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## False Advertising

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False advertising law is not, strictly speaking, intellectual property law, but it is a close relative. Three issues are pervasive in advertising law: falsity, materiality and commerciality. Each of them raises conceptual questions about the control of information that go well beyond advertising law.

The central concern of false advertising law is to prevent the dissemination of false commercial information. Note that this task necessarily requires courts to distinguish true statements from false ones. At least five different conceptions of truth butt heads in the caselaw:

- **Scientific truth** exists in the world and can be determined through objective investigation.
- **Linguistic truth** is conventional; the true meaning of a term is the meaning a reasonable listener (e.g., a reasonable consumer) would regard it as having.
- **Legal truth** is a matter of authority; courts must defer to what legislatures and agencies assert.
- **Trademark truth** is determined by priority of appropriation; the owner of a mark is entitled to say definitively what it means.
- In a pluralistic society committed to free speech, there is **no absolute truth**; everyone is entitled to express their own opinions.

As you read the cases, always ask which conception or conceptions the courts are appealing to.

As with trademark and unfair competition,<sup>1</sup> state and federal law provide overlapping – and often redundant – protections against false advertising. In this chapter, we will focus on our old federal friend, section 43(a), except that now our attention turns to a different subparagraph. The next chapter looks more broadly at advertising law beyond the Lanham Act.

Section 43(a)(1)(B) of the Lanham Act is short and to the point:

- (a) *Civil action.* –
- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination

1. The leading advertising treatises are DAVID H. BERNSTEIN & BRUCE P. KELLER, *THE LAW OF ADVERTISING, MARKETING, AND PROMOTIONS* (2011); JAMES B. ASTRACHAN, DONNA M.D. THOMAS, & PETER E. ROSDEN, *THE LAW OF ADVERTISING* (2014). See also the casebook REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING AND MARKETING LAW: CASES AND MATERIALS* (5th ed. 2020).

thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— ...

- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

## A "Ownership": Competitor Standing

In a sense, false advertising law shares the tort structure of trademark law, but without the requirement that the plaintiff own a trademark.<sup>2</sup> One gains tort protection against competitors' false advertising competitors simply by having competitors – by engaging in a commercial activity that has customers capable of being diverted by lies. This requirement of competitor standing functions as a kind of ownership rule. But modern standing law under § 43(a) is considerably more liberal than its common-law precursor.

At common law circa 1900, consumers could sue a seller in fraud for lies about its own products, provided that they satisfied the fraud tort's stringent requirements. And competitors could sue in defamation or trade libel for lies about them or their products. But to the classical legal imagination, false statements about one's products own invaded no legally protected interests of one's competitors.

It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature, and not the courts, must provide a remedy.<sup>3</sup>

In the case from which this language comes, *American Washboard Co. v. Saginaw Mfg. Co.*, the American Washboard Company sold aluminum washboards honestly marked "aluminum." The Saginaw Manufacturing Company sold zinc washboards, falsely marked "aluminum." In an opinion by future President and Chief Justice William Howard Taft, the Sixth Circuit held that American had no right to sue. It could not bring a *trademark* lawsuit, because it held no trademark in the word ALUMINUM, which is a generic term for aluminum washboards. Nor was there an unfair-competition theory that Saginaw was passing off its washboards as being from American. Saginaw was passing off its washboards as being made of aluminum; this is deception about product attributes, not deception about source.

The court also added a policy justification that is worth reading closely:

2. See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305 (2011).

3. *Am. Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281, 285 (6th Cir. 1900).

Take the metal which is the subject-matter of the controversy in this case. Many articles are now being put upon the market under the name of aluminum, because of the attractive qualities of that metal, which are not made of pure aluminum, yet they answer the purpose for which they are made and are useful. Can it be that the courts have the power to suppress such trade at the instance of others starting in the same business who use only pure aluminum?<sup>4</sup>

There is a serious point here. Zinc washboards "answer the purpose for which they are made and are useful," so if a court is too aggressive in examining their composition, it could drive from the market a product that consumers genuinely want and benefit from. Many plaintiffs would love to exclude their competitors from the market, and false advertising provides an attractive tort for that purpose even when – as here – the plaintiff holds no exclusive rights over its product.

But this reasoning is ultimately unsustainable, because it relies on a false binary. The alternative to letting Sagniw sell mislabeled zinc washboards is not prohibiting it from selling zinc washboards, but *requiring it to accurately label the zinc washboards it sells*. That lets consumers who prefer aluminum washboards find the washboards that truly are made of aluminum, while also leaving zinc washboards on the market for consumers who are okay with zinc. A concern that plaintiffs will sue over trivial inaccuracies – stamping "aluminum" on a washboard that is only 99% aluminum – is best addressed on the merits,<sup>5</sup> not with a blanket rule against competitor suits.

False advertising law today is far more expansive about competitor standing. Section 43(a) gives statutory standing to "any person who believes that he or she is likely to be damaged" by the false advertising. This language includes direct competitor who sell competing products, like American Washboard. In *Lexmark International, Inc. v. Static Control Components, Inc.* ("*Static Control II*"), the Supreme Court held that it extends even further.<sup>6</sup> Static Control made and sold the components needed to remanufacture Lexmark toner cartridges to other companies that actually carried out the refurbishment. Lexmark allegedly lied in two ways. First, it told its own customers that they were legally required to return cartridges to Lexmark after a single use. Second, it sent letters to numerous cartridge remanufacturers telling them "that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control's products to refurbish those cartridges."<sup>7</sup>

The Supreme Court's opinion held that to bring a section 43(a) false-advertising suit, a plaintiff must show *proximate causation* between the false statements and its injuries:

We thus hold that a plaintiff suing under [section 43(a)] ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That show-

4. *Id.* at 286.

5. This is what falsity and materiality guard against.

6. *Lexmark Int'l, Inc. v. Static Control Components, Inc.* ("*Static Control II*"), 134 S. Ct. 1377 (2014). You may recall Lexmark's attempts to lock up the toner aftermarket for its printers from *Lexmark Intern., Inc. v. Impression Products, Inc.* and *Lexmark International v. Static Control Components*.

7. *Static Control II*, 134 S. Ct. 1377.

ing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's inability to meet its financial obligations.<sup>8</sup>

8. *Id.* at 1391.

Under this test, Static Control had competitor standing to sue. True, it was not a "classic Lanham Act false-advertising claim in which one competitor directly injures another by making false statements about his own goods or the competitor's goods and thus inducing customers to switch."<sup>9</sup> But Lexmark did bad-mouth Static Control (indeed, it did so by name). "When a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements."<sup>10</sup> In addition, Static Control tied a decrease in the purchase of remanufactured cartridges to a decrease in its own business:

9. *Id.* at 1393.

10. *Id.*

In addition, Static Control adequately alleged proximate causation by alleging that it designed, manufactured, and sold microchips that both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges. It follows from that allegation that any false advertising that reduced the remanufacturers' business necessarily injured Static Control as well. Taking Static Control's assertions at face value, there is likely to be something very close to a 1:1 relationship between the number of refurbished Prebate cartridges sold (or not sold) by the remanufacturers and the number of Prebate microchips sold (or not sold) by Static Control. Where the injury alleged is so integral an aspect of the violation alleged, there can be no question that proximate cause is satisfied.<sup>11</sup>

11. *Id.* at 1394.

This is a functional test, not a formalistic one; it is attentive to the specific nature of the false statements, and to the structure of the relevant industry.

There *is* one class of plaintiffs still conspicuously excluded from Lanham Act standing: consumers. They may have been injured by the false advertising – indeed, they are arguably more injured than anyone else – but they do not allege "an injury to a commercial interest in reputation or sales."<sup>12</sup> Note that this is the case even where the consumer of the product is itself a business. "Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis."<sup>13</sup>

12. *Id.* at 1390.

13. *Id.*

## B "Similarity": Actionable Claims

With no specific information as such to protect, false advertising law lacks a similarity test. Instead, because it protects the truth, it asks whether the challenged statements are *false* and *material* to consumers.

### 1 Falsity

There is nothing particularly unusual about the evidence that shows whether a claim is true or false. Courts weigh evidence on factual questions all the time, and the factual questions teed up by an advertiser's claim are more of the same. We will not dwell on the nature of the proof required to show that "4 out of 5 dentists surveyed recommended Flet Toothpaste" or that "Colon Blow has as much fiber as 30,000 bowls of oat bran cereal."

Instead, the heart of false advertising law is figuring out *what a claim means* in the first place, because that determines which questions must be shown to be true or false. The caselaw exhibits a subtle ambiguity about how falsity is to be proven. On the one hand, sometimes judges treat it as an empirical facts about consumer understanding, of the sort that can (or sometimes must) be proven with survey evidence. A claim means what a substantial number of consumers think it means. At other times, judges treat them as interpretive tasks in identifying the objective meaning of terms, at which judges have a particular expertise by virtue of their training and experience – just as they do in reading statutes and regulations.

#### a Literal Falsity, Misleadingness, and Puffery

To establish falsity, a plaintiff must show either that the claim is *literally false* or that it is *misleading*. A literally false claim is one that is false on its face. A misleading claim is one that is literally true (or ambiguous), but which leaves consumers with a false impression about the product. For the most part, a plaintiff can show that a claim is literally false with intrinsic evidence alone, simply by pointing to its language and explaining why it is untrue. But to show that a claim is misleading, a plaintiff typically must introduce extrinsic evidence showing why a reasonable consumer would take away the false impression from the claim. Survey evidence is not absolutely required to show misleadingness, but it is the standard way of doing so.<sup>14</sup>

It is important to remember that some statements *do not have truth values*. "Is the cat in the kitchen?" is a question, not a statement; it makes no claims about where the cat is. And "Johnny is a poopy-head" is a statement of *opinion*, not an assertion of a factual proposition. It expresses the speaker's negative attitude towards Johnny, but does not say anything specific enough about Johnny to be proven true or false. Statements of opinion are pervasive in advertising:

The law recognizes that a vendor is allowed some latitude in claiming merits of his wares by way of an opinion rather

14. "Although factfinders usually base literal falsity determinations upon the explicit claims made by an advertisement, they may also consider any claims the advertisement conveys by necessary implication. A claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated. For instance, a factfinder found that an advertisement that claimed a motor oil provided 'longer engine life and better engine protection' without explicitly mentioning competitors nonetheless drew a comparison by necessary implication vis a vis those competitors." *Clorox Co. P.R. v. Procter & Gamble Commercial Co.*, 228 F.3d 24 (1st Cir. 2000).



than an absolute guarantee, so long as he hews to the line of rectitude in matters of fact. Opinions are not only the lifestyle of democracy, they are the brag in advertising that has made for the wide dissemination of products that otherwise would never have reached the households of our citizens. If we were to accept the thesis set forth by the appellees, [that all statements by advertisers were statements of fact actionable under the Lanham Act,] the advertising industry would have to be liquidated in short order.<sup>15</sup>

General claims of superiority are called *puffery*, and they are not actionable. "The Best Beer in America" is puffery of this sort.<sup>16</sup> McCarthy's trademark treatise describes puffery as "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely. But Prosser and Keeton on torts is more cynical, describing puffery as "a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk."

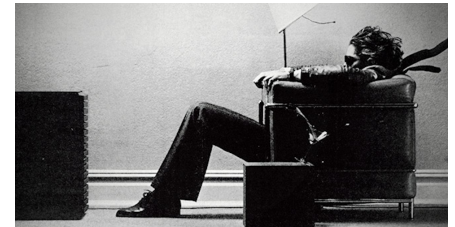
The category of puffery also includes some statements that superficially look like they are falsifiable. Consider the 1980s-era Maxell advertisement for blank audio cassette tapes with a picture of a person in an armchair, hair and tie flowing out behind them, nearly being blown out of the chair by the sound coming out of a speaker. A reasonable consumer looking at the ad would have understood that this is a metaphor, and would not have expected Maxell tapes to literally create a windstorm in their home. To be precise, one might say that just as a misleading claim is one that is literally true but not taken literally by consumers, hyperbolic puffery is literally false but not taken literally.

As an examine of falsity in action, consider *Pizza Hut, Inc. v. Papa John's Intern., Inc.* In the 1990s, Papa John's and Pizza Hut found themselves locked in a grudge-match advertising war. In a \$50 million ad campaign, Pizza Hut's president stood on the deck of an aircraft carrier to declare "war" on "skimpy, low quality pizza." Papa John's responded with a series of ad campaigns featuring taste tests of the two brands, and then launched a series of ads – the "sauce campaign" and the "dough campaign" – comparing its ingredients to Pizza Hut's.

Papa John's asserted that its sauce was made from "fresh, vine-ripened tomatoes," which were canned through a process called "fresh pack," while its competitors—including Pizza Hut—make their sauce from remanufactured tomato paste. During the dough campaign, Papa John's stated that it used "clear filtered water" to make its pizza dough, while the "biggest chain" uses "whatever comes out of the tap." Additionally, Papa John's asserted that it gives its yeast "several days to work its magic," while "some folks" use "frozen dough or dough made the same day." At or near the close of each of these ads, Papa John's punctuated its ingredient comparisons with the slogan "Better Ingredients. Better

15. *Presidio Enters., Inc. v. Warner Bros. Distribution Corp.*, 784 F.2d 674, 685 (5th Cir. 1986).

16. *In re Boston Beer Co.*, 198 F.3d 1370 (Fed. Cir. 1999) (this type of general claim "should be freely available to all competitors in any given field to refer to their products or services").



Maxell advertisement



"Better Ingredients. Better Pizza" ad

Pizza."<sup>17</sup>

There are a number of claims in here:

- The slogan "Better Ingredients. Better Pizza." was puffery of the opinion type. (Pizza Hut, which used the slogan "The Best Pizza Under One Roof," was in no position to throw stones.) As the court put it:

What makes one food ingredient "better" than another comparable ingredient, without further description, is wholly a matter of individual taste or preference not subject to scientific quantification. Indeed, it is difficult to think of any product, or any component of any product, to which the term "better," without more, is quantifiable.<sup>18</sup>

- The ingredient claims were literally true but misleading. Pizza Hut conceded that it used canned tomatoes, tap water, and frozen dough to make its pizza, so these claims were all literally true. However, these claims implied that the ingredient choices *made a detectable difference to the resulting pizza*, and Papa John's never presented any credible evidence to show that they did. Experts testified that the tomato sauces had identical consistencies when they went into the oven, and consumers could not taste the difference between pizzas made from fresh dough and pizzas made from frozen dough. Thus, the claims left consumers with a false impression, making them misleading.
- Combining the slogan with the ingredient claims made the slogan misleading because it implied that Papa John's pizza was better *because* of the ingredient differences.

The slogan, when used in combination with the comparison ads, gives consumers two fact-specific reasons why Papa John's ingredients are "better." Consequently, a reasonable consumer would understand the slogan, when considered in the context of the comparison ads, as conveying the following message: Papa John's uses "better ingredients," which produces a "better pizza" because Papa John's uses "fresh-pack" tomatoes, fresh dough, and filtered water. In short, Papa John's has given definition to the word "better." Thus, when the slogan is used in this context, it is no longer mere opinion, but rather takes on the characteristics of a statement of fact.<sup>19</sup>

Thus, the ads were actionably false.

### **b Establishment Claims**

A typical claim refers to the product itself. For example, if an advertiser says that its mouthwash is "as effective as floss," then the claim is

17. *Pizza Hut, Inc. v. Papa John's Intern., Inc.*, 227 F.3d 489, 492 (5th Cir. 2000).

18. *Id.* at 499.

19. *Id.* at 501–02. This is common with "opinions" in false advertising (and defamation) law. If an opinion is stated in a way that implies that it is based on underlying facts, the speaker puts the truth or falsity of those facts in play.



that *the mouthwash is as effective as floss*, and to show falsity, the plaintiff must prove that the mouthwash is less effective. But if the advertiser says "clinical studies prove that our mouthwash is as effective as floss," then the claim is that *the clinical studies prove its effectiveness*, and to show falsity the plaintiff must prove that the studies do not do so. This is an easier burden for the plaintiff to meet, because to win on the issue, all it needs to do is show that the studies do not exist or "were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited."<sup>20</sup> The plaintiff doesn't need to set up its own studies; it just needs to knock down the advertiser's studies. In effect, the burden of proof on the underlying issue – is the mouthwash as effective as floss? – is shifted from the plaintiff to the defendant's studies.

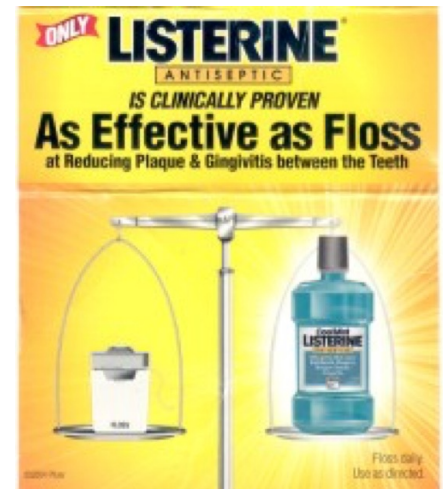
The doctrinal rule is that *establishment claims* require *substantion*. To continue the mouthwash example, consider *McNeil-PPC, Inc. v. Pfizer Inc.*, where Pfizer ran a campaign for Listerine with print ads featuring "an image of a Listerine bottle balanced on a scale against a white container of dental floss" and a television commercial that announced "Listerine's as effective as floss at fighting plaque and gingivitis. Clinical studies prove it." McNeil-PPC, which sells dental floss, sued under section 43(a).

The court first observed that the two studies Pfizer sponsored only included participants with mild to moderate gingivitis, but not with severe gingivitis. Thus, the studies did not even purport to stand for the broader claim in the ad. If the ad had said "as effective as floss at fighting plaque and *mild to moderate* gingivitis," that would have been a different story. But it did not, and the unqualified claim was thus literally false. Next, the court observed that the experimenters in both studies observed that the effectiveness of flossing declined over time in the flossing group, suggesting that the participants were no longer flossing effectively. Thus:

Hence, the studies did not "prove" that Listerine is "as effective as floss." Rather, they proved only that Listerine is "as effective as improperly-used floss." The studies showed only that Listerine is as effective as floss when the flossing is not performed properly. As one of the ADA consultants observed in objecting to the advertising when it was proposed, "for a substitute product to be 'as good as' or 'better' than flossing it must be compared against the data of subjects who demonstrate they can and are flossing effectively."

Pfizer and its experts argue that the two studies are reliable, notwithstanding the indications that the participants in the flossing group did not floss properly, because these conditions reflect "real-world settings." But the ads do not say that "in the real world," where most people floss rarely or not at all and even those who do floss have difficulty flossing properly, Listerine is "as effective as floss." Rather, the ads

20. *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y. 2005).



Listerine ad

make the blanket assertion that Listerine works just as well as floss, an assertion the two studies simply do not prove. Although it is important to determine how a product works in the real world, it is probably more important to first determine how a product will work when it is used properly.<sup>21</sup>

21. *Id.* at 252.

An advertiser who relies on scientific studies must be prepared to defend the *bona fides* of those studies. There is an enormous quantity of low-quality, small-sample advertiser-funded studies that “prove” all kinds of dubious propositions about the health benefits of foods, hygiene products, and dietary supplements. False advertising law’s substantiation requirement is one way of policing these shady studies.

## 2 Materiality

Even if a claim is false, it is actionable only if it is also *material*, i.e., likely to influence consumers’ purchasing decisions. The usual rule is that a literally false claim is presumed to be material, but that the plaintiff must show that a merely misleading claim actually deceived consumers. This commonly requires direct extrinsic evidence: testimony from consumers who fell for the deception, or surveys showing that consumers are likely to fall for it. These presumptions are questionable as a factual matter; they don’t correspond to anything linguistics tells us about how people use and interpret language. But perhaps they can be justified on the theory that we can and should expect advertisers to keep literal falsehoods out of their ads, so it is fair to take a presumption of materiality against advertisers who do not.

In *Pizza Hut*, even though Papa John’s ads were held to be misleading, the court held that the falsehoods were not material. Pizza Hut introduced several surveys, but the trial judge excluded one as unreliable, and the jury rejected another two in finding that Papa John’s taste-test ads did not result in deception. Finally, Pizza Hut pointed to a study that Papa John’s had conducted, which found that 48% of people surveyed believed that “Papa John’s has better ingredients than other national pizza chains.” But this survey did not show whether these beliefs were a result of the ads. Thus, Pizza Hut’s suit failed on materiality.

## C Prohibited Conduct

Notice the two threshold conditions in § 43(a)(1)(B). First, the challenged statement must be “in commercial advertising or promotion,” a requirement that is heavily influenced by First Amendment concerns. Second, the statement must concern “the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,” a phrase that is expansive but not infinitely so. In short, the statement must be commercial on both the speaker’s and the subject’s side.

## 1 "in commercial advertising or promotion"

In *Greater Houston Transportation Co. v. Uber Technologies, Inc.*, taxicab permit owners sued Uber for allegedly misrepresenting its safety to consumers. They pointed to statements given by Uber's Communications department to news organizations reporting on allegations that Uber failed to screen its drivers properly.<sup>22</sup> The statements, which included phrases like "We work every day to connect riders with the safest rides on the road and go above and beyond local requirements in every city we operate," were posted as parts of the news organizations' stories on their websites.

Uber argued that these statements were not "in commercial advertising or promotion" because news articles are not commercial advertising. Certainly this is a winning argument *as to the news organizations*. Their reporting is not advertising. And it is sometimes a winning argument for defendants who are quoted in news articles. In *In Boulé v. Hutton*, for example, the plaintiffs and defendants competed in selling paintings by Lazar Khidekel.<sup>23</sup> Two defendants, who were Khidekel's son and daughter-in-law, were quoted in *ARTnews* claiming that paintings being sold by the plaintiff were not authentic Khidekels. This was not commercial on their part, either. But the argument was a loser for Uber:

Each of Uber's statements was issued by its corporate spokesperson or on Uber's own official website as part of a concerted campaign by the company in response to incidents that had been publicized in the media. . . .

Because Uber's statements as a whole are issued with the intent to influence consumer opinion, they thereby become commercial speech even though they were contained in news media. . . . The comments issued by Uber's communication executives demonstrate a careful, uniform, and orchestrated message designed to encourage and facilitate the commercial use of its product and service. Thus, the Court finds that the disputed statements contained in media articles are commercial speech, and are potentially actionable under the Lanham Act.

Another recurring fact problem of commerciality is the line between scientific research and press release. Typically, research articles as such are noncommercial. But if a company distributes an allegedly false study that praises its products, is *that* commercial? Compare *Eastman Chemical Co. v. PlastiPure, Inc.*<sup>24</sup> (yes) with *Ony, Inc. v. Cornerstone Therapeutics, Inc.*<sup>25</sup> (no).

## 2 "[concerning] commercial activities"

Now for the requirement that the false statement concern someone's business. In *Procter & Gamble Co. v. Haugen*, Randy Haugen, an Amway distributor, sent a voice message to other Amway distributors alleging

22. *Greater Houston Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670 (S.D. Tex. 2015).

23. *Boulé v. Hutton*, 328 F.3d 84 (2d Cir. 2003).

24. *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230 (5th Cir. 2014).

25. *Ony, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490 (2d Cir. 2013).

that the president of Procter & Gamble had announced his allegiance to Satan, and that P&G gave a large portion of its profits to the Church of Satan.<sup>26</sup> According to Haugen, this could be confirmed by observing a ram's horn and the demonic number 666 in the P&G logo. Needless to say, all of this was entirely false.

This baseless rant did not concern the "qualities or characteristics" of P&G's products; it "impugned no feature of the products themselves, such as price, regulatory approval, scope of copyright, or substitutability for another product."<sup>27</sup> But it *did* concern the nature of P&G's "commercial activities":

In particular, the subject message asserted that "a large portion of the profits from [P&G] products go to support [the church of Satan]." Given the common association of Satan and immorality, a direct affiliation with the church of Satan could certainly undermine a corporation's reputation and goodwill by suggesting the corporation conducts its commercial activities in an unethical or immoral manner. There can be little doubt that products are often marketed and purchased not only on the basis of their inherent utility, but also for the images they project and the values they promote. In that regard, the subject message itself implies that recipients should question the values promoted by the businesses from whom they purchase goods. In light of the foregoing reality of the marketplace, corporations cultivate their images and values through a wide array of activities, including celebrity endorsements, sponsorships, and charitable giving. Allegations that P&G tithes the church of Satan concern just such commercial activities.<sup>28</sup>

## D Secondary Liability

There is not a lot of caselaw on secondary liability for false advertising – but there is some. As always, there must be an underlying act of false advertisement to hold someone else contributorily liable for it. The actual test for contributory liability, which should sound familiar, is that a defendant will be liable if it "contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in it."<sup>29</sup> The necessary mental state is knowledge or intent. More specifically:

Analogies from trademark infringement, in which contributory liability is more developed, can be instructive. Thus, for example, a plaintiff may be able to make out the participation prong of a contributory false advertising claim by alleging that the defendant directly controlled or monitored the third party's false advertising. It is also conceivable that there could be circumstances under which the provision of a necessary product or service, without which the false ad-

26. *Procter & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000).



The allegedly Satanic P&G logo

27. *Id.*

28. *Id.* at 1272.

29. *Duty Free Americas, Inc. v. Estee Lauder Cos., Inc.*, 797 F.3d 1248 (10th Cir. 2015).

vertising would not be possible, could support a theory of contributory liability. In determining whether a plaintiff has adequately alleged facts to support such a claim, we look to whether the complaint suggests a plausible inference of knowing or intentional participation, examining the nature and extent of the communication between the third party and the defendant regarding the false advertising; whether or not the defendant explicitly or implicitly encouraged the false advertising; whether the false advertising is serious and widespread, making it more likely that the defendant knew about and condoned the acts; and whether the defendant engaged in bad faith refusal to exercise a clear contractual power to halt the false advertising.<sup>30</sup>

30. *Id.* at 1277–78.

For example, consider the case from which this quotation is taken, *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*<sup>31</sup> DFA operates duty free stores in airports. Due to a pricing dispute, it stopped selling Estée Lauder cosmetics, but some of its competitors still did. In the process of bidding against DFA for airport concession contracts, they made allegedly false statements about DFA, which sued Estée Lauder on a number of theories, including contributory false advertising. But DFA failed to show that Estée Lauder contributed to the false statements.

31. *Id.*

We cannot see how the mere sale of Estée Lauder products can serve as a basis for holding the manufacturer liable for any disparaging statements its customers make in the course of their own separate business relations. In our view, selling Estée Lauder products is too unrelated to the making of the allegedly false or misleading statements to form a basis for liability – under either an inducement or participation theory.

Moreover, contrary to DFA’s argument, there are simply no facts in the complaint that suggest the existence of coordinated action or encouragement, much less inducement, between Estée Lauder and the operators on the decision to make the disputed claims to airport authorities. There has been no allegation that by selling its products to the duty free operators, Estée Lauder monitored, controlled, or participated in operators’ statements to airport authorities during a competitive bidding process for which Estée Lauder was not even present. More generally, there are no facts to suggest that Estée Lauder commonly exercises any level of control over or involvement in the duty free operators’ conduct during airport RFP bidding.<sup>32</sup>

32. *Id.* at 1279.

This passage shows how contributory liability for false advertising is different from contributory liability for other IP rights. Holding Estée Lauder liable for selling its products to the operators could make sense if it were their *sales* that infringed DFA’s rights – if, for example, it held



a patent on one of the ingredients in Estée Lauder’s cosmetics. But false advertising is a tort about deceptive speech, not about unauthorized products. To impose liability here would be to give DFA a kind of exclusive right to sell Estée Lauder products in duty-free shops, and that is emphatically not a job for false advertising law.

### Problems

#### Satellite TV

This advertisement for DirecTV ran on the Internet; it was shown to customers in markets served by Time Warner Cable. Some of Time Warner’s channels are analog; others are digital HD. DirecTV offers only digital HD channels. The parties agree that the HD channels are equivalent in quality. They also agree that the pixelated portions of the ads are not accurate depictions of cable TV signals, either digital or analog. Is the advertisement actionable?

