 would be screening for the next category and the next
19 category and the one after that, there is a never-ending
20 situation here and I think there are other solutions to
21 the problem.

22 MS. FAIR: We will certainly get to solutions,
23 but in the interest of time -- you know, we've tried to
24 deal with practical issues here, but I think certainly
25 there are issues involving the First Amendment, the

1 Constitution, that we would be remiss in not at least
2 addressing briefly. Professor Schauer, I've been wanting
3 to say this for 25 years now, Professor, I have some
4 questions for you. That felt good.

5 What about -- you know, certainly this may be a
6 relatively obvious point, but could you tell us what the
7 courts have talked about about the Constitutional
8 protection of false ads?

9 PROF. SCHAUER: Until 1976, commercial
10 advertising was not even covered by the First Amendment
11 at all. All of that changed in 1976 with the Virginia
12 Pharmacy case that protects commercial advertising. But
13 the Supreme Court has been quite careful to say three
14 things.

15 First of all, it does not protect the
16 advertising of an illegal product. Second, and
17 different, the commercial speech idea is interpreted such
18 that the First Amendment does not protect false and
19 misleading advertising. The Supreme Court first said it
20 in Virginia Pharmacy, then they said it a few years later
21 in the Central Hudson case that gives us the test that we
22 now have. And third, the Central Hudson case and all of
23 the others have made clear that although commercial
24 advertising, if of a legal product and if neither false
25 nor misleading, is substantially protected, but not as

1 fully protected as news, opinion, art and the other
2 things that get as much as the First Amendment has to
3 give.

4 MS. FAIR: So, let's take a situation that I
5 think is safe to say has happened at the FTC. We're
6 dealing with, in this hypo, let's say, a company offshore
7 that is selling a weight loss soap, let's say. They are
8 advertising it on American media outlets, but, you know,
9 the money is going offshore to the people offshore
10 selling it. Let's say in this hypo that the company had,
11 you know, a one-year contract for a media outlet, you
12 know, disseminate this every day for the next year, would
13 there be anything that the FTC could do to stop the
14 dissemination of that ad?

15 PROF. SCHAUER: I think that Michael Pashby got
16 it right in describing the reaction of his members and
17 others to the blast off 48 pounds in 29 days -- or is it
18 29 pounds in 48 days -- in saying that the key is to have
19 knowledge. And, in fact, that fits with the existing
20 state of the law.

21 If we go back to 1959, the Supreme Court said
22 that bookstores could be liable for selling obscene
23 books, but only if it could be proved that they had
24 knowledge of the nature and character of the specific
25 materials, and the Supreme Court has reiterated that a

1 number of times as well.

2 In the defamation area, as a matter of common
3 law, libel, a publisher can be liable for defamatory
4 material in the publication, but after 1964, in New York
5 Times vs. Sullivan, only if with respect to that
6 particular item, the publisher has actual knowledge of
7 falsity.

8 So, if we apply both of those to your question,
9 filter it through the example you give with commercial
10 speech being substantially protected, but not quite as
11 protected as non-obscene, sexually explicit material, or
12 non-intentionally false defamatory material, the
13 conclusion that comes out of this is that there are
14 certainly circumstances in which there could be media
15 liability, but it would be necessary to show that the
16 newspaper, magazine or whatever had moderately specific
17 knowledge as to where this ad or the narrow category
18 within this ad falls, being false, misleading,
19 scientifically unsubstantiated or something like that.

20 There are out there a couple of cases, two of
21 them involve Soldier of Fortune, and there are a few
22 others, in which publications have been held liable under
23 a should-have-known negligence standard rather than an
24 actually new standard or a common law recklessness
25 standard. Neither of the Soldier of Fortune cases have

1 reached the Supreme Court. They suggest that it would be
2 plausible under current lower court case law to apply
3 simply a negligence standard.

4 It seems to me in light of Smith, in light of
5 the defamation cases and so on, that would be a risky
6 strategy, something that requires either actual knowledge
7 or something that comes close to the recklessness that in
8 the common law we call gross negligence would be
9 substantially safer. But like with the bookstore, like
10 with the newspaper and defamation and so on, if it can be
11 shown that the publication either actively participated
12 in the creation of the ad, and we certainly have some
13 examples of that, although not -- it's hardly the
14 majority, or if the publication actually had actual and
15 provable knowledge of its falsity or misleadingness, then
16 neither the offshore advertiser nor the publication would
17 be protected as a matter of existing law.

18 MS. FAIR: What about the FTC saying, you are
19 hereby told not to run any false or deceptive weight loss
20 ads?

21 PROF. SCHAUER: It is --

22 MS. FAIR: I mean, what level of knowledge are
23 we talking about here?

24 PROF. SCHAUER: It is certainly -- like
25 Michael's description of the knowledge of the judgment,

1 it certainly would go a long way towards putting
2 publishers on notice, creating the knowledge. It would
3 also, from the other direction it would seem to me, give
4 publishers a safe harbor. We're not only talking here
5 about possible FTC actions, we're talking about who knows
6 how many potential private actions that somebody who felt
7 misled might want to bring.

8 It would seem to me that formal notification
9 would make some sort of FTC action easier. It would be a
10 useful predicate. But the absence of that formal
11 notification, under a scheme in which formal notification
12 existed, would likely give a publisher much more of a
13 safe harbor in a private suit than would exist without
14 any kind of a notification scheme.

15 MS. FAIR: How specific would the notification
16 have to be, do you think?

17 PROF. SCHAUER: I've learned something in the
18 course of the day. I knew about the existence of these
19 things. I had never heard the expression 'pop-up
20 company.' Obviously, the existence of pop-up companies
21 creates a little bit of the problem in the sense of one
22 can imagine minor re-incorporations, minor changes in
23 wording or things of that sort that at least it could be
24 argued that makes it different.

25 Maybe again we ought to go back to -- although

1 we're dealing with a very different area -- some of the
2 other ones I mentioned, obscenity, defamation and so on,
3 in which the real issue is, as the Supreme Court has put
4 it, the nature and character of the materials. I think
5 it has to be narrower than weight loss. That would be
6 far too broad. But weight loss ads of a particular kind
7 described preferably numerically; that is, one can
8 imagine the category of notification in which publishers
9 would be put on notice if the claim is that the weight
10 loss will be more than X pounds per day or more than X
11 pounds per week. It would be specific enough to guard
12 against the real dangers of chilling in the like while at
13 the same time probably withdrawing one of the most
14 effective tools of the deceptive advertiser.

15 I think that kind of specificity, even if it's
16 not numbers, but that kind of specificity, certain kinds
17 of claims, maybe even with examples, maybe at times
18 certain kinds of companies, certain kinds of pictures,
19 but narrower rather than broader. Weight loss is not
20 going to do it. As the common law would have described
21 it, mere buffering is, of course, okay. Something much
22 more specific, much more identifiable.

23 MS. FAIR: What about the issue of chill? A
24 number of commenters have raised a concern that since
25 there is certainly value to truthful commercial speech,

1 how would you deal with that?

2 PROF. SCHAUER: In the somewhat -- somewhat
3 understates it -- quite controversially, in its first big
4 commercial speech case, Virginia Pharmacy, the Supreme
5 Court said that concerns about chilling, buffer zones,
6 margins of errors and the like, which are a staple of
7 First Amendment doctrine and a staple of First Amendment
8 rhetoric, are less applicable to commercial advertising
9 because of the effect of profit motivations and things of
10 that sort. That may be right, that may be wrong, it is
11 the law.

12 Nevertheless, it does seem to me that there is
13 a concern about too much chilling, not only blending over
14 into the kind of fear that would deter publishers from
15 taking any constitutionally protected ads, but
16 occasionally would even spill over, and this would be
17 worse, to chill possible ads that had some political or
18 ideological content as well as we see more and more ads
19 that are a combination of product selling and -- so, it
20 seems to me that although the concern is going to be less
21 in this area than it would in some number of others, it's
22 genuinely real.

23 We all have an example, and I think it's
24 appropriate, of the kinds of things we might be worried
25 about. I mean, if I send to the New York Review of Books

1 my classified personal ad, I am an attractive 38-year-old
2 single male of independent means seeking companionship,
3 not one item in that list is true about me.

4 I think we would all be troubled by the
5 possibility of any liability for the New York Review of
6 Books, and indeed, we'd all be troubled even by a
7 notification scheme that said something like, watch out
8 for personal ads or watch out for people claiming to be
9 attractive or wealthy or anything of that sort.

10 So, the chilling idea is real, even if less for
11 commercial speech, but that's why I come back to things
12 like numbers, examples. Chilling is about uncertainty.
13 The more certainty there is, the more chilling effect --
14 the more the chilling effect argument becomes mere
15 rhetoric and not an actual phenomenon. The more the
16 notification can use numbers, examples, people, places,
17 models and everything else to reduce the degree of
18 uncertainty, the less chilling there's going to be.

19 MS. FAIR: Let's move to some practical
20 solutions, building on what was talked about this morning
21 especially. One suggestion was the publication of a list
22 of scientifically infeasible claims. Is this something
23 that would assist media in their screening efforts? What
24 are the pros, what are the cons of that kind of approach?

25 MR. PASHBY: The first thing I know about any

1 list is the moment that list is published, the people who
2 are producing ads will change their ads so that they
3 skirt around those lists of claims, and I think that's a
4 very important thing to remember because the list is not
5 a static list. It probably would change almost daily.

6 I think rather than make a judgment based on a
7 list, the publishers that we have discussed this with
8 would categorically deny space to -- irrespective of the
9 legal judgment here, they would categorically deny space
10 to all weight loss products.

11 MS. FAIR: Other comments about -- since that
12 was such a big issue this morning?

13 MR. KIMBALL: I think that to the degree that
14 realizing the context in which advertising is accepted
15 and the chaos, as I mentioned earlier, that surrounds
16 that, if there were some buzz words, some things to be
17 aware of, that would be helpful. I think that that might
18 be helpful for a newspaper in making some of those
19 initial decisions. Realizing that ultimately the
20 publisher has the decision and the authority to publish
21 or not publish what they choose to, that might be
22 helpful, it might work, and certainly from our
23 perspective, communicating that to our members would be
24 something that would be one of the functions that we do.

25 MS. LEVINE: I think the FTC too good to be

1 true list is not a bad idea, and once again, I still
2 believe in self-regulation. But I do think the more
3 information that's out there, the smarter the consumer
4 is, the smarter the ad department is, and as I had -- I
5 agree with Michael that there will be an incredible surge
6 in advertising hyperbole to skirt around this and I do
7 think that this information should go to the ad agencies
8 and the small agencies. But beyond that, to editorial.
9 And as the Dean said earlier, information does help, but
10 people -- the other new battle, the lawsuits against some
11 of the corporations that have so much fat in their foods
12 will also bring to people's attention some of the issues
13 about the obesity problems.

14 MS. FAIR: Other comments about the list issue?

15 MR. PASHBY: I have one more here. I think
16 there was a concern mentioned by our members about
17 possible liability as well. Because if they make a
18 mistake, this is a country where McDonald's is being sued
19 at the moment for making people fat and if people -- if
20 the magazines take ads which they shouldn't, people will
21 sue them. There will be class actions. We're facing
22 enough lawsuits as it is without having other ones based
23 on this. And it does open -- I mean, I'm not a lawyer,
24 obviously, but it does open the door, I am told, for the
25 necessity to screen all advertising.

1 MS. FAIR: Why would that open the door for --

2 MR. PASHBY: I am told by the lawyers for the
3 companies that we represent that they feel that there is
4 a possibility that we'd then have to review all
5 advertising.

6 MS. FAIR: Yes, Professor?

7 PROF. SCHAUER: Although, certainly, if the
8 fear is in reviewing something they'd have to review
9 everything, then presumably the advertising pages would
10 have to become something other than what they are now and
11 there couldn't be screening for illegality, there
12 couldn't be screening for blatant fraud, there couldn't
13 be screening for taste and the like. It does seem to be,
14 as I suggested earlier, that there is this safe harbor
15 possibility.

16 Indeed, in the kind of lawsuit your members are
17 most afraid of, the possibility that -- or the
18 probability that this particular kind of claim did not
19 appear on the FTC list is something that if I were
20 representing one of your members in one of those lawsuits
21 I would very much like to have and, indeed, the
22 possibility of information and, indeed, the First
23 Amendment has two sides. It's not only worrying
24 appropriately about government as regulator, but thinking
25 about the government as a provider of information as in

1 this case, serving First Amendment ideas by providing
2 accurate factual information.

3 But I do think that in terms of the much larger
4 fear of class actions, much larger fear of civil
5 liability, something that comes from the agency is
6 concrete, is specific, is not so vague as to produce
7 chilling and is as important for what's not on the list
8 as for what's on ought to be welcome by publishers.

9 MS. FAIR: What about -- another thing that's
10 been raised is some sort of recognizing the time issues,
11 the deadline issues that I think everyone has talked
12 about, the idea of some sort of third party hotline where
13 someone can call or a media screener or screening
14 personnel might be able to immediately contact. What
15 about a possible solution, pros or cons, for something
16 along those lines?

17 PROF. ROTFELD: Lesley, a lot of the claims
18 here -- I mean, we talked about deadlines and brought the
19 things up and I guess when personal frustration is when
20 you keep finding the same thing over and over again.
21 Social science journals don't like replications. So,
22 every time I keep finding the same things, I can't
23 publish them since I'm repeating the old materials.

24 We are talking here of, yes, there are a lot of
25 things that come in on deadline pressures and a lot of

1 things that are involved here. But a lot of the ads that
2 have been brought up today have been ads that run time
3 and time and time again, and they're repeat ads and
4 they're repeat visits.

5 Somebody this morning made a comment about
6 deceptive ads that appear in a newspaper while the
7 editorial side of a newspaper had pointed out how that
8 was deceptive, and I don't think anyone here would like
9 to see the advertising division held liable for news
10 stories in the paper because then the result would be --
11 the obvious result would be that the ad managers would
12 come into the newsroom and say, well, you can't run that
13 and we don't want the advertising divisions of various
14 vehicles to have this sort of effect on the other side.
15 In fact, I've talked to reporters that have just voiced
16 this sort of concern when they run a five-day expose on a
17 certain advertiser and on the fifth day those ads appear
18 in their paper. They don't want that type of thing.

19 But on the other hand, when you talk of
20 liability or just actions, having been around and been in
21 contact with a number of people or lawyers that have been
22 suing vehicles at different times, the vehicles that have
23 faced these legal actions, in my experience, which
24 granted is limited, has never been the Good Housekeeping,
25 the Modern Maturity, the major broadcast networks. They

1 have been the radio stations that are running ads night
2 after night after night encouraging a party at a bar that
3 is serving known drunks that are falling down on the
4 floor in front of the DJs from the station. They are
5 television stations that are letting guests pay to be on
6 the news programs and not telling anybody that they're
7 doing this. It's the stations that are not doing any
8 sort of screening whatsoever.

9 The idea here, I guess, that you're going after
10 as you're looking for, what a vehicle does to screen is
11 purely a mix of incentives, and whenever I say what a lot
12 of vehicles, managers or different people seem to me
13 they're doing, I always have someone else in the room
14 saying I'm not like that, which is to be expected.

15 There are a number of vehicle managers and
16 there's a number of publishers and there's a number of
17 organizations that are extremely good and inter-directed
18 and they do it because this is what they want to do.
19 They feel this is right, we are going to take these
20 steps, we are going to set up an organization to screen.
21 And as I've said before, some of them are very small
22 organizations, some of them people who surprise you on
23 their economic resources on how they dedicate themselves
24 to this. But other organizations of a variety of
25 sizes -- and I said, I've been surprised at the size of

1 some very large organizations that I ask them, why do you
2 do that, and the ad manager will say, that's a good
3 question, we had it discussed at a meeting the other day.

4 DEAN NORTON: I --

5 PROF. ROTFELD: I'm just saying it's -- the
6 incentives -- the questions Lesley's coming up with on a
7 list is trying to say what sort of incentive would come
8 to these vehicle managers to make them say, at least take
9 another look here, maybe stop this.

10 DEAN NORTON: I'm optimistic. I come from
11 Nebraska where one of the first questions they ask you
12 when you reach the campus is what does the N on the
13 helmet stand for. The answer obviously is knowledge.
14 So, I think a simple truth here is that the American mass
15 media is better than anyplace in the world. We
16 disseminate information. We have got to be optimistic
17 and believe in our system and the way it works, and I
18 think that if the FTC gets this information out about --
19 I mean, I asked you when we talked on the telephone, how
20 big a problem this is, how many dollars are involved. It
21 was astonishing to me to hear what the amount was. I
22 don't think most Americans know.

23 And when news gets out about how significant
24 the problem is, I think we'll have solutions to it.

25 MS. FAIR: Well, speaking of solutions, since

1 it's about that time, again, in the final spirit of John
2 McLaughlin, rather than predictions, let me go down the
3 line and ask our panelists, let's assume that the goal of
4 what we're here to do today is so that if the FTC were to
5 run a repeat of its weight loss report a year from now or
6 two years from now, what do the FTC and media, jointly
7 and severally, need to do so that we could assure that a
8 year or two from now, the number of these ads running in
9 mainstream media are reduced?

10 Let me start with Mr. Kimball from the
11 Newspaper Association.

12 MR. KIMBALL: I think a couple of things. As
13 Dean Norton said, the ability to educate the public
14 through the dissemination of editorial material on the
15 whole concept and the whole issue of not only weight loss
16 advertising and weight loss fraud, but the whole issue of
17 obesity and weight control and weight management and
18 running in the health pages of American newspapers or on
19 the front page, you know, depending upon what the issue
20 is, is a continuing role that the FTC and other health
21 organizations can help. And the newspaper industry, I
22 think, would be one of the great supporters of that
23 information.

24 I would also say that to the specific issue of
25 advertising, to the degree that the two concepts work

1 together, a more educated public is more aware of the
2 advertising and the claims that are made, and I would
3 say, again, that if there was some easily understood buzz
4 words, things to watch out for that were simple, that
5 were on a one-page piece that could be in the hands of
6 people who are making these decisions at all levels of
7 the newspaper, I think that a more informed public and a
8 more informed media, working together, can make a
9 difference. And I think that those would be the two
10 areas that I think we ought to focus on.

11 MS. FAIR: Ms. Levine.

12 MS. LEVINE: Ditto, plus. We're at a unique
13 period of time in the country where I think Americans are
14 just sick of being misled and they're sick of scandals
15 and they're sick of corporate malfeasance. So, it seems
16 to me that you need a two-prong approach. Your buzz
17 words, but companies don't place ads when customers don't
18 buy. So, if you really want to put an end to this,
19 you've got to make it two-pronged, the buyer and the
20 seller, and they're not going to put those 1-800 numbers
21 in when nobody's dialing. So, a dual approach would be
22 my wish, and I'm still sitting here and I'm thinking I'm
23 from New York and I don't know what the N stands for.
24 But maybe never again.

25 MS. FAIR: Mr. McLemore?

1 MR. McLEMORE: I'd like to add a third prong to
2 that. I think that, first of all, the FTC should -- I
3 would encourage them to increase their enforcement
4 because I like to play the good cop and let the FTC be
5 the bad cop when I go after my clients to change their
6 ads.

7 But I think the third prong is, once the FTC
8 has cited or warned an advertiser for false and
9 misleading advertisement, I think they should also
10 publish or make known where that ad was published and
11 make the publisher responsible as well.

12 MS. FAIR: Dean Norton?

13 DEAN NORTON: I sort of gave my answer, but be
14 sure that the Attorney Generals in all the states know
15 about your studies. Make sure that the state press
16 associations, in addition to the state advertising
17 associations and also the national organizations that
18 represent the media, and I just think you'll get good
19 response.

20 MS. FAIR: Mr. Ostrow?

21 MR. OSTROW: I think we have to be careful that
22 we don't treat the symptom and not the disease, and I
23 think where that should start is with something like
24 using the advertising to influence the consumer. There's
25 an ad council organization that runs public service

1 advertising throughout the country and why one isn't
2 running, a campaign isn't running on this subject is
3 beyond me. I think one of the things that should be
4 encouraged is to get out there and get this message
5 through PSAs out to the consumer telling the consumer
6 that this is bad advertising.

7 Secondly, I think, and this is a personal
8 opinion, I haven't surveyed my members, I think there's a
9 role for NARC in this, a very important safety valve for
10 us to be able to utilize on those occasions where we
11 can't handle the volume of things that are going through.

12 And, third, I think if the FTC were to furnish
13 us with alerts, however they're constructed, whether they
14 are numbers, whether they are key phrases, whether they
15 are evidences of campaigns that have been rejected, we
16 would be able to act on something specific rather than
17 something vacuous.

18 MS. FAIR: Mr. Pashby?

19 MR. PASHBY: I agree with virtually everything
20 that's been said, except, of course, for naming the
21 publishers. I think, also, we have to recognize that
22 this -- you know, changes are not going to occur
23 overnight. It's going to take a period of time to do
24 this, part of which is the education of the consumer,
25 which is the historic role of the media.

1 I mean, just before we came here, we quickly
2 looked up how many articles have actually run on weight
3 loss over the last year, and there are -- in the
4 magazines that were in the database, there were over
5 1,300 articles about weight loss, which was double the
6 number that were running about 10 years ago.

7 So, there is a great deal of interest and the
8 media can inform the public. That's the historic role of
9 the media. And we are very supportive of the role of
10 NAD. I think they can play a huge role within this and
11 it's the appropriate role to review things after
12 publication. And that will, inevitably, reduce deception
13 within advertising.

14 MS. FAIR: Mr. Rotfeld?

15 PROF. ROTFELD: Well, I'm a pessimist on the
16 possibility of education to do anything, especially when
17 you start talking of PSAs. There's an article in the
18 newest issue of Journal of Consumer Affairs that points
19 out how PSAs, on even very important topics, tend to be
20 run and shown for people that are doing bed spins. So,
21 we have insomniacs being persuaded, I guess.

22 But part of the problem, as we talked of a list
23 to be given to various ad managers, as I listened to
24 things during the first sessions from this morning, I
25 remember a President once said with his frustration with

1 economists that were trying to tell him on one hand, on
2 the other hand. I think the FTC should wish for some one-
3 handed doctors so they can have one set of clear, nice
4 claims.

5 But if they were able to give a set of clear
6 statements that are false and say, these are false
7 statements and give them directly to the people that are
8 making these decisions, we acknowledge this is a false
9 statement, many ad managers, decision makers would use
10 this as the basis to reject ads if they have it as a
11 clear statement of what's there, though I'll admit that
12 there are a good number out there that might also act
13 only if they're shown that their readers would object to
14 seeing them or get upset with seeing them.

15 If you want to talk about incentives, you can
16 add the thing, send a similar notice to the plaintiff's
17 bar and say, we have found these things to be deceptive
18 or say to them, we will hold you liable as the Commission
19 if you run these things that we know are clearly false.
20 The problem here is if you define the list too wide, all
21 the trade associations are going to come in and try and
22 fight any sort of proposal along those lines. If the
23 list is very narrowly drawn and very clear and easily
24 defined and very direct, few vehicles would fight it.
25 They would just see it's a lot easier to just not accept

1 those ads.

2 MS. FAIR: Professor Schauer?

3 PROF. SCHAUER: As I said, notification,
4 specific notice is likely a constitutionally necessary
5 predicate for any FTC enforcement action. My suspicion
6 is that if it is specific enough, it would never have to
7 come to that. If specific enough, clear enough, the buzz
8 word approach, that involves being willing to be slightly
9 oversimplifying. That is, it's nice to say that every ad
10 is different, it is nice to say that context matters,
11 that doesn't work when I tell the police officer that I'm
12 a particularly good driver so 65 shouldn't apply to me.
13 We have to make these decisions in clear, crisp general
14 categories so that there is no doubt and, therefore, no
15 chill.

16 MS. FAIR: I'd like to thank the panelists very
17 much. I do want to remind everyone that the record is
18 remaining open at weightloss@ftc.gov for the panelists to
19 comment, for members of the gallery, for members of the
20 public, and Mary Engle, I think, was going to introduce
21 our final portion of today.

22 MS. ENGLE: We're almost on time. We've been
23 doing pretty well. Now, I'd just like to introduce, for
24 our closing remarks, the Director of the Bureau of
25 Consumer Protection, Howard Beales.