1983

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False Advertising: A Discussion of a Competitor’s Rights and Remedies

Gary Schuman *

INTRODUCTION

Advertising theoretically provides the public with information about products and services in a convenient and understandable manner so that consumers can differentiate between available brands. Advertising is influential because people make purchasing decisions on the basis of information they receive through advertisements.

Advertisers seek to present their goods and services to consumers in a favorable light because the primary purpose of most commercial advertising is to induce the consuming public to buy a particular product or service. To the extent that advertising provides reliable information about products or services, it is a

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Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

3. See Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 314 (2d Cir. 1982).
valuable and necessary component of the competitive market. Although advertisers generally attempt to influence the buying public by emphasizing the merits of their own goods, recently, advertisers have begun to compare their products with those of the competition.

Comparative advertising when presented in a straightforward and unbiased manner can be a useful tool for consumers. Comparative advertising can provide a meaningful frame of reference for evaluating sellers' claims by contrasting the attributes of competing products or services. In addition, comparative advertising can provide information concerning relative product prices, and it also allows a company to rebut the false or inaccurate claims of competitors. Finally, comparative advertising permits new market entrants to gain a foothold among established brands by inviting the consumer to try something new.

Many product brands, however, are virtually indistinguishable from one another. Consequently, advertisers must find ways to differentiate their products so that the public will perceive them as being "better" than other similar products. To create a

5. "[W]here consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977) (footnote omitted).
6. See generally Sterk, supra note 4.
8. See Nye, In Defense of Truthful Comparative Advertising, 67 TRADE-MARK REP. 353 (1977). Some commentators believe that comparative advertising will create more confusion in the market and be of little if any benefit to the consumer. For example, comparative advertising may cause consumers to confuse the established brand with the newer and less known product. If the new product is not satisfactory, the public may also stop buying the established product, believing the two are related. See Robin & Barnaby, Comparative Advertising: A Skeptical View, 67 TRADE-MARK REP. 358, 366 (1977).
9. "Apart from the tradesman's right of free speech, which must be vigorously safeguarded, the public has a genuine interest in learning the relative merits of particular products, however that may come about." Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 288-89 (E.D. Pa. 1966).
11. Pridgen & Preston, supra note 10, at 647.
distinctive brand image, advertisers often present nonfactual information to the public rather than information about the use or merits of a particular product. Differences which cannot be objectively demonstrated, may nonetheless be real to the consumer who is often willing to pay more for the "premium" product.

Consequently, puffs, social-psychological claims, and nonverbal images distinguish one brand from its competitors' brands when facts about tangible product qualities cannot distinguish them from one another. Problems occur because these influential advertising techniques often convey deceptive messages which injure the consumer. However, consumer lawsuits against advertisers are rare because injuries are often to small and too difficult to prove to justify individual resort to the courts.

False advertising also harms competitors. When a purchaser's attention is directed to a product that is falsely advertised, it lures potential customers away from honest competitors. To protect against future unfair competition and to obtain redress for the damage resulting from a competitor's false advertisements, an injured business seeks compensation for damage sustained and an assurance that no further damage will occur. To obtain adequate protection and compensation, an injured competitor must turn to the courts for relief.

Until recently, competitors rarely sought relief from the courts for injuries suffered because of another competitor's false adver-

12. For a general discussion detailing how competitors selling virtually identical products attempt to distinguish their name brand through subjective images which, in reality, are meaningless, see Note, supra note 2, at 1008, 1047.
13. "A court should ... recognize the economic fact that many buyers are motivated by personal prejudice or other preferences which have no rational basis in fact." 1A R. CALLMANN, supra note 2, § 5.14, at 88 (footnote omitted).
14. See Note, supra note 2, at 1008.
15. 1A R. CALLMANN, supra note 2, § 5.12, at 80.
16. One Note described the situation as follows:
Legal pitfalls and requirements of proof ... were sufficient to dissuade all but the most persistent or most seriously injured consumer. The purchaser willing to seek recovery of the nominal sum usually involved was likely to be told by the court that scienter had not been proved, that his reliance on the misrepresentation was unreasonable ... that the representations concerned matters of opinion and thus—as "puffing"—should have been treated with skepticism, or that in any case he had not sufficiently demonstrated that his purchase was induced by the advertisement.

Note, supra note 2, at 1017 (footnotes omitted) (emphasis in original).
17. Id.
tising. In part, this was due to the courts' restrictive interpretation of a competitor's common law rights to prevent such false claims through equitable relief or monetary redress. Now, with the assistance of recent federal and state statutes which ease the required burden of proof necessary to prevail on a claim of false advertising, competitors are increasingly seeking redress in the courts.

First, this article will discuss the common law claim of false advertising and the obstacles in proving injury which have deterred many competitors from bringing false advertising claims. This article will then analyze the Lanham Act which provides a statutory remedy for false advertising and obviates the necessity of proving injury. This article will also discuss the common law claim of disparagement and a plaintiff's difficulty in proving special damages which has prevented many competitors from recovering under a disparagement claim. Next, this article will analyze the Uniform Deceptive Trade Practices Act which allows statutory relief for disparagement without a showing of special damages. This article concludes that the federal and state statutes which ease the burden in proving a claim for either false advertising or disparagement properly allow competitors to recover for injuries suffered as a result of misrepresentations made by another.

COMMON LAW CLAIM FOR FALSE ADVERTISING

Traditionally, courts were reluctant to grant relief to advertisers for the false advertising of a competitor. The primary obstacle a plaintiff faced under the common law in attempting to establish a case for false representations was proving that he had suffered an actual injury because of a competitor's false advertising.

In American Washboard Co. v. Saginaw Manufacturing Co.,\(^\text{19}\) the plaintiff was the sole manufacturer of aluminum washboards. The plaintiff sued to enjoin the defendant from falsely

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18. Because competitors would not sue each other for false claims, the Federal Trade Commission took a more active role to protect consumers. See generally Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 664-65 (1977).
19. 103 F.2d 281 (6th Cir. 1900).
advertising that its zinc washboards were made of aluminum.\textsuperscript{20} The plaintiff alleged that it was injured because the defendant had diverted business from the plaintiff by misbranding its product.\textsuperscript{21} The Court of Appeals for the Sixth Circuit denied injunctive relief.\textsuperscript{22} The court noted that a manufacturer could recover for trademark infringement\textsuperscript{23} and passing-off\textsuperscript{24} by a competitor because those activities violated a manufacturer's property rights. In contrast, the court stated that the defendant's misrepresentation concerning the quality of its own goods was not actionable because no property rights of the plaintiff had been invaded.\textsuperscript{25}

In \textit{Ely-Norris Safe Co. v. Mosler Safe Co.},\textsuperscript{26} the Court of Appeals for the Second Circuit disagreed with the decision in \textit{American Washboard} that an action for unfair competition was limited to the infringement of another's trademark or the passing-off of goods as those of a competing producer.\textsuperscript{27} The court stated that trademark infringement and passing-off were actionable because of the deceit of a competitor.\textsuperscript{28} For the same reason, the court concluded that the plaintiff had a cause of action for the wrongful diversion of his trade achieved through a competitor's false advertising.\textsuperscript{29}

In \textit{Ely-Norris}, the plaintiff manufactured safes which con-

\begin{itemize}
\item \textsuperscript{20} Id. at 281-82.
\item \textsuperscript{21} Id. at 283. The plaintiff sought relief, not because the defendant was selling its goods as the goods of the plaintiff, but because the plaintiff was the only manufacturer of a genuine aluminum board and the defendant was deceiving the public by selling a board made of zinc material, although falsely branded as aluminum.
\item \textsuperscript{22} Id. at 287.
\item \textsuperscript{23} Protection against trademark infringement stems from the general principle that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts his symbol or manner of marking his goods. The plaintiff comes into a court of equity in such cases for the protection of his property rights. The private action is given, not for the benefit of the public, although that may be its incidental effect, but because of the invasion by the defendant of that which is the exclusive property of the plaintiff.
\item \textsuperscript{24} "Palming-off" or "passing-off" is an attempt by one person to induce customers to believe that his products are actually those of another. PIC Design Corp. v. Bearings Specialty Co., 436 F.2d 804, 806-07 (1st Cir. 1971); Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155, 159 (S.D.N.Y. 1959).
\item \textsuperscript{25} 103 F.2d at 285.
\item \textsuperscript{26} 7 F.2d 603 (2d Cir. 1925), rev'd, 273 U.S. 132 (1927).
\item \textsuperscript{27} Id. at 604.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\end{itemize}
tained a patented explosion chamber which made the safes burglar-proof. The plaintiff sought an injunction to prevent the defendant from continuing to falsely represent that its safes also contained an explosion chamber. The court construed the plaintiff's complaint as alleging that the plaintiff was the sole manufacturer of explosion chamber safes. The court ruled that the traditional restriction on a competitor's legal action, which required him to show injury through direct evidence of a loss of sales, should not apply when a plaintiff was in a monopoly position because injury in such a case may be inferred. In contrast to the monopolist's burden of proving injury, the court noted:

In an open market it is generally impossible to prove that a customer, whom the defendant has secured by falsely describing his goods, would have bought of the plaintiff, if the defendant had been truthful. Without that, the plaintiff, though aggrieved in company with other honest traders, cannot show any ascertainable loss. He may not recover at law, and the equitable remedy is concurrent. The law does not allow him to sue as a vicarious avenger of the defendant's customers.

The court stated that because the plaintiff in this case was the sole manufacturer of explosion chamber safes, it could be inferred that the plaintiff was injured through diversion of customers, and consequently sales, to the defendant because of the defendant's false advertising. The court concluded that but for the false advertising the defendant's customers would have bought explosion-proof safes from the single available source, which was the plaintiff. The Supreme Court reversed because the plaintiff had not adequately alleged that it was the single source of explosion-proof safes.

The exception to the common law rule that diversion of trade through false advertising must be proven through direct evidence, enunciated by the court in Ely-Norris, is often referred to

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30. Id. at 603.
31. Id. The court acknowledged that the defendant's name and address appeared prominently upon its safes and that no customer had ever been given reason to believe that the defendant's safes were manufactured by the plaintiff. Id.
32. Id. at 604.
33. Id.
34. Id.
35. Id.
36. Id.
as the "single source" rule. The single source exception was further defined in *Electronics Corp. of America v. Honeywell, Inc.* 38 In this case, the plaintiff manufactured safety control systems. 39 The defendant constructed its own programmer so that it could be installed in the plaintiff's systems, 40 thus permitting the defendant to compete with the plaintiff in the business of selling replacement parts for the plaintiff's control systems. 41 The owners of the plaintiff's systems could choose between purchasing replacement parts manufactured by either the plaintiff or the defendant. 42

The defendant advertised the quality of its product 43 and the ease of its product's installation in contrast to the plaintiff's product, despite evidence that the defendant's replacement programmer was more difficult to install in the plaintiff's machines than the plaintiff's product. 44 The defendant made other quasi-comparative claims to promote the quality of its product. 45 The plaintiff contended that the misrepresentations made by the defendant were actionable because customers who had previously purchased its product were now buying from the defendant because of the defendant's false and misleading statements. 46

The trial court held that despite the presence of some misleading statements the plaintiff had no cause of action without a showing of trademark infringement, passing-off, or express disparagement of the plaintiff's product. 47 The Court of Appeals for the First Circuit, however, reversed and remanded the case 48 holding that material misrepresentations made by a competitor in a two-firm market may be enjoined when injury to the plaintiff is ascertainable. 49

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38. 428 F.2d 191 (1st Cir. 1970).
39. *Id.* at 192.
40. *Id.* at 193.
41. *Id.*
42. *Id.* at 194.
43. *Id.* at 194-95.
44. *Id.*
45. *Id.* at 193.
46. *Id.* at 194. Because these misrepresentations related directly to the qualities of a product which was sold only by the plaintiff and the defendant, buyers who bought from the defendant on the basis of the false advertising were buyers who probably would have purchased the product from the plaintiff.
47. *Id.* at 195.
48. *Id.* at 196.
49. *Id.* at 194-96.
The court noted that the instant computer market was essentially a two-firm market comprised of the plaintiff and the defendant, and therefore buyers in the market could only buy the plaintiff's or the defendant's product. Consequently, there was an ascertainable loss of revenue to the plaintiff as a result of the defendant's false advertising. Recognizing the difficulty an aggrieved competitor has of showing injury through direct evidence of a loss of sales, the court concluded that this proof was not mandatory and that injunctive relief was appropriate.

By granting relief to a plaintiff who competes in a two-firm market, the court slightly expanded the single source exception. However, few plaintiffs will be able to avoid the general rule that injury by diversion of trade must be established through direct evidence of a loss of sales by relying on the Honeywell case because there are few markets in which there are only two competitors.

STATUTORY CLAIM FOR FALSE ADVERTISING

The Lanham Act

Section 43(a) of the Lanham Act makes various types of unfair competition occurring in interstate commerce a federal

50. Id. at 194.
51. Id.
52. Id. at 196.
53. Id. at 194.
54. Id. at 194, 196.
55. In Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302 (N.D. Ill. 1965), the court denied relief for a common law claim of false advertising based on the reasoning in Ely-Norris. The court concluded that unless a plaintiff has a monopoly position in the market, it is impossible to establish the diversion of sales by a defendant's false advertising. Id. at 309. The court stated: "The tenuous connection between what one says about his own product and the injury to a competitor probably accounts for the reluctance of some courts to recognize a cause of action for false advertising which does not include palming off." Id. at 312. See also Hall v. Duart Sales Co., 28 F. Supp. 838, 840-41 (N.D. Ill. 1939) (The defendant falsely advertised that its facial cream was the only cream containing milk when the plaintiff's and other competitors' products also contained milk. The court denied relief stating that the defendant's sales may have been obtained from the plaintiff's competitors and thus the plaintiff could not prove damage.).
56. Section 43(a) of the Lanham Act provides:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation
tort. Anyone who uses a false designation of origin or any other false description or representation of goods or services in commerce will be found to have violated section 43(a). Remedies include civil damages and/or injunctive relief. Section 43(a) is "an affirmative code of business ethics" designed to protect an honest competitor in his fair business dealing.

The common law rule requiring an invasion of the plaintiff's property rights either through trademark infringement or passing-off to allow recovery, is not a prerequisite for section 43(a) recovery. Rather, recent decisions have noted that Congress


57. 15 U.S.C. §§ 1125(a) (1982). The word "origin" in § 43(a) does not merely refer to geographical origin, but also to origin of source or manufacture. Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405, 408 (6th Cir. 1963).


60. However, the Lanham Act does provide a statutory remedy for trademark infringement and passing-off. "Palming-off" or "passing-off" is the selling of a good or service under the name or mark of another. Historically, the terms were used to describe a wrongful intent on the part of the defendant to pass or palm-off his goods as being those of the plaintiff, but most courts have come to use the terms to describe cases where likelihood of confusion between goods is present. Thus, the courts have shifted the emphasis from the wrongful action of the defendant to the effect on the customer. The shift has
created this section of the Lanham Act to, in part, provide new remedies for false advertising.\textsuperscript{62} Thus, courts have recognized that section 43(a) did not simply codify the common law.\textsuperscript{63}

...
Courts have broadly interpreted section 43(a)\(^6\) to mean that one competitor cannot conduct business in a manner that interferes unfairly with the business of another competitor, or which injures another competitor, by either destroying a basis of genuine competition between their products or preventing the consumer from judging fairly between them.\(^6\)

Liability under this section may arise when no federally registered trademark is involved,\(^6\) even though section 43(a) is contained in the Lanham Act, which primarily relates to federally registered trademarks. Section 43(a), however, does not have boundless application as a remedy for unfair trade practices.\(^7\) This section only provides a remedy for unfair competitive activities which are analogous to, or associated with, the misuse of trademarks or trade names and which produce similar kinds of injuries. In other words, section 43(a) is only concerned with the defendant’s false representations regarding his own goods or services. For example, courts have interpreted section 43(a) to encompass a claim of false advertising when the misrepresentation relates to the defendant’s own product or service\(^6\) while disparagement of a competitor’s product will not provide the

\(^6\) The Second Circuit Court of Appeals noted: “One of the principal purposes of the 1946 revisions to the Lanham Act was ‘[t]o modernize the trade-mark statutes so that they will conform to legitimate present-day business practices.’” Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 277 (2d Cir. 1981) (quoting S. REP. No. 1333, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. Code Cong. Serv., at 1276). For this reason, the court stated that § 43(a) must be broadly interpreted “lest rapid advances in advertising and market methods outpace technical revisions in statutory language and finally defeat the clear purpose of Congress in protecting the consumer.” Id.

\(^6\) Gold Seal Co. v. Weeks, 129 F. Supp. 928, 940 (D.D.C. 1955), aff’d sub nom., S.C. Johnson & Son, Inc. v. Gold Seal Co., 230 F.2d 832 (D.C. Cir. 1956) (Congressional intent was to allow a competitor’s private cause of action to prevent or terminate the type of unfair competition that consists of lying about goods or services in interstate commerce.). See also Skil Corp. v. Rockwell Int’l Corp., 375 F. Supp. 777, 784-85 (N.D. Ill. 1974).

\(^6\) While the intent of Congress in enacting the Lanham Act was to make deceptive and misleading use of trademarks actionable, the Lanham Act was also intended “to protect persons engaged in [interstate] commerce against unfair competition.” 15 U.S.C. § 1127 (1982).

\(^6\) See Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 160-62 (1st Cir. 1977). See also Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237-38 (2d Cir. 1974) (“Not every possible evil has yet been proscribed by federal law. The fact that there are some acts which may arguably be wrongful and which are not prohibited by existing statutes does not license courts to disregard the boundaries which Congress has written into its legislation.”).

basis for a cause of action under section 43(a). Similarly, the use of another's trademark to identify the trademark owner's product in comparative advertising is not prohibited absent misrepresentation regarding the products or confusion as to their source or sponsorship.

Unlike the common law claim of false advertising which effectively limited relief to a competitor who fell within the single source exception because of the burden of proving injury through direct evidence, section 43(a) states that an unfair competitor is liable to "any person who believes that he or she is likely to be damaged." Although section 43(a) obviates the necessity of

American Gym, Recreational & Athletic Equip. Corp., 397 F. Supp. 1063, 1071-74 (W.D. Pa. 1975), vacated on other grounds, 546 F.2d 530 (3d Cir. 1976), aff'd, 566 F.2d 1171 (3d Cir. 1977); Alberto-Culver Co. v. Gillette Co., 408 F. Supp. 1160, 1163 (N.D. Ill. 1976). The basis of recovery for false advertising claims arising under § 43(a) is the statute's prohibition against "any false description or representation, including words or other symbols tending falsely to describe or represent the same." 15 U.S.C. § 1125(a) (1982).


With due respect to the court [referring to Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969)], it does not seem logical to distinguish between a false statement about the plaintiff's product and a false statement about the defendant's product in a case where the particular statement is contained in comparison advertising by the defendant, such that in the first instance the plaintiff does not have a cause of action whereas in the latter he does. . . . Rather, it would seem that in comparison advertising, a false statement by the defendant about plaintiff's product would have the same detrimental effect as a false statement about defendant's product. I.e., it would tend to mislead the buying public concerning the relative merits and qualities of the products, thereby inducing the purchase of a possibly inferior product.

Id. at 782 n.10.


The Lanham Act does not prohibit a commercial rival's truthfully denominating his goods a copy of a design in the public domain, though he uses the name of the designer to do so. Indeed it is difficult to see any other means that might be employed to inform the consuming public of the true origin of the design.

Id. at 36 (citations omitted). However, such comparison must be accurate or the plaintiff will be entitled to relief. Chanel, Inc. v. Smith, 528 F.2d 284, 285 (9th Cir. 1976) (per curiam).

71. The language of the section states that "[a]ny person . . . shall be liable to a civil
proving diversion of trade and thus eliminates the requirement that the competitor seeking relief is the single source of a product, the competitor still must have some protectable interest that is likely to be damaged. Section 43(a) is also distinguishable from the common law because the statutory section was designed to protect consumers as well as commercial interests from the effects of false advertising. Nonetheless, the majority of courts have been unwilling to hold that the Lanham Act confers a right of action on consumers.

The court in *Skil Corp. v. Rockwell International Corp.*, established a five-part test to determine whether relief for false advertising should be granted under the Lanham Act. The test requires proof that: (1) the defendant made false statements of fact in advertising his products; (2) those advertisements actually deceived or have the tendency to deceive a substantial action by any person... who believes that he is or is likely to be damaged by the use of any such false description or representation." 15 U.S.C. § 1125(a) (1982) (emphasis added). *See also* New West Corp. v. NYM Co., 595 F.2d 1194, 1198 (9th Cir. 1979) ("The dispositive question is whether the party has a reasonable interest to be protected against false advertising."). One court has stated that to have standing to sue under § 43(a), the plaintiff's product must be in competition with the defendant's product. Springs Mills, Inc. v. Ultracashmere House, Ltd., 532 F. Supp. 1203, 1220-21 (S.D.N.Y. 1982).


The [Lanham] Act's purpose, ... is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.

...[T]he procedural advantages of bringing suit in federal court, would lead to a veritable flood of claims brought in already overtaxed federal district courts, while adequate private remedies for consumer protection, which to date have been left almost exclusively to the States, are readily at hand.

Id. at 692-93 (footnote omitted). *But see* Arnesen v. Raymond Lee Org., 333 F. Supp. 116, 120 (C.D. Cal. 1971) ("[T]here is, absent legislative intent to the contrary, no reason why a consumer should not be able to sue for his own protection.").

75. 375 F. Supp. 777 (N.D. Ill. 1974). In this case, the defendant's advertising campaign centered upon product testing done on a variety of electric drills and jigsaws...
segment of their audience; (3) the deception is material because it is likely to influence purchasing decisions; (4) the defendant caused its falsely advertised goods to enter interstate commerce; and (5) the plaintiff has been injured or is likely to be injured as the result of the defendant's conduct either by direct diversion of sales from the plaintiff to the defendant, or by lessening the goodwill which the plaintiff's products enjoy with the buying public.\footnote{76}

To prevail on a charge of unfair advertising under section 43(a), a plaintiff must first prove by a preponderance of the evidence that the challenged advertisements are false or deceptive.\footnote{77} Because wilfulness is not a factor in the determination of section 43(a) liability, proof by the defendant that the use of a false designation, description or representation was undertaken innocently will not constitute an affirmative defense to the charge.\footnote{78}

Liability under the statute is not restricted to descriptions which are literally false,\footnote{79} but includes situations where the defendant creates a false impression.\footnote{80} A statement which is actionable under the Lanham Act may be an affirmatively misleading statement, a partially incorrect statement, or a statement manufactured by the plaintiff, the defendant, and several other competitors. The plaintiff alleged that some of the factual statements made by the defendant "concerning the qualities and relative performance of its own products and those of [the plaintiff]" were "false, misleading, deceptive and incomplete." \textit{Id.} at 780. The trial court found these allegations adequate to state a claim under § 43(a) because "the Congressional intention [in enacting § 43(a)] was to allow a private suit by a competitor to stop the kind of unfair competition that consists of lying about goods or services, when it occurs in interstate commerce." \textit{Id.} at 784-85.

\footnote{76} \textit{Id.} at 783.


\footnote{80} American Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978).

In this case, the plaintiff advertised its product, Anacin, as superior to the defendant's products, Tylenol and Datril. Proof of consumer perception of Anacin's general superiority over its competitor's products without evidence of discernment of Anacin's superiority...
which is untrue as the result of the defendant's failure to disclose a material fact. The courts have also recognized that a statement which is literally true can be misleading because of the manner in which it is presented.

In situations involving literally false claims, it is immaterial how consumers perceive the message of the advertisements because courts presume that false claims "tend to mislead" consumers. This presumption relieves the plaintiff of his burden to aduce evidence to prove part (2) of the Skil Corp. test. If a statement is actually false, relief can be granted without reference to the reaction of the buyer or consumer of the product.

However, when the issue is whether a statement acknowledged by the plaintiff to be literally true and grammatically correct, nevertheless, has a tendency to mislead, confuse or deceive because of the way it is presented, the plaintiff has a greater burden of proof. He must show that the persons to whom the advertisement is addressed would find that the message received left a false impression about the product. To prove this element, courts have stated that the relevant interpretation of the statement is one that would be made by the "average individual" or by the "buying public" generally. Courts have also stated that the law protects the "ignorant, the unthinking and the cre-

over Tylenol specifically, was sufficient to establish that the plaintiff had misrepresented Anacin in its comparison with Tylenol. The court stated: "Clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed." Id. at 165.


82. The way the public perceives the product is the only true measure of deceptiveness. Hesmer Foods, Inc. v. Campbell Soup Co., 346 F.2d 356, 359 (7th Cir. 1965); Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 648 (3d Cir. 1958).


85. Id.

86. Id: The court in American Brands stated:

We are dealing not with statements which are literally or grammatically untrue. . . . Rather, we are asked to determine whether a statement acknowledged to be literally true and grammatically correct nevertheless has a tendency to mislead, confuse, or deceive. As to such a proposition "the public's reaction to [the] advertisement will be the starting point in any discussion of the likelihood of deception. . . . If an advertisement is designed to impress . . . customers,. . . . the reaction of [that] group[s] will be determinative."
dulous,”88 and that an advertisement should be interpreted from the point of view of the “least sophisticated reader.”89 The literal truth of the assertions is no defense in this situation if the representations are misleading.90

A court in making the determination of whether a statement is deceptive should consider actual consumer perceptions to evaluate whether the advertisement contains false representations.91 Thus, in determining whether statements are misleading or deceptive despite their truthfulness, the plaintiff must adduce evidence, usually in the form of market research or consumer surveys to show the manner in which the statements are perceived by those who are exposed to them.92 An advertisement’s tendency to mislead need not be established by any minimum percentage of confused consumers. Rather, a plaintiff need only show that a substantial number of consumers received a false or misleading

Id. at 1357 (quoting 1 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 19.2(a)(1) (3rd ed. 1967)).
87. Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 278 (2d Cir. 1981) (reasonably intelligent consumer); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (general populace). See also 1A R. CALLMANN, supra note 2, § 5.14, at 88 (“Words must be interpreted in the same manner as they would be understood by those to whom they are directed.”).
88. E.g., Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).
89. Id. However, because advertisers aim their advertisements at different consuming groups, advertisements must be judged in the context of the marketplace where they appear. American Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1360 (S.D.N.Y. 1976). If the advertisement is directed exclusively at the expert, then his expertise will be the proper frame of reference in assessing its deceptive nature. See Glenn v. Advertising Publications, Inc., 251 F. Supp. 889, 904-05 (S.D.N.Y. 1966).
91. Normally, the representation which is relevant in determining the legality of an advertisement is the general impression given by the advertisement as a whole, not the literal truth of the statements. Coca-Cola Co. v. Tropicana Prods., Inc., 538 F. Supp. 1091, 1096 (S.D.N.Y.) rev’d on other grounds, 690 F.2d 312 (2d Cir. 1982). An advertisement’s contents should not be dissected but must be viewed in light of the reactions of the audience to which it was directed. As stated in FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963):

It is therefore necessary . . . to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. . . . “[T]he buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.”

Id. at 674 (quoting Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942)).
impression from the defendant's statements in order to substantiate his charge that the advertisement is deceptive.93

Another factor considered by courts in determining liability under the Lanham Act is consumer reliance on the truth of the statement. This factor also indicates the competitive impact of the advertisement.94 Additionally, reliance is also related to the question of materiality.95 A purchaser is likely to rely upon material claims which would then affect his purchasing decisions.96 According to part (3) of the Skil Corp. test, for a plaintiff to recover under the Lanham Act he must prove that the defendant’s deception is material because it is likely to influence consumers’ purchasing decisions. If the advertisement is misleading with respect to facts to which the public does not attach any significance, it may be allowed.97

Finally, to have jurisdiction under the Lanham Act, a plaintiff must allege that the false statements concern goods or services involved in interstate commerce.98 Because of the broad inter-

Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352 (S.D.N.Y. 1976), the defendant’s advertising boasted the low tar quantity in its cigarettes. No mention was made of the plaintiff’s trademark. The court held that without a survey of consumer reaction, the plaintiff could not establish any confusion resulting from the advertising. Id. at 1358.

93. Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312 (2d. Cir. 1982). In this case, the parties were competitors in the sale of orange juice. The defendant, Tropicana, advertised its product on TV showing Bruce Jenner squeezing a fresh orange and pouring the juice in a Tropicana carton. This visual demonstration and its commentary, according to the plaintiff, falsely represented that Tropicana orange juice was freshly squeezed unprocessed juice, when it was not. A consumer survey indicated that 15% of the public may have been confused by the commercial’s message. The Second Circuit Court of Appeals ordered that Tropicana be enjoined from showing this commercial. The court stated: “The District Court found that at least a small number of those interviewed in the survey were deceived. This is not an insubstantial number of consumers and thus plaintiff has met its burden of proving irreparable harm.” Id. at 317.


95. See Id. Materiality concerns the fact that “the maker of the representation knows that its recipient is likely to regard the fact as important although a reasonable man would not so regard it.” RESTATEMENT (SECOND) OF TORTS § 538(2)(b), at 80 (1976).


97. For example, consumers are not expected to rely on an advertiser’s puffing that his products are the “best,” “greatest,” and the like. See also Toro Co. v. Textron, Inc., 499 F. Supp. 241, 251 (D. Del. 1980) (the deceptive statement must be material so that the public will rely on it in their purchasing decisions). But see McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517, 530 (S.D.N.Y. 1980) “([I]t must be assumed that more often than not advertisements successfully project the messages they are intended to project, especially when they are professionally designed...!).

98. Article I, § 8 of the Constitution provides in part that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States.”
pretation given to the definition of interstate commerce, this element of the cause of action is not difficult to prove.

A Defense to a False Advertising Claim

A frequent defense to a false advertising claim under the common law and the Lanham Act is that challenged advertisements merely puff or boast about the product's quality. The concept of puffery as a permissible form of advertising or sales technique has existed for many years. Puffing involves situations in which superlatives are used to describe products or services. Under the puffing doctrine, a businessman can advertise that his goods are the best in the market as long as he makes no specific assertions of fact unfavorable to his rivals. This rule is based on practicality because in competitive advers-
Advertising, puffing is, for the most part, either discounted or ignored.\textsuperscript{103} The public has become insensitive to a seller's claim that his product is "the best." The average buyer is skeptical and therefore attaches little importance to a seller's boasting.

However, the line between puffing and false advertising is often indistinguishable.\textsuperscript{104} To make this determination, it is necessary to consider the advertisement's effect on the average purchaser.\textsuperscript{105} If the evidence indicates that an advertisement has the tendency to deceive and that the material representations were relied upon by purchasers, then the advertisement is false and should not be considered to be mere puffing.\textsuperscript{106} There is an obvious difference, for example, between stating that one's product is the best and asserting that a competitor's product is only a certain percentage as effective as one's own product.\textsuperscript{107} The former instance merely expresses an opinion, the truth or falsity of which is difficult or impossible to ascertain. The latter instance, however, is an assertion of fact which implies that the party


The defendant's advertisements, amounting to no more than a claim in general terms of superiority of its product over the products of competitors, constitute mere "puffing" and are not actionable. "Mere general statements of comparison, declaring that the defendant's goods are the best on the market, or are better than the plaintiff's, are privileged so long as they contain no specific assertions of unfavorable facts reflecting upon the rival product. The feeling has been that the practice of sellers to make consciously exaggerated claims for their own goods is so well known that purchasers attach little or no importance to such assertions, and they usually can do no serious harm. They are sometimes said to be mere statements of opinion."


\textsuperscript{105} See McLean v. Fleming, 96 U.S. 245, 255 (1877) (The Court stated that the test to utilize in determining whether a claim is merely puffing is the effect on "the ordinary purchaser in the exercise of ordinary care and caution in such matters."); \textit{See} 1 A. R. CALLMANN, supra note 2, \S 5.14, at 88.


\textsuperscript{107} \textit{E.g.}, Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 289 (E.D. Pa. 1966) (The defendant falsely advertised that the U.S. Government tested its product and the plaintiff's, finding the former 60% better than the latter.).
making the statement possesses the facts necessary to substantiate its truth.\textsuperscript{108} Additionally, although a buyer may not be persuaded by the boast that one product is the best, he may be persuaded by the claim that one article is better than the other. Thus, it has been held that it is more than mere puffing when the seller compares his product with another and asserts that his goods are better than those of an identified competitor.\textsuperscript{109} A defendant's assertion that his advertisement was not false but merely boasted about the quality of his product has been a frequent defense to false advertising claims. However, courts are now taking a closer look at puffing and rejecting it as a defense when consumer deception is apparent.

\textit{Statutory Remedies for False Advertising}

Assuming that a cause of action does exist under section 43(a) of the Lanham Act, various remedies are available to the aggrieved competitor. The exact interaction between section 43(a) and the remedies sections of the Lanham Act was, until recently, unclear. Uncertainty was caused by the remedies sections' specific references to "registered mark" or some other similar term\textsuperscript{110} whereas section 43(a) also applies to causes of action not involving federally registered trademarks.\textsuperscript{111} The courts have, however, interpreted section 43(a) to include both the right to an injunction\textsuperscript{112} and monetary damages.\textsuperscript{113}

\textsuperscript{108} In Bose Corp. v. Linear Design Labs, Inc., 467 F.2d 304, 310 (2d Cir. 1972), the defendant advertised its loudspeaker system as the "most lifelike" and having the "most exacting reproduction of natural sound ever heard" with "overwhelming superiority." These claims were held to be puffing. However, the defendant's assertion that its frequency response had been measured at a specific level was considered to be factual. \textit{Id.} at 309-10.

\textsuperscript{109} In Davis Elecs. Co. v. Channel Master Corp., 116 F. Supp. 919 (S.D.N.Y. 1953), the plaintiff alleged that the defendant wrongfully advertised its product as superior to other brands, including the plaintiff's product. Allegations that the defendant's claims were false were sufficient to rebut the defendant's motion to dismiss on the ground that such claims were merely puffing. \textit{Id.} at 922.


\textsuperscript{111} See supra note 56.

\textsuperscript{112} Durbin Brass Works, Inc. v. Schuler, 532 F. Supp. 41, 43 (E.D. Mo. 1982).

\textsuperscript{113} Section 35 of the Lanham Act provides for monetary relief. 15 U.S.C. § 1117 (1982). The Eighth Circuit Court of Appeals in Metric & Multistandard Components Corp. v. Metric's, Inc., 635 F.2d (8th Cir. 1980), held that § 35 applied to causes of action.
Although section 43(a) does not specifically refer to injunctive relief,\(^\text{114}\) it is within the general equity power of a court to grant appropriate injunctive relief.\(^\text{115}\) Most courts, however, merely base injunctive relief on section 43(a) without further explanation of remedial authority.\(^\text{116}\) To obtain equitable relief under section 43(a), a preponderance of the evidence must show that the falsities complained of have a tendency to deceive.\(^\text{117}\) Upon a successful showing of such consumer reaction, the plaintiff has demonstrated the likelihood of deception and consequently the likelihood of economic harm to his business.\(^\text{118}\) Unlike the common law, there is no requirement that the plaintiff prove actual loss.\(^\text{119}\) Injunctive relief may be granted even where the pecuniary injury to the plaintiff may be slight and the possibility of recovery of damages in the future is speculative.\(^\text{120}\)

\(^\text{114}\) See supra note 56.

\(^\text{115}\) U-Haul Int'l, Inc. v. Jartran, Inc., 522 F. Supp. 1238, 1254-55 (D. Ariz. 1981), aff'd, 681 F.2d 1159 (9th Cir. 1982). Equitable causes of action are also subject to equitable defenses, one of which is "unclean hands." This defense has been held to be applicable to cases brought under § 43(a). Ames Publishing Co. v. Walker-Davis Publications, Inc., 372 F. Supp. 1, 14 (E.D. Pa. 1974). When applying this defense, however, the courts must look not only to the rights of the competitors but also to the public interest. Id. See also McNeilab, Inc. v. American Home Prods. Corp., 501 F. Supp. 517, 539 (S.D.N.Y. 1980) ("A private party who has not acted fairly is not entitled to judicial aid enforcing fair play on the part of another, but the public is.").


\(^\text{117}\) Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 649 (3d Cir. 1958); Toro Co. v. Textron, Inc., 499 F. Supp. 241, 251 (D. Del. 1980). When determining whether an advertisement has a tendency to deceive, courts generally look at the audience to which the advertisement is directed. For example, in Ames Publishing Co. v. Walker-Davis Publications, Inc., 372 F. Supp. 1 (E.D. Pa. 1974), magazine publishers were soliciting advertisements for their respective publications. Thus, the audience was comprised of companies that might purchase space to advertise their products. Id. at 12.


\(^\text{119}\) Id.

At common law, the most difficult element a plaintiff had to prove when seeking an injunction to prevent a defendant from continuing his false advertising was showing that he would suffer irreparable harm if the injunction was not granted. It was difficult for the plaintiff to prove lost sales or damage to goodwill as a result of a competitor’s advertisement because of the large number of market variables which entered into the advertising sales equation. Consequently, under section 43(a), courts have held that once it is determined that a defendant’s advertisement conveys a false message, irreparable injury for the purpose of injunctive relief will be assumed. Sound policy reasons exist for not requiring proof of actual loss as a prerequisite to obtaining injunctive relief under section 43(a). Failure to prove actual damages before an injunction is granted poses no likelihood of a windfall for the plaintiff. The complaining competitor is also entitled to a market free of false advertising.

Money damages, on the other hand, provide additional relief to the competitor. Consequently, a plaintiff is held to a higher


Sound policy reasons exist for not requiring proof of actual loss as a prerequisite to § 43(a) injunctive relief. Failure to prove actual damages . . . poses no likelihood of a windfall for the plaintiff. The complaining competitor gains no more than that to which it is already entitled—a market free of false advertising.

Id. at 192.


122. Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 316 (2d Cir. 1982).


standard of proof before recovering money damages.\textsuperscript{125} Section 35 of the Lanham Act provides for a monetary recovery by a successful plaintiff which consists of the following: (1) defendant's profits; (2) any damages sustained by the plaintiff; and (3) the costs of the action.\textsuperscript{126} This recovery is cumulative. A court may award both damages and the defendant's profits.\textsuperscript{127}

Accounting for profits is an equitable remedy and it is often justified under an unjust enrichment theory.\textsuperscript{128} The plaintiff need not demonstrate any actual damages in order to obtain an accounting for profits.\textsuperscript{129} Before making an award on the basis of the defendant's profits, courts customarily require a plaintiff to show bad faith or wilful conduct by the defendant\textsuperscript{130} because the accounting is designed to deter future violations.\textsuperscript{131}

To obtain damages for the plaintiff's loss of business, the aggrieved party must show that it suffered actual harm to its


\textsuperscript{126} Section 35(a) of the Lanham Act provides:

When a violation of any right... shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, ... subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award attorney fees to the prevailing party.


\textsuperscript{127} See Borg-Warner Corp. v. York-Shipley, Inc., 127 USPQ 42, 46 (N.D. Ill. 1960), aff'd, 293 F.2d 88 (7th Cir. 1961) (The plaintiff was awarded $2,280,000.00 in damages and an order of accounting of the defendant's profits.).


\textsuperscript{129} Id. The plaintiff need only show the gross sales of the defendant's infringing goods. The burden of proof then shifts to the defendant to demonstrate all the elements of its claimed costs or deductions. 15 U.S.C. § 1117 (1982). See also Durbin Brass Works, Inc. v. Schuler, 532 F. Supp. 41, 43 (E.D. Mo. 1982).


\textsuperscript{131} See, e.g., Playboy Enters., Inc. v. Baccarat Clothing Co., 692 F.2d 1272, 1279 (9th
business. The Lanham Act requires that the plaintiff demonstrate not only that the defendant’s advertisement is false but also that it actually deceived a portion of the buying public. To sustain his burden of proof, the plaintiff is faced with the common law problem of proving an actual diversion of his customers who relied upon the false advertising of the defendants. However, the plaintiff’s burden does not require him to produce a list of his customers who were diverted by the defendant, thereby proving specific loss of sales. Such proof goes to the quantum of damages and not to the very right to recover. Reliance on the defendant’s deceptive statements may be shown by surveys, or testimony of a dealer, distributor, or customer.

Under the proper circumstances, a court may also award a plaintiff up to three times the amount of profits made by the defendant. To award damages, however, there must be an actual showing of harm. Attorneys’ fees also may be awarded.

Cir. 1982); Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117 (9th Cir. 1968); Marshak v. Green, 505 F. Supp. 1054, 1061 (S.D.N.Y. 1981).


134. In Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 260 (D. Del. 1975), the court indicated that proof of the defendant’s increased sales during the period it falsely advertised will be admissible for the purpose of establishing damages.

135. Id.

136. Id.


140. The “American Rule” is that attorneys’ fees are not ordinarily recoverable. Scotch Whiskey Ass’n v. Barton Distilling Co., 489 F.2d 809, 813-14 (7th Cir. 1973). In Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 721 (1967), the Supreme Court ruled that attorneys’ fees may not be recovered under the Lanham Act. Subsequent to this decision, § 35 of the Lanham Act was amended to allow the awarding of attor-
but only in exceptional cases where the defendant's violation of section 43(a) was malicious, fraudulent or wilful.\footnote{Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981)}

**COMMON LAW CLAIM FOR DISPARAGEMENT**


Commercial disparagement results when the quality of the goods or services of a business have been demeaned.\footnote{In contrast, when an advertiser makes false statements concerning a competitor he may violate the common law governing defamation. Defamation exists when the integrity of a business has been impugned. Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 291 (E.D. Pa. 1966); Montgomery Ward & Co. v. United Retail, Wholesale & Dept Store Employees of Am., 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948). It is often difficult to draw the line between libel of the product and libel of its manufacturer. Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 291 (E.D. Pa. 1966); National Dynamics Corp. v. Petersen Publishing Co., 185 F. Supp. 573, 575 (S.D.N.Y. 1960). However, as stated in Black & Yates, Inc. v. Mahogany Ass'n, 129 F.2d 227 (3d Cir.), *aff'd on reheg*, 129 F.2d 232 (3d Cir. 1941), *cert. denied*, 317 U.S. 672 (1942):}

In a product disparagement case, liability results only when the plaintiff proves that the defendant's statements are false.\footnote{See generally Nims, *Unfair Competition by False Statements or Disparagement*, 19 CORNELL L.Q. 63 (1933); Montgomery Ward & Co. v. United Retail, Wholesale & Dept Store Employees of Am., 400 Ill. 38, 51, 79 N.E.2d 46, 53 (1948). It is often difficult to draw the line between libel of the product and libel of its manufacturer. Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 291 (E.D. Pa. 1966); National Dynamics Corp. v. Petersen Publishing Co., 185 F. Supp. 573, 575 (S.D.N.Y. 1960). However, as stated in Black & Yates, Inc. v. Mahogany Ass'n, 129 F.2d 227 (3d Cir.), *aff'd on reheg*, 129 F.2d 232 (3d Cir. 1941), *cert. denied*, 317 U.S. 672 (1942):}

Therefore, courts will not proscribe statements that
one product is better than another or is the best of its kind, because the truth of such a proposition depends on subjective factors which vary from person to person.\textsuperscript{145} The plaintiff must also show an intent on the part of the defendant to cause the plaintiff financial harm or to divert customers away from the plaintiff.\textsuperscript{146} Finally, the necessity of pleading and proving special damages has been the most difficult element to establish in a cause of action for disparagement.\textsuperscript{147} No damages are presumed.\textsuperscript{148} Restrictive conceptions of compensable damage for disparagement have constituted the major obstacle to recovery.\textsuperscript{149} Because a plaintiff in a disparagement action is seeking vindication of his property rights, he must establish the amount of his loss.\textsuperscript{150}

The courts have set forth rigorous standards of proof for disparagement compensation demanding, \textit{inter alia}, evidence of

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the plaintiff's product was only 40\% as effective as the defendant's product.
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\textsuperscript{145} A businessman can advertise that his goods are the "best" in the market as long as he makes no specific assertions of fact unfavorable to his competitors. This rule is premised on practicality. The average consumer is skeptical enough to attach little importance to a seller's boasting. See supra notes 101-09 and accompanying text.


\textsuperscript{150} Bose Corp. v. Consumers Union of the United States, Inc., 57 F.R.D. 528, 529 (D. Mass. 1973). Unlike disparagement, the plaintiff in a defamation case is only required to show communication to a third person or publication of a statement understood by those to whom it is communicated to be defamatory in meaning. Fleck Bros. v. Sullivan, 442 F.2d 155, 156 (7th Cir. 1970). Falsity is presumed, obviating proof of scienter or actual damages. Cantrell v. American Broadcasting Cos., 529 F. Supp. 746, 752 (N.D. Ill. 1981).
lost contracts, employment or sales. For example, a plaintiff in a disparagement action who pleads special damages in the nature of lost sales must prove with specificity that his loss of sales is attributable to the defendant's false statements. Unfortunately, courts have failed to appreciate that the complexities of modern marketing make it difficult, if not impossible, for a manufacturer to identify the names of the actual or prospective customers who were induced to divert their business as a proximate result of his competitor's disparagement. The inflexibility of most courts in demanding such a strict standard of proof of special damages has hampered the effectiveness of this cause of action.

Another difficulty encountered in an action for disparagement is obtaining an injunction. The plaintiff wants the advertisements stopped immediately. However, equity will not enjoin a

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152. Bose Corp. v. Consumers Union of the United States, Inc., 57 F.R.D. 528, 530 (D. Mass. 1973); Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 290 (E.D. Pa. 1966). Courts recognize that factors other than disparagement may have caused the plaintiff loss of sales. The plaintiff's loss may have resulted from a normal decline in demand for his product. There may have been a general business recession in the plaintiff's marketing area or in the industry as a whole. See Comment, supra note 2, at 89.

Courts have gone as far as requiring proof of specific refusals to buy on the part of identified customers. These courts suggest that otherwise it would be too easy to fabricate evidence which the defendant would be unable to rebut. In Bose Corp. v. Consumers Union, the court ruled that the plaintiff had not shown its loss with sufficient specificity because it failed to allege as follows:

[F]acts showing an established business, the amount of sales for a substantial period preceding the [defendant's] publication, the amount of sales subsequent to the publication, facts showing that such loss in sales were [sic] the natural and probable result of such publication, and facts showing that plaintiff could not allege the names of particular customers who withdrew or withheld their custom.

57 F.R.D. at 530 (quoting Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, 17 F.2d 255, 261 (8th Cir. 1926)).


As a nation, we have evolved since the industrial revolution from a simple agrarian society into a highly industrialized country with dynamic and complex commercial interests. One would expect that such an evolution would be attended by comparable activity in commercial law, and specifically in the law of product disparagement. Surprisingly, this has not been the fact. The enormous growth in commercial and industrial activity has not had a similarly prolific effect on the number of product disparagement cases.

libel, and hence, courts have held that equity jurisdiction does not extend to cases involving the false representations of the quality of another's goods unless there is some other basis for equitable jurisdiction. The reason equity will not enjoin such actions is predicated on three theories. The first theory contends that equitable enjoinder of libel violates the constitutional guarantees of freedom of speech and press. The second theory states that equitable enjoinder violates the constitutional guarantee of a trial by jury because libel is an issue to be determined by a jury. The third theory maintains that equity jurisdiction does not extend to such cases because equity does not interfere to protect rights which are purely personal in nature. Therefore, to obtain an injunction to stop a competitor's false representations, a plaintiff should predicate his action upon an alternative theory, such as a claim for unfair competition.

In Black & Yates, Inc. v. Mahogany Association, the plaintiff was engaged in the business of selling a hardwood grown in the Philippines which it called "mahogany." The plaintiff sought to enjoin the defendant association, a group of sellers of wood which traditionally had been known as mahogany, from circulating statements disparaging the plaintiff's product. The trial court dismissed the complaint on the basis, inter alia, that equity has no jurisdiction over disparagement.

The Court of Appeals for the Third Circuit reversed the decision of the trial court. For the first time, a court held that an injunction could be granted based on a cause of action for disparagement, independent of a claim based on unfair competition.

1953); Robert E. Hicks Corp. v. National Salesmen's Training Ass'n, 19 F.2d 963, 965 (7th Cir. 1927).


157. 129 F.2d 227 (3d Cir.), aff'd on reh'g, 129 F.2d 232 (3d Cir. 1941), cert. denied, 317 U.S. 672 (1942).

158. Id. at 228.

159. Id.

160. Id.

161. Id. at 228-29.


163. 129 F.2d at 227.
which would justify equitable jurisdiction.\textsuperscript{164} However, the precedential force of this ruling is doubtful because the court’s decision was predicated on the view that equitable relief is determined by federal law rather than state law,\textsuperscript{165} a view which was rejected by the Supreme Court in \textit{Guaranty Trust Co. v. York}.\textsuperscript{166} In addition, the court weakened the precedential value of its own decision. On rehearing, although the court strongly criticized the theories underlying equity’s refusal to enjoin an action for disparagement,\textsuperscript{167} the court stated that it was “not required to depart from severely criticized precedent”\textsuperscript{168} because the plaintiff’s complaint was also sufficient to support a charge of unfair competition which would justify injunctive relief.\textsuperscript{169}

\textbf{STATUTORY CLAIM FOR DISPARAGEMENT}

The Uniform Deceptive Trade Practices Act (“Uniform Act”) provides injunctive relief for false advertising.\textsuperscript{170} An action can be brought under the Uniform Act for both disparagement and misrepresentation.\textsuperscript{171} The remedy available under the Uniform

\begin{footnotesize}
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\item Id. at 231.
\item Id.
\item 326 U.S. 99, reh’g denied, 326 U.S. 806 (1945). The federal courts cannot permit recovery if the right to relief is not available under state law, regardless of whether the remedy sought is legal or equitable. Id. at 110. The outcome of the case should be the same whether the action is brought in state or federal court. Id.
\item 129 F.2d 232, 233-36.
\item Id. at 236.
\item Id.
\item The Uniform Act has been adopted in a number of states. Illinois is one of the states that has adopted the Uniform Act. ILL. REV. STAT. ch. 121½, §§ 311-317 (1981). For the text of the Uniform Act and a list of the adopting states, see \textit{Unif. Deceptive Trade Practices Act} §§ 1-9, 7 U.L.A. 35 (1978). However, the likelihood of it being adopted by enough states to make its provisions truly uniform is slight, as a number of states have already adopted other legislation in this area. See Sterk, supra note 4, at 380 n.6.
\item Section 2 of the Illinois statute provides in pertinent part:
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§ 2. A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:

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\item [(5)] represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
\item [(7)] represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another;
\item [(8)] disparages the goods, services or business of another by false or misleading representation of fact;
\end{itemize}
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\end{footnotesize}
Act is limited to injunctive relief. Thus, unlike the common law, the Uniform Act expressly provides that a competitor's disparagement may be enjoined in a court of equity. The Uniform Act also does not require proof of special damages resulting from disparagement. A competitor's disparagement of another's product may be enjoined without proof of monetary damages or loss of profits. A plaintiff may be granted injunctive relief if the court finds that he is "likely to be damaged by a deceptive trade practice of another." Additionally, a number of states have adopted statutes, commonly known as anti-dilution statutes, to protect a business from advertisements which have the likelihood of injuring its reputation. To state a claim under an anti-dilution statute, it is not necessary to prove the existence of competition between the parties or confusion as to the source of the goods or services.

(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

ILL. REV. STAT. ch. 121 1/2, § 312 (1981).

172. Section 3 provides that "[a] person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable." ILL. REV. STAT. ch. 121 1/2, § 313 (1981). To obtain relief under the Uniform Act, the plaintiff does not have to be in direct competition with the defendant. In addition, the plaintiff does not have to prove palming-off by the defendant. National Football League Properties, Inc. v. Consumer Enters., Inc., 26 Ill. App. 3d 814, 820, 327 N.E.2d 242, cert. denied, 423 U.S. 1012 (1975). Both individuals and businesses may utilize the Uniform Act. McDonald's Corp. v. Gunvill, 441 F. Supp. 71, 75 (N.D.Ill. 1977), aff'd, 622 F.2d 592 (7th Cir. 1980).

173. Section 3 provides that "[p]roof of monetary damage, loss of profits or intent to deceive is not required." ILL. REV. STAT. 121 1/2, § 313 (1981).


When a violation is proven, a plaintiff is entitled to have the damaging conduct enjoined.\textsuperscript{178}

\section*{CONCLUSION}

This article has described the radical changes in the law of false advertising. Under certain circumstances, competitors may now obtain relief from false or misleading advertising. Formerly, courts routinely denied a claim of misrepresentation alleged by one competitor against another. Now, however, injunctions against such advertising are becoming more and more frequent. This change has evolved through the recognition by Congress and state legislatures that harm is inflicted on competitors and consumers by these practices. The common law restrictions have not yet been eliminated entirely, but state and federal legislation have opened the courtroom door to competitors who believe they have been injured by another’s misrepresentations to the public.

\textsuperscript{178} For example, \textsc{Ill. Rev. Stat.} ch. 140, § 22 (1981) states in part: “[T]he circuit court shall grant injunctions, to enjoin subsequent use by another of the same or any similar . . . form of advertisement if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the . . . form of advertisement of the prior user . . . .”