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The U.S. International Trade Commission: Import Advertising Arbiter or Artifice

Cover Page Footnote

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The U.S. International Trade Commission: Import Advertising Arbiter or Artifice?

Ross D. Petty*

I. Introduction

Section 337 of the Tariff Act of 1930 condemns:

[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is —

- (i) to destroy or substantially injure an industry in the United States;
- (ii) to prevent the establishment of such an industry; or
- (iii) to restrain or monopolize trade and commerce in the United States.¹

This condemnation of unfair import competition was first enacted as section 316 of the Tariff Act of 1922.² It was intended to give “more adequate protection to American industry than any antidumping statute the country has ever had” and to “prevent every type and form of unfair practice.”³ This language tracked the recommendations of an earlier report that compared the treatment of dumping by Canada with the then criminal treatment of dumping by the United States.⁴ This report distinguished dumping from other unfair trade practices such as commercial threats, bribery, deceptive use of trademarks, passing off, exploitation of patents, false labeling, and deceptive advertising.⁵ Thus, in passing the Tariff Act, Congress intended “unfair methods of competition and unfair acts” to include deceptive advertising.⁶ Since the passage of the Trade Act of 1974, which substantially amended the Tariff Act, the U.S. International Trade Commission has brought over 300 cases under this provision.⁷ Most

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¹ 19 U.S.C. § 1337(a)(1)(A) (Supp. 1991).

² Tariff Act of 1922, Pub. L. No. 318, 42 Stat. 943.

³ S. REP. No. 595, 67th Cong., 2d Sess. 3 (1922).

⁴ United States Tariff Commission, DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES, Report to Committee on Ways and Means, House of Representatives (Oct. 4, 1919).

⁵ *Id.* at 11.

⁶ *Id.*

⁷ The ITC has opened 327 unfair trade practice investigations under section 337. Nearly all of these (320) have been at least preliminarily terminated. *Investigations of Unfair Trade Practices in the Import Trade* (Fed-Track Guide)(May 31, 1991).

of these cases involve intellectual property issues such as patent, copyright or trademark infringement, or the theft of trade secrets.⁸ Others involve issues similar to trademark infringement such as passing off and trade dress misappropriation.⁹ Relatively few involve false advertising, and most of those concern a false designation of country of origin.¹⁰ This Article discusses the use of section 337 of the Tariff Act as authority for challenging false advertising generally, not merely false designations of origin.

The modest use of section 337 to challenge the advertising of imported products appears comparable to the limited use of section 43(a) of the Lanham Act in the years immediately following its passage in 1946.¹¹ In fact, it was not until 1954 that a court first recognized a claim of false advertising under the Lanham Act.¹² Not until the late 1970s did the use of the Lanham Act to challenge false advertising become widely accepted.¹³ Today, more advertising cases are litigated under the Lanham Act than by the Federal Trade Commission.¹⁴

This Article suggests that, like the Lanham Act during its early years, the potential for section 337 as a means of challenging advertising is largely unrealized. In a small effort to remedy this situation, this Article explains its full potential and explains how it may be used to challenge the advertising of imported products.

The following section provides background on other modes for resolving disputes concerning the validity of advertising. It primarily examines industry self-regulation, the Federal Trade Commission, and private litigation under the Lanham Act for later comparison with the International Trade Commission.¹⁵ Part III of this Article

⁸ THOMAS V. VAKERICS, ET AL., *ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS* 488 (1987).

⁹ *Id.* at 495.

¹⁰ A recent study of the 269 cases filed before the ITC through September 1987 found that out of 596 allegedly unfair acts cited in the complaints, over 300 involved patent or copyright infringement and another 129 alleged trademark infringement. Passing off/trade dress misappropriation was alleged 71 times, false designation of origin 60 times, but false advertising only 32 times. Robert J. Thomas, *Patent Infringement of Innovations by Foreign Competitors: The Role of the U.S. International Trade Commission*, 53 J. MARKET-ING 63, 67 (Oct. 1989).

¹¹ Bruce Keller, *How Do You Spell Relief? Private Regulation of Advertising Under Section 43(a) of the Lanham Act*, 75 TRADEMARK REP. 227 (1985). "[T]he courts construed section 43(a) to require the plaintiffs to plead to prove the elements of a common law passing off claim." *Id.* at 230.

¹² *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954).

¹³ Keller, *supra* note 11, at 230-31.

¹⁴ Ross D. Petty, *Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising*, 25 IND. L. REV. (forthcoming 1991).

¹⁵ For comparison of industry self-regulation, the FTC, and the Lanham Act, see Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self Policing, and Private Litigation*, 20 GA. L. REV. 1 (1985). For a comparison of the FTC and Lanham Act, see Petty, *supra* note 14; see also ROSS D. PETTY, *THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY* (forthcoming, Quorum Books 1991).

describes the International Trade Commission, its procedures, and its advertising cases and decisions. Part IV discusses issues that the case law has not yet addressed and the likelihood that the International Trade Commission will adjudicate more advertising cases in the future.

II. Background: Other Modes for Challenging Advertising

A. Industry Self-Regulation

Perhaps the quickest means for a business to challenge a competitor's advertising is to file a complaint with one of the many sources of industry self-regulation.¹⁶ Many industry trade associations have advertising codes, as do media and media associations.¹⁷ The National Advertising Division (NAD) of the Council of Better Business Bureaus, for example, has actively investigated advertising complaints since 1971.¹⁸ It is funded by dues paid to the Council of Better Business Bureaus by advertisers and advertising agencies.¹⁹ During 1983-85, forty-three percent of these complaints were from business competitors.²⁰

Complaining to the NAD does not require a lawyer or the payment of filing fees.²¹ In addition, the NAD acts quickly; it frequently resolves complaints within six months of receipt.²² The NAD examines approximately one hundred complaints annually.²³ Despite its lack of authority to issue binding orders, the NAD has obtained a discontinuance or modification of the advertisement in about seventy-five percent of its cases, with the remainder of its findings vindicating the challenged advertisement.²⁴

If the NAD cannot resolve the complaint to its own satisfaction, the case may be appealed to the National Advertising Review Board (Board).²⁵ The Board is funded in the same manner as the NAD. It has only decided forty-one cases that have been appealed to it out of the more than 2,000 investigated by NAD since 1971.²⁶ In sixty-six percent of those cases, the Board upheld the NAD decision; in twenty percent it reversed or modified the NAD decision;²⁷ and in

¹⁶ GORDON E. MIRACLE & TERRENCE NEVETT, VOLUNTARY REGULATION OF ADVERTISING 62 (1987).

¹⁷ *Id.* at 29-33.

¹⁸ *Id.* at 82.

¹⁹ *Id.* at 83.

²⁰ *Id.* at 209.

²¹ *Id.* at 86.

²² Sixty four percent of all complaints in 1982 were resolved within six months. *Id.*

²³ *Id.* at 209 (table 6-1).

²⁴ It examined 107 complaints in 1986 and obtained discontinuance or modification in 75% of them. Arthur Best, *Monetary Damages for False Advertising*, 49 U. PITT. L. REV. 1, 38 (1987). For figures from 1980-84, see MIRACLE & NEVETT, *supra* note 16, at 216.

²⁵ MIRACLE & NEVETT, *supra* note 16, at 86, 219.

²⁶ *Id.*

²⁷ *Id.* at 218(table 6-4).

fifteen percent the case was dismissed or withdrawn.²⁸ Advertisers thus far have always complied with Board decisions decided against them.²⁹

The NAD's legal standards for determining whether advertising is false or deceptive appear comparable to the Federal Trade Commission's low standards discussed below.³⁰ For example, in 1984 the NAD took formal action on 105 complaints.³¹ Eighty percent of these complaints questioned the adequacy of substantiation of claims in the advertisements, and eighty-three percent challenged misleading statements or depictions.³²

B. Federal Trade Commission

Commentators have suggested that the Federal Trade Commission (FTC or Commission) has brought relatively few advertising cases recently.³³ Since the FTC is free to decide whether or not to take action in a particular case, a business cannot be confident that the FTC will take effective or timely action in any particular case.³⁴

When the FTC does decide to take action, however, the Commission bears the expenses of discovery, litigation, and possibly settlement negotiation.³⁵ Under section 5 of the FTC Act, it has broad authority to condemn "unfair or deceptive acts and practices."³⁶ The FTC is able to use its own expertise to determine what claims are made in the advertisement.³⁷ It then determines if the claims are deceptive or unsubstantiated. To a lesser degree, the FTC also

²⁸ *Id.*

²⁹ *Id.* at 86-87. If the advertiser did not comply with the Board decision, procedures call for referring the complaint to the FTC.

³⁰ *Id.* at 91.

³¹ *Id.* at 226(table 6-8).

³² *Id.* The NAD also addressed children's advertising issues in 9% of its cases. *Id.*

³³ See, e.g., Stanley E. Cohen, *FTC Memo Hits Ad Self-Regulation*, ADVERTISING AGE, 39, 42 (Feb. 7, 1983)("During a year when the ad industry self-regulation system identified nearly 60 instances where national advertisers were making claims that could not be substantiated, the Miller management at the FTC failed to act against a single case involving national ads that have run in major media since the present regime took office."); Thomas J. McGrew, *Advertising Issues Avoided by the FTC in Past Year*, LEGAL TIMES, Jan. 7, 1985, at 12. See also Best, *supra* note 15, at 17 (the FTC's published decisions for 1982-83 contained 24 advertising cases). But see Joanne Lipman, *FTC is Cracking Down on Misleading Ads*, WALL STREET J., Feb. 4, 1991 at 6; Kim Foltz, *FTC Signals Its Concerns Over Deceptive Campaigns*, N.Y. TIMES, Feb. 14, 1991 at D-19(suggesting that the FTC under President Bush is more active).

³⁴ See, e.g., *Moog Indus. v. FTC*, 355 U.S. 411 (1958)(FTC discretion to set enforcement priorities); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873-74 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962)(deference to FTC expertise in deciding public significance of enforcement actions).

³⁵ *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (1979).

³⁶ 15 U.S.C. § 45(a) (1988). This authority was added after the Supreme Court decided that under the Commission's authority to condemn "unfair methods of competition," the Commission must allege and prove competitor injury. See *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938).

³⁷ See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 886 (6th Cir. 1967). This "intui-

polices advertising that it deems to be unfair.³⁸

Under the FTC's Deception Policy Statement, an advertisement would be considered deceptive if it contained a representation, practice, or omission likely to mislead reasonable consumers and if the representation, practice, or omission was material to consumer choice.³⁹ Thus, the FTC can pursue omissions of material information that should be disclosed to prevent the advertisement from being misleading.⁴⁰

The major advantage of the FTC's deception authority is its relatively low burden of proof. The FTC does not have to prove that the advertiser intended to deceive consumers or knew its advertisements were deceptive.⁴¹ The FTC similarly does not need to prove actual falsity of a particular statement.⁴² Rather, it merely must prove that reasonable consumers are likely to be misled by particular

tive approach" has been criticized. See, e.g., Ernest Gellhorn, *Proof of Consumer Deception Before The Federal Trade Commission*, 17 KAN. L. REV. 559, 565 (1969).

³⁸ Under the FTC's unfairness jurisdiction and recent policy statement, it would pursue advertising claims as unfair if they are likely to cause substantial consumer injury as determined by the conduct's net effects and consumers could not reasonably avoid such injury. Thus, in a situation where the omission of product information might harm consumers, the FTC would require the disclosure of this information in advertising when the costs to the advertiser, and ultimately purchasers, of doing so, would not outweigh the benefits. Additionally, consumers must not readily be able to determine the missing information by a simple examination of the product. Of course in many cases, the omission of such information might also be deceptive.

For a brief explanation of the FTC's recent deception, unfairness, and advertising substantiation policy statements, see Carol T. Crawford, *Unfairness and Deception Policy at the FTC: Clarifying The Commission's Roles and Rules*, 54 ANTITRUST L. J. 303 (1985). The Commission's Unfairness Policy Statement is appended to its decision in *In re International Harvester*, 104 F.T.C. 949, 1072 (1984). See also Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" In Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981).

The only examples of advertising that the FTC has challenged solely on unfairness grounds involve depictions in advertisements that may influence children to engage in dangerous activities. See, e.g., *A.M.F., Inc.*, 95 F.T.C. 310 (1980)(consent order prohibiting bicycle advertisements showing unsafe riding by children); *In re Mego Int'l*, 92 F.T.C. 186 (1978)(consent order prohibiting depictions of people using electrical appliances near water); *In re Uncle Ben's Inc.*, 89 F.T.C. 131 (1977)(consent order prohibiting depictions of unsupervised children near active gas stove); *In re General Foods Corp.*, 86 F.T.C. 831 (1975)(consent order prohibiting depiction of naturalist eating wild nuts and berries). *Accord, In re Philip Morris, Inc.*, 82 F.T.C. 16 (1973)(consent order prohibiting placement of sample of razor blades in newspapers where they might injure children).

The FTC has also challenged advertising as unfair and deceptive because of a lack of substantiation of the advertising claims and or failure to disclose material information. See Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 Wisc. L. Rev. 107, 116-27 (1981).

³⁹ The FTC's Deception Statement is appended to its decision in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

⁴⁰ The so-called "pure omission," silence on a subject in circumstances that do not give any particular meaning to the silence, can only be pursued under unfairness. See Crawford, *supra* note 38, at 310-11; *In re International Harvester*, 104 F.T.C. 949, 1059-61 (1984).

⁴¹ *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977); *In re Travel King, Inc.*, 86 F.T.C. 715, 773 (1976).

⁴² *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979).

representations—even those representations that might be literally true.⁴³ In addition, the FTC does not need to prove actual deception caused by the advertisement.⁴⁴ It only must show that the claims are material to consumer choice and that consumers are likely to be misled.⁴⁵ Certain claims, such as express claims and implied claims made intentionally or concerning health, safety, efficacy, or price, are presumed by the FTC to be material.⁴⁶

The second prong of the FTC's advertising regulation program is its requirement that advertisers have a "reasonable basis" for their advertising claims prior to making them.⁴⁷ According to the 1984 Advertising Substantiation Policy Statement, claims that promise a certain level of substantiation (e.g., "tests prove") must be supported by that level of substantiation.⁴⁸ Claims implying a high level of substantiation to reasonable consumers must have the promised level of substantiation.⁴⁹ For example, comparative claims, specific performance claims, and claims with a scientific aura all imply that tests were performed to substantiate them. All other claims must be substantiated at a level determined by six factors: (1) type of claim; (2) type of product; (3) consequences of a false claim; (4) benefits of a truthful claim; (5) cost of developing substantiation; and (6) amount experts feel is reasonable.⁵⁰

The standard FTC remedy in an advertising case is a simple cease and desist order.⁵¹ Should the company later violate it, it would be subject to civil penalties.⁵² A cease and desist order typically prohibits claims that are false or misleading on their face as well as other claims not containing a reasonable basis.⁵³ The FTC often specifies the type of reasonable basis. For example, drug efficacy claims must be substantiated by well-controlled, double-blind

⁴³ Some argue that the "likely to mislead" standard is a retreat from prior case language requiring only "the tendency or capacity to mislead." See Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849 (1984).

⁴⁴ *Trans World Accounts*, 594 F.2d at 214; *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975).

⁴⁵ *Trans World Accounts*, 594 F.2d at 214.

⁴⁶ Crawford, *supra* note 38, at 307.

⁴⁷ *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). However, while announcing this new doctrine, the Commission did not find Pfizer liable, so there was no basis for an appeal. *Id.* at 73-74. For a discussion of the history of FTC's advertising substantiation program, see Charles Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1, 5-13 (1986).

⁴⁸ *In re Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 1289 (1987).

⁴⁹ The policy statement is appended to the Commission decision in *Thompson Medical Co.*, 104 F.T.C. at 648.

⁵⁰ *Id.* at 840. See also *id.* at 821.

⁵¹ Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 692 (1977).

⁵² See, e.g., *United States v. J.B. Williams Co.*, 354 F. Supp. 521 (S.D.N.Y. 1973), *aff'd in part, rev'd in part*, 498 F.2d 414 (2d Cir. 1974).

⁵³ Pitofsky, *supra* note 51, at 692.

clinical tests.⁵⁴ In many cases, the FTC will also order affirmative disclosures of information necessary to prevent deception.⁵⁵ Such disclosures may be ordered for all advertising, often for a limited period of time, or whenever a specified claim is made.⁵⁶

Such remedies have been described as "pathetically inadequate," particularly when imposed after a long period of investigation and litigation.⁵⁷ According to one commentator, even if the FTC sought a preliminary injunction in federal district court, a fifty-two week advertising campaign would have run its course.⁵⁸ Nonetheless, the FTC has obtained preliminary injunctions in advertising cases.⁵⁹ To obtain such relief, the FTC must only prove a likelihood of ultimate success on the merits in its underlying case.⁶⁰

Because of the limited value of injunctive relief, the FTC has attempted to correct the effects of past practices by occasionally ordering corrective advertising.⁶¹ In addition, under section 19 of the Federal Trade Commission Act, the FTC is authorized to seek consumer redress for knowingly dishonest or fraudulent conduct that violates a rule or order of the Commission.⁶² It has used this authority to negotiate refunds to consumers in settlements of advertising cases where feasible.⁶³ These two remedies enhance the deterrence value of FTC actions.

C. Lanham Act Litigation

Most commonly, business rivals challenge each others' advertising under section 43(a) of the Lanham Act, the Federal codification of trademark law.⁶⁴ Originally, trademark law only protected a business from a rival's use of a similar trade name or mark where consumer confusion appeared likely over the identity of the producer of the goods in question.⁶⁵ But section 43(a) allows injured parties to sue firms that use "[any] false or misleading description of fact, or

⁵⁴ *Thompson Medical Co.*, 104 F.T.C. at 844.

⁵⁵ Pitofsky, *supra* note 51, at 685.

⁵⁶ *Id.*

⁵⁷ *See id.* at 692-93.

⁵⁸ Pitofsky, *supra* note 51, at 693 n.128. Complaints against three marketers of over-the-counter analgesics were issued in 1973, but appeals of the final FTC orders did not occur until 1982 for one and 1984 for the other two. *See Sterling Drug Co. v. FTC*, 741 F.2d 1146, 1148 n.1 (9th Cir. 1984).

⁵⁹ *E.g.*, *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294 (D.D.C. 1983).

⁶⁰ *Id.* at 299 (citing *FTC v. Weyerhäuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981)).

⁶¹ *See, e.g.*, *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

⁶² 15 U.S.C. § 57(b) (1988).

⁶³ *See, e.g.*, *In re Champion Home Builders Co.*, 101 F.T.C. 316 (1983); *In re Mid City Chevrolet, Inc.*, 95 F.T.C. 371 (1980).

⁶⁴ 15 U.S.C. §§ 1051-1127 (1982).

⁶⁵ Copyright law protects a business from having its advertising copied ("substantially similar" unless under a "fair use" exception) by a rival. *See* KENNETH A. PLEVAN & MIRIAM L. SIROKY, *ADVERTISING COMPLIANCE HANDBOOK* 269-95 (1988).

false or misleading representation of fact, which . . . 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"⁶⁶ Some early cases interpreted prior language to require the plaintiff to prove the defendant was "passing off" its goods as being those of the plaintiff, but modern interpretations apply this language to cover all sorts of false or misleading advertising.⁶⁷

An obvious difference between bringing a private Lanham Act case and complaining to the FTC or NAD is that the complaining firm must bear the cost and burden of pursuing the lawsuit in a private action.⁶⁸ This includes proving that its rival's advertising actually is false or misleading.⁶⁹ Thus, a plaintiff, unlike the FTC or NAD, cannot simply say that the claims are unsubstantiated and win relief.⁷⁰ Of course, in cases where the advertising explicitly or implicitly promises that its claims are supported by proper evidence, the plaintiff may prove falsity by showing a lack of substantiation.⁷¹

The plaintiff's burden of proving falsity is far from insurmountable. The plaintiff must prove that the false statements either have deceived or have the capacity to deceive a substantial segment of the audience, that the deception is material to the purchasing decision, and that the plaintiff is injured or is likely to be injured by the statement.⁷² When fifteen percent of the audience interprets the advertising in a deceptive way, the courts become concerned.⁷³ Courts also have held that literally true claims may be "false" under the act

⁶⁶ 15 U.S.C. § 1125(a) (1988).

⁶⁷ See generally, Ross D. Petty, *Competitor Suits Against False Advertising: Is Section 43(a) of the Lanham Act A Pro-consumer Rule or an Anticompetitive Tool?*, 20 U. BALT. L. REV. (forthcoming 1991).

⁶⁸ See Keller, *supra* note 11, at 228. The Lanham Act creates a private right of action for businesses harmed by, among other things, false advertising. *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 (D. Del. 1980) (plaintiff must prove actual falsity, not merely lack of substantiation). *But see*, *Johnson & Johnson v. Quality Pure Mfg.*, 484 F. Supp. 975, 983 (D.N.J. 1979) (injunction of defendant's claim made "without a good faith basis, grounded on substantial pre-existing proof, to support it").

⁷¹ See, e.g., *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277-78 (2d Cir. 1981); *American Home Prods. Corp. v. Johnson & Johnson*, 436 F. Supp. 785, 803 (S.D.N.Y. 1977) (efficacy claim proven deceptive because the weakness of the supporting evidence should have led to a weaker claim of efficacy), *aff'd*, 577 F.2d 160 (2d Cir. 1978).

⁷² E.g., *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

⁷³ *Coca-Cola Co. v. Tropicana Prods., Inc.*, 538 F. Supp. 1091, 1096 (S.D.N.Y. 1982), *rev'd on other grounds*, 690 F.2d 312, 317 (2d Cir. 1982); *PLEVAN & SIROKY, supra* note 65, at 9. The FTC reportedly considered a similar standard for its deception policy statement instead of the reasonable consumer test in the statement. See *Bailey & Pertschuk, supra* note 43. Early FTC cases also have considered this issue. See, e.g., *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 461-62 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *In re I.T.T. Continental Baking Co.*, 83 F.T.C. 865 (1973) (10-14% is deceptive); *In re Benrus Watch Co.*, 64 F.T.C. 1018, 1032 (1964) (14% is deceptive); *In re Rhodes Pharmacal Co.*, 49 F.T.C. 263, 283 (1952) (9% is deceptive).

when they are misleading.⁷⁴

Judges ease the plaintiff's burden by frequently interpreting the meaning of the express claims within the advertisement without requiring evidence of how consumers would interpret them.⁷⁵ Of course, other judges acknowledge their lack of expertise in this area, as compared to the FTC, and require evidence of consumer interpretation.⁷⁶ The lack of expertise argument is supported by occasional cases where the court of appeals interpreted the express claims in advertising in a way diametrically opposed to the district court's interpretation.⁷⁷ The traditional rule for implied claims is to require evidence of consumer interpretation.⁷⁸

Two major advantages that mitigate the Lanham Act's added burden of proof are the speed in which courts resolve these cases and the remedies they impose.⁷⁹ Under the Lanham Act, a competitor's advertising may be enjoined within "months or even weeks" of its beginning.⁸⁰ Often cases are essentially over after a preliminary injunction is issued.⁸¹

In order to obtain a preliminary injunction, the plaintiff must prove that (1) he will likely win the lawsuit because the advertising is false, (2) the defendant's advertising is likely to cause or have caused injury to the plaintiff, and (3) the plaintiff's injury without the injunction is likely to be higher than the defendant's injury with the injunction (balancing of the hardships).⁸² In contrast, the FTC must only prove the first element.⁸³

Proving likelihood of injury caused by the advertisement in

⁷⁴ See, e.g., *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165-67 (2d Cir. 1978).

⁷⁵ See, e.g., *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 313, 317 (2d Cir. 1982); *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1356 (S.D.N.Y. 1976).

⁷⁶ E.g., *American Home Prods. Corp.*, 577 F.2d at 172 n.27; *Proctor & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984); *American Brands, Inc.*, 413 F. Supp. at 1357 (S.D.N.Y. 1976).

⁷⁷ See, e.g., *Avis Rent A Car System*, 782 F.2d at 384-86; *Fur Info. and Fashion Council, Inc. v. E. F. Timme & Son, Inc.*, 501 F.2d 1048 (2d Cir. 1974). Cf., *Coca-Cola Co.*, 690 F.2d at 312 (court of appeals finds facial falsity where district court finds ambiguity); *Bose Corp. v. Linear Design Labs., Inc.*, 467 F.2d 304 (2d Cir. 1972)(court of appeals held three of four claims were mere "puffing", district court had not ruled).

⁷⁸ E.g., *Coca-Cola Co.*, 690 F.2d at 317; *American Home Prods.*, 577 F.2d at 165; *PLEVAN & SIROKY*, *supra* note 65, at 415-16. *But see*, *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190 (S.D.N.Y. 1987); *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 580 F. Supp. 634 (S.D.N.Y. 1984)(defendants advertising implied claims enjoined without consumer interpretation evidence).

⁷⁹ Keller, *supra* note 11, at 243.

⁸⁰ *Id.* at 243-44 and the cases cited therein at 243 n.99.

⁸¹ *Id.* at 244.

⁸² *PLEVAN & SIROKY*, *supra* note 65, at 23-28. If the challenged conduct has ceased with no reasonable probability that it will be resumed, the court may refuse to issue and injunction. *Id.* at 28.

⁸³ See *supra* notes 59-60 and accompanying text.

question is relatively straightforward in injunction cases.⁸⁴ It is presumed in cases involving explicit comparative advertisements and can otherwise be proven by establishing direct competition between the plaintiff's products and the defendant's advertised product.⁸⁵ Proving injury in cases where damages are sought is more difficult.⁸⁶ A court may require proof of lost sales actually caused by the defendant's advertisement.⁸⁷ Presenting such proof may expose the complainant to broad discovery of its sales figures and planning documents by its rival.⁸⁸ Damages, when awarded, have typically been \$678,000 or less, but damages in the amount of \$40 million were recently awarded in the case of *U-Haul Int'l v. Jartran, Inc.*⁸⁹

Lanham Act cases occasionally involve more unusual remedies. Just as the *U-Haul* court awarded damages based on the corrective advertising that U-Haul disseminated (prior to the corrective advertisements, U-Haul only advertised in telephone book yellow pages), other courts have ordered that offending advertising, labeling, or package inserts be recalled.⁹⁰ Courts have also ordered affirmative injunctions requiring letters to consumers or disclosures in future advertising to correct previous advertisements.⁹¹

D. Other Private Litigation

Under common law, competitors can sue for the torts of passing off, product disparagement, and trade defamation (statements not about the plaintiff's product, but about the plaintiff's integrity or character).⁹² Passing off can be enjoined after the plaintiff proves a likelihood of consumer confusion, secondary meaning of product or package design, and nonfunctionality of the design or packaging.⁹³ The courts typically will not order an injunction for disparagement and defamation, and will only award special damages in disparagement cases when they are proven with considerable specificity.⁹⁴ The plaintiff in a disparagement case also has the burden of proving

⁸⁴ Keller, *supra* note 11, at 244.

⁸⁵ PLEVAN & SIROKY, *supra* note 65, at 24-25.

⁸⁶ Keller, *supra* note 11, at 244.

⁸⁷ *Id.* at 26.

⁸⁸ *Id.*

⁸⁹ Best, *supra* note 24, at 19. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982), *damages awarded*, 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part, modified in part, and rev'd in part*, 793 F.2d 1034 (9th Cir. 1986), is the only false advertising case to award damages. PLEVAN & SIROKY, *supra* note 65, at 50. The cases cited by Best also involve trademark infringement issues. Best, *supra* note 24.

⁹⁰ Perfect Fit Indus., Inc. v. Acme Quilting Co., 646 F.2d 800 (2d Cir. 1981).

⁹¹ PLEVAN & SIROKY, *supra* note 65, at 38-46.

⁹² See, e.g., Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527 (1979); PLEVAN & SIROKY, *supra* note 65, at 363-92.

⁹³ See *In re Application of Deister Concentrator Co.*, 289 F.2d 496, 502-03 (C.C.P.A. 1961); *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977); *In re Certain Surveying Devices*, 2 I.T.R.D. (BNA) 5409, 5420-21 (1981).

⁹⁴ Note, *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 893 (1964).

that the allegedly disparaging claims were false and made with malice.⁹⁵ Thus, these torts only cover limited types of false advertising and are difficult to prove.⁹⁶

Occasional antitrust cases have challenged advertising under section two of the Sherman Act's prohibition against monopolizing and attempts to monopolize.⁹⁷ The plaintiff must prove that the defendant has an intent to monopolize, a high level of market power, and that the advertising is anticompetitive.⁹⁸ A few courts have found that "massive" advertising in conjunction with other anticompetitive conduct violates the antitrust laws.⁹⁹ Other cases have recognized this possibility, but have failed to find liability.¹⁰⁰ Courts also have found antitrust liability where the defendant has disparaged the plaintiff's product.¹⁰¹ Lastly, courts have condemned the introduction and advertising of "new" products called fighting brands, targeted at rival products and often attempting to be "passed off" as them.¹⁰²

III. International Trade Commission Procedures and Cases

In 1974, sixty years after the establishment of the Federal Trade Commission, the federal agency primarily responsible for advertising regulation, Congress transformed the U.S. Tariff Commission, a purely investigatory agency, into the U.S. International Trade Commission (ITC), an agency with investigatory and adjudicative authority.¹⁰³ This section first explains the procedures of the ITC as applied to an advertising dispute and then describes several cases involving such disputes.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ 15 U.S.C. § 2 (1988).

⁹⁸ *See* Ross D. Petty, *Predatory Promotion: A Theory of Antitrust Liability Whose Time Has Come?*, 27 AM. BUS. L. J. 215 (1989).

⁹⁹ *See* *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd*, 417 F.2d 622 (3d Cir. 1969). For cases involving "massive" advertising, price-cutting, and other anticompetitive practices, see *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929); *In re Golden Grain Macaroni Co.*, 78 F.T.C. 63, 66-67 (1971).

¹⁰⁰ *See, e.g.*, *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988); *Purex Corp. v. Proctor & Gamble Co.*, 596 F.2d 881, 889-90 (9th Cir. 1979), *appeal after remand*, 664 F.2d 1105 (9th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); *Bailey's Bakery Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720 (D. Hawaii 1964), *aff'd*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969). For a case nearly identical to *Mount Lebanon Motors*, where liability was denied, see *Rea v. Ford Motor Co.*, 497 F.2d 577, 590 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).

¹⁰¹ *See, e.g.*, *Multiflex v. Sam Moore*, 709 F.2d 980 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *International Travel v. Western Airlines*, 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971).

¹⁰² *See* Ross D. Petty, *Antitrust and Innovation: Are Product Modifications Ever Predatory?*, 22 SUFFOLK U. L. REV. 997 (1988).

¹⁰³ VAKERICS, *supra* note 8, at 6.

A. International Trade Commission Procedures

To challenge the advertising of imported goods, a complainant must file a complaint with the ITC containing far greater detail than the "notice" type complaint that a federal court would allow to initiate a Lanham Act lawsuit.¹⁰⁴ The ITC complaint must include facts that constitute an unfair method of competition or unfair act, including descriptions of known instances of the unlawful act and the names and addresses of the parties responsible for it.¹⁰⁵ The complaint must also define and describe the domestic injury caused by the practices and contain both the theory of injury and the factual basis establishing the injury, such as a reduction in profits or volume of sales.¹⁰⁶ The ITC's Office of Unfair Import Investigations is available to assist in drafting the complaint and to discuss the complaint with the plaintiff before it is filed.¹⁰⁷

Informal investigation by the Office occurs during the thirty day period after the complaint is filed to assist the ITC in deciding whether to institute a formal investigation.¹⁰⁸ The ITC must hold a public meeting and make that decision before the thirty day period lapses.¹⁰⁹ Unlike the FTC, the ITC begins investigation proceedings in any case where a complaint has been properly filed.¹¹⁰ The proceeding or trial is conducted by an Administrative Law Judge (ALJ) under rules similar to the Federal Rules of Civil Procedure that govern court trials. Unlike court trials, however, an Investigative Attorney is assigned to facilitate accurate and useful discovery and, after discovery, to advocate an independent position on the issues before the ALJ and the Commission.¹¹¹

After discovery, the ALJ conducts a trial and makes an initial determination concerning the alleged violations.¹¹² The Commission then determines whether to review the ALJ's determination or merely adopt it as its own.¹¹³ The Commission holds its own hearings focusing on whether to review the ALJ's decision as well as whether the public interest favors imposing a remedy and what form the remedy should take. The ITC must complete its investigation and make its determination on liability and recommendation on a remedy within one year or, "in more complicated cases," within eighteen months of the Federal Register announcement of the inves-

¹⁰⁴ See VAKERICS, *supra* note 8, at 512.

¹⁰⁵ 19 C.F.R. § 210.20 (1991).

¹⁰⁶ *Id.*

¹⁰⁷ See VAKERICS, *supra* note 8, at 514.

¹⁰⁸ *Id.*

¹⁰⁹ 19 C.F.R. § 210.12 (1991).

¹¹⁰ VAKERICS, *supra* note 8, at 518.

¹¹¹ See Donald Knox Duvall, FEDERAL UNFAIR COMPETITION ACTIONS: PRACTICE AND PROCEDURE UNDER SECTION 337 OF THE TARIFF ACT OF 1930 649-52 (1991).

¹¹² VAKERICS, *supra* note 8, at 538.

¹¹³ *Id.*

tigation.¹¹⁴ The President then has sixty days to review and approve or disapprove the determination of liability.¹¹⁵ Of course, judicial review of final ITC determinations and recommendations is available by the U.S. Court of Appeals for the Federal Circuit.¹¹⁶

Section 337 dictates that the primary remedy of the ITC in unfair methods of competition cases is an order excluding the products in question from entry into U.S. commerce.¹¹⁷ It states that the ITC "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States. . . ."¹¹⁸ The ITC may decide not to order exclusion if such an order would be contrary to the public interest,¹¹⁹ or it may limit its order to only the products of certain importers rather than all such products.¹²⁰ The ITC has broad discretion in formulating the appropriate remedy.¹²¹ It may also order that goods be temporarily excluded during the pendency of its proceeding to the same extent that federal district courts may order temporary relief.¹²² Because these orders operate against goods, it is not necessary for the ITC to have personal jurisdiction over the respondents, who are frequently foreign businesses.¹²³

Exclusion orders seem appropriate in cases where the violation is directly related to the product or its packaging: patent, trademark, or copyright infringement; passing off; or the misappropriation of trade dress. Advertising, however, as opposed to labeling and packaging, is separate and distinct from the product. It therefore may be more appropriate in some advertising cases for the ITC to issue a cease and desist order against the unlawful conduct.¹²⁴ Such an order is enforceable in federal district court, with a penalty for non-compliance being the greater of \$100,000 or twice the domestic value of the goods per day of violation.¹²⁵

Because section 337 creates a right to relief "in addition to any other provision of law,"¹²⁶ it is important to note that a complainant

¹¹⁴ 19 U.S.C. § 1337(b)(1) (1988).

¹¹⁵ *Id.* § 1337(j)(2).

¹¹⁶ *Id.* § 1337(c).

¹¹⁷ *Id.* § 1337(d).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See David S. Nance, *Relief from Unfair Import Practices Under Section 337 of the Tariff Act of 1930: An Overview*, 13 N.C. J. INT'L L. & COM. REG. 493, 516-17 (1988).

¹²¹ *Id.* at 514-17.

¹²² 19 U.S.C. § 1337(e)(3).

¹²³ See *Sealed Air Corp v. U.S.I.T.C.*, 645 F.2d 976, 985 (C.C.P.A. 1981). For a discussion of ITC jurisdiction, see Janet D. Saxon & Paul A. Newhouse, *Section 337 Jurisdiction and the Forgotten Remedy*, 9 CAMPBELL L. REV. 45 (1986).

¹²⁴ 19 U.S.C. § 1337(f)(1). Cease and desist orders have rarely been used by the ITC. See Saxon & Newhouse, *supra* note 123, at 61.

¹²⁵ 19 U.S.C. § 1137(f)(2).

¹²⁶ *Id.* § 1337(a). The courts have been reluctant to enjoin parties from also participating in a section 337 proceeding. David I. Wilson & George E. Hovanec, Jr., *The Growing*

may file for relief from false advertising concurrently with the ITC and a district court. This raises the issue of whether ITC determinations will be given *res judicata* effect in other proceedings. Patent-based 337 proceedings are not given *res judicata* effect because district courts have exclusive jurisdiction over patent validity.¹²⁷ On the other hand, the Second Circuit recently decided to give *res judicata* effect to ITC determinations in trademark infringement cases.¹²⁸ Although this issue has yet to be addressed in the context of a false advertising case, it appears likely that district courts would follow the Second Circuit's reasoning in the trademark situation.

B. *Proving a Section 337 Violation*

A complainant in a section 337 proceeding must prove (1) an unfair method of competition or unfair act in the importation into or sale of imported articles in the United States, and (2) that the threat or effect of the act is to (a) "destroy or substantially injure an industry in the United States," (b) prevent its establishment, or (c) "restrain or monopolize trade and commerce in the United States."¹²⁹ All sorts of practices have been found unfair under the first criterion including false advertising, as detailed below.¹³⁰ The proof of injury merits discussion.

The first step in proving injury is defining the domestic industry.¹³¹ If the U.S. manufacturing is significant and distinct from any overseas manufacturing, then a domestic industry exists.¹³² Even without domestic manufacturing, a domestic industry may exist if domestic services such as quality control, packaging, installation, and warranty service substantially add to the value of the product.¹³³

Once the domestic industry is defined, the ITC considers several factors in making its determination of injury to that industry: (1) lost sales or customers; (2) underpricing by imports; (3) significant market penetration by imports; (4) declining profits, employment, or production in the domestic industry; and (5) large foreign produc-

Importance of Trademark Litigation Before the International Trade Commission Under Section 337, 76 TRADEMARK REP. 1, 2 n.8 (1986).

¹²⁷ See *W.A. Baum Co. v. Propper Mfg. Co.*, 343 F. Supp. 1016, 1019 (E.D.N.Y. 1972).

¹²⁸ *Union Mfg. Co. v. Han Baek Trading Co.*, 763 F.2d 42, 45 (2d Cir. 1985).

¹²⁹ 19 U.S.C. § 1337(a)(1)(A) (1988).

¹³⁰ For a general discussion of types of practices, see Nance, *supra* note 120, at 496-506.

¹³¹ See *VAKERICS*, *supra* note 8, at 498. "Absent a showing of domestic industry, the ITC has no jurisdiction to hear a 337 case, and the complaint will be dismissed." *Id.*

¹³² See *Schaper Mfg. Co. v. U.S.I.T.C.*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983).

¹³³ *Id.* (finding no domestic industry); *In re Certain Products with Gremlins Character Depictions*, 8 I.T.R.D. (BNA) 1585 (Mar. 1986) (no domestic industry); *In re Certain Cube Puzzles*, 4 I.T.R.D. (BNA) 2102 (1982) (domestic industry based on rigorous domestic quality control); *In re Certain Air-Tight Cast Iron Stoves*, 3 I.T.R.D. (BNA) 1785 (Jan. 1981) (domestic industry found based on advertising and servicing).

tion capacity with intent to increase U.S. sales.¹³⁴ Only a few cases have found no injury to domestic industry.¹³⁵

C. ITC Advertising Cases

The vast majority (sixteen) of section 337 complaints alleging false advertising have been withdrawn prior to adjudication so that the specific details of the advertising allegations have not been reported.¹³⁶ In three additional cases, decisions published prior to the withdrawal or settlement of the advertising claims indicate the specific allegations. In *Certain Insulated Security Chests*, the complainant alleged it had documented tests that disproved advertising claims that the chest could withstand temperatures of "1550 degrees F" for "up to 30 minutes."¹³⁷ In *Certain Single Handle Faucets*, the complainant initially challenged, but did not pursue, claims that the imported faucets had been "proven dependable in millions of installation [sic]."¹³⁸ This claim was challenged as both false advertising and as evidence that the importer was attempting to pass off its faucets as being those of the complainant.¹³⁹ Finally, in *Certain Limited Charge Cell Culture Microcarriers*, the complainants withdrew false advertising charges concerning price comparisons and the origin of the technol-

¹³⁴ See Nance, *supra* note 120, at 512; VAKERICS, *supra* note 8, at 503-06; Wilson & Hovanec, *supra* note 128, at 6-7.

¹³⁵ See VAKERICS, *supra* note 8, at 505-06.

¹³⁶ See *In re* Certain Strip Lights, Inv. No. 337-TA-287, 54 Fed. Reg. 14874 (Apr. 13, 1989)(allegations withdrawn); *In re* Certain Laser Inscribed Diamonds and the Method of Inscription, Inv. No. 337-TA-240, 51 Fed. Reg. 33935 (Sept. 24, 1986)(settlement agreement); *In re* Certain Upper Body Protector Apparatus for Use in Motorsports, Inv. No. 337-TA-234, 51 Fed. Reg. 44536 (Dec. 10, 1986)(settlement agreement); *In re* Certain Key Telephone Systems and Components, Inv. No. 337-TA-223, 50 Fed. Reg. 50849 (Dec. 12, 1985)(complaint withdrawn); *In re* Certain Automatic Bowling Machine Printed Circuit Control Boards, Inv. No. 337-TA-218, 50 Fed. Reg. 37918 (Sept. 18, 1985)(consent order agreement); *In re* Certain Pull-Type Golf Carts and Wheels Therefor, Inv. No. 337-TA-204, 50 Fed. Reg. 16170 (Apr. 24, 1985)(complaint withdrawn); *In re* Certain Anodes for Cathodic Protection and Components Thereof, Inv. No. 337-TA-199, 50 Fed. Reg. 10116 (Mar. 13, 1985)(settlement agreement); *In re* Certain Softballs and Polyurethane Cores Therefor, Inv. No. 337-TA-190, Pub. 1751 (Apr. 1985)(allegations withdrawn); *In re* Certain Glass Construction Blocks, Inv. No. 337-TA-187, 50 Fed. Reg. 6073 (Feb. 13, 1985); *In re* Certain Metal and Wire Shelf Products and Accessories, Inv. No. 337-TA-175, 49 Fed. Reg. 29161 (July 18, 1984)(complaint withdrawn); *In re* Certain Poultry Cut Up Machines, Inv. No. 337-TA-159, 49 Fed. Reg. 15288 (Apr. 18, 1984)(terminated on the basis of two consent orders); *In re* Certain Radar Detectors and Accompanying Owner's Manuals, Inv. No. 337-TA-149, 49 Fed. Reg. 2168 (Jan. 18, 1984)(settlement agreement); *In re* Certain Copper-Clad Stainless Steel Cookware, Inv. No. 337-TA-141, 48 Fed. Reg. 44279 (Sept. 28, 1983)(variety of reasons); *In re* Certain Marine Hardware and Accessories, Inv. No. 337-TA-136, 48 Fed. Reg. 20164 (May 4, 1983)(settlement agreement); *In re* Certain Thermal Conductivity Sensing Gem Testers and Components Thereof, Inv. No. 337-TA-100, 47 Fed. Reg. 17134 (Apr. 21, 1982)(settlement agreement); *In re* Certain Alternating Pressure Pads, Inv. No. 337-TA-48, 44 Fed. Reg. 12286 (Mar. 6, 1979)(complaint withdrawn).

¹³⁷ Inv. No. 337-TA-244, 1986 ITC LEXIS 155 (June 17, 1986)(ALJ decision to amend the complaint).

¹³⁸ 6 I.T.R.D (BNA) 1470, 1484 (Nov. 1984).

¹³⁹ *Id.*

ogy in question.¹⁴⁰ Thus, in nineteen cases, the false advertising allegations were settled or withdrawn.¹⁴¹

The remaining ITC advertising cases fall into four categories. First, five cases pled false advertising, but really had no separate cause of action beyond passing off or false designation of origin.¹⁴² Similarly, three other cases alleged misappropriation of a picture of the complainant's product used in the respondent's advertisement, which is essentially passing off or false designation of origin.¹⁴³ While false advertising, broadly defined, would certainly include such practices, these eight cases offer little precedential value for false advertising cases generally.

The second category of false advertising cases consists of only one early case where the ITC found infringement of a patent as a basis for an exclusion order but did not reach a determination on the false advertising count.¹⁴⁴ In a separate opinion, Vice Chairman Albenger and Commissioner Stern suggested that the advertising claim "as seen on TV" had not clearly been proven false by the complainant.¹⁴⁵

The third category is comprised of cases where false advertising was found, but failed to meet the requirements of section 337. In two other cases, the ITC found that false claims of either actual or pending U.S. patent protection constituted false advertising, but found no section 337 violation because of insufficient proof of injury to the domestic industry.¹⁴⁶ Similarly, in *Certain Compound Action Metal Cutting Snips*, the ITC found that a false claim that snips had molybdenum blades constituted false advertising, but also held that

¹⁴⁰ Inv. No. 337-TA-129, 1983 ITC LEXIS 80 (Mar. 14, 1983)(ALJ decision).

¹⁴¹ In one other case, the ITC Administrative Law Judge noted false advertising about a product's chemical content that was not challenged. See *In re Certain Minoxodil Powder, Salts and Compositions For Use in Hair Treatment*, Inv. No. 337-TA-267, 1988 ITC LEXIS 19 (Feb. 16, 1988).

¹⁴² *In re Certain Electric Power Tools, Battery Cartridges and Battery Chargers*, Inv. No. 337-TA-284, 54 Fed. Reg. 31896 (Aug. 2, 1989)(finding no liability for false advertising/passing off); *In re Certain Nut Jewelry*, 9 I.T.R.D. (BNA) 1595 (Nov. 1986)(exclusion order issued for products falsely labelled to imply hawaiian origin); *In re Certain Caulking Guns*, 6 I.T.R.D. (BNA) 1432 (Feb. 1984)(use of cut-away drawing held not to be false advertising/false designation of origin); *In re Certain Power Woodworking Tools*, Inv. No. 337-TA-115, 1983 LEXIS 22 (1983)(ALJ merges claim of false advertising with claim of false designation of origin); *In re Certain Surveying Devices*, 2 I.T.R.D. (BNA) 5409, 5418-21 (Jul. 1980)(false advertising count discussed with passing off and false designation of origin).

¹⁴³ *In re Certain Apparatus for Installing Electrical Lines*, 7 I.T.R.D. (BNA) 1869 (June 1985); *In re Certain Heavy Duty Staple Gun Tackers*, 6 I.T.R.D. (BNA) 1623 (Feb. 1984); *In re Certain Novelty Glasses*, 2 I.T.R.D. (BNA) 5400 (July 1979).

¹⁴⁴ *In re Certain Rotary Scraping Tools*, 2 I.T.R.D. (BNA) 5233 (Jan. 1980).

¹⁴⁵ *Id.*

¹⁴⁶ *In re Certain Vertical Milling Machines*, 6 I.T.R.D. (BNA) 1259 (Mar. 1984), *aff'd.*, *Textron, Inc v. ITC*, 753 F.2d 1019 (Fed. Cir. 1985)(use of complainant's product photograph and trademarks also false advertising); *In re Certain Solder Removal Wicks*, 582 F.2d 628 (C.C.P.A. 1978).

"there are no confusing similarities between these products and those of complainant which could give rise to injury or tendency to injure complainant, as required by section 337."¹⁴⁷ In one additional case, the ITC found that the use of a picture of the complainant's product in the respondent's advertisement and a false logo for Underwriters Labs constituted false advertising, but held that no proof existed of importation into the U.S.¹⁴⁸ The complainant later sued and obtained an injunction against these and other practices in federal district court under the Lanham Act.¹⁴⁹

Lastly, the ITC found that false advertising did constitute a violation of section 337 in two cases involving claims that the imported product was equivalent to the domestic product.¹⁵⁰ In both cases, the importers were attempting to compete with dominant firms in the product market.¹⁵¹ It is not unusual for small competitors to claim equivalency to the market leader under these circumstances (the marketing literature refers to this tactic as an associative claim).¹⁵² These cases also successfully challenged the importers for passing off.¹⁵³

The earlier of these two cases was the first in which the ITC discussed its authority over false advertising. In *Certain Airtight Cast Iron Stoves*, the complainant challenged stoves imported from Taiwan that copied non-functional features of Jotul brand stoves from Scandinavia as violating a common law trademark on those features.¹⁵⁴ It also challenged these imports for falsely advertising their origin and their equivalency to Scandinavian stoves.¹⁵⁵ The ITC cited both the Lanham and FTC acts as authorities for finding that these false advertising claims constituted unfair competition under section 337.¹⁵⁶

An interesting issue in this precedent-setting case was the Commission's interpretation of the terms "domestic industry" and "proof of injury."¹⁵⁷ Although the complainant's products were manufactured in Norway, the Commission found there to be a domestic industry in the sale, installation, and servicing of these stoves

¹⁴⁷ *In re Certain Compound Action Metal Cutting Snips*, 8 I.T.R.D. (BNA) 1307, 1325 (Mar. 1986).

¹⁴⁸ *In re Certain Miniature Plug-In Blade Fuses*, 4 I.T.R.D. (BNA) 2417, 2432 (Jan. 1983).

¹⁴⁹ *See Littlefuse, Inc. v. Parker*, 230 U.S.P.Q. (BNA) 654 (N.D. Ill. 1986).

¹⁵⁰ *In re Certain Airtight Cast-Iron Stoves*, 3 I.T.R.D. (BNA) 1158 (Dec. 1980); *In re Certain Plastic Food Storage Containers*, 6 I.T.R.D. (BNA) 2133 (Aug. 1984).

¹⁵¹ *See infra* note 155.

¹⁵² *See, e.g., Debra Scammon, Comparative Advertising: A Reexamination of the Issues*, 12 J. CONSUMER AFFAIRS 381, 387 (1978).

¹⁵³ *In re Certain Plastic Food Storage Containers*, 6 I.T.R.D. (BNA) 2133 (Aug. 1984); *In re Certain Airtight Cast Iron Stoves*, 3 I.T.R.D. (BNA) 1158 (Dec. 1980)(also false advertising of origin).

¹⁵⁴ 3 I.T.R.D. at 1159.

¹⁵⁵ *Id.* at 1160.

¹⁵⁶ *Id.* at 1159-60.

¹⁵⁷ *Id.* at 1161-63.

by U.S. firms and workers.¹⁵⁸ It also found this domestic industry to be injured by the challenged practices since imports were obtaining significant market penetration.¹⁵⁹

The copying of non-functional features in *Cast Iron Stoves* also were challenged as a restraint of trade under the antitrust laws.¹⁶⁰ Despite finding injury to the domestic industry, the ITC found no evidence of concerted action and no suppression of competition sufficient to constitute a restraint of trade.¹⁶¹ Thus, while the ITC's antitrust analysis appears sketchy, its finding of no antitrust liability is consistent with other antitrust cases that have only found liability when the advertising was "massive" or disparaging.¹⁶²

Two other points about this decision bear mentioning. First, the Commission failed to reconcile its findings that the Taiwanese stoves were both being passed off as Jotul stoves and being falsely advertised as equivalent to them.¹⁶³ The former illegal practice tells consumers they are Jotul stoves; the latter says they are not, but are just as good.¹⁶⁴ Whether both claims can be communicated to consumers simultaneously is not explained by the decision.

Second, while the decision cites to FTC precedent, it omits any reference to a famous FTC decision that appears analogous. In *In re Heinz B. Kirchner*,¹⁶⁵ the Federal Trade Commission noted its responsibility to protect the gullible and credulous consumer, but stated that it would not hold advertisers liable for every conceivable interpretation of the advertising, such as those that might be made by the "foolish or feeble-minded."¹⁶⁶ The example that the FTC presented of an "outlandish" interpretation was the view that Denmark was the source of all Danish pastries.¹⁶⁷ Perhaps Scandinavian stoves do not hold the same sort of generic meaning for consumers as do Danish pastries, but the ITC did not discuss this issue.

The second ITC case to find section 337 liability for false advertising is *In re Certain Plastic Food Storage Containers*.¹⁶⁸ The complain-

¹⁵⁸ *Id.* at 1162.

¹⁵⁹ *Id.* at 1163.

¹⁶⁰ *Id.* at 1160.

¹⁶¹ *Id.* at 1161.

¹⁶² See *supra* notes 98-101. In *In re Certain Electrically Resistive Monocomponent Toner*, 10 I.T.R.D. (BNA) 1672 (Mar. 1988), the ALJ found the respondent liable under section 337 for the maintenance of monopoly power through disparagement—referring to its rivals as "pirates." The Commission reversed stating that the ALJ improperly reversed the burden of proof by forcing the respondent to disprove injury rather than requiring the complainant to prove it. The ITC found there was no proof that the disparagement was exclusionary and dismissed the case. *Id.* at 1676-77.

¹⁶³ *Certain Airtight Cast Iron Stoves*, 3 I.T.R.D. at 1159-60.

¹⁶⁴ *Id.* at 1160.

¹⁶⁵ See *In re Heinz B. Kirchner*, 63 F.T.C. 1282 (1963), *aff'd*, 337 F.2d 731 (9th Cir. 1964).

¹⁶⁶ *Heinz B. Kirchner*, 63 F.T.C. at 1290.

¹⁶⁷ *Id.*

¹⁶⁸ 6 I.T.R.D. (BNA) 2133 (Aug. 1984).

ant, who made Tupperware brand storage containers, based its false advertising cause of action solely on the Lanham Act. It alleged, and the Administrative Law Judge found (these findings were adopted by the Commission), that the advertising claims of "interchangeability" with Tupperware were false because even though the products fit together, Tupperware had conducted tests which proved that its products sealed better and were more resistant to impact and warpage.¹⁶⁹ The decision follows Lanham Act precedent of not requiring proof of how consumers would interpret the advertising claims because they were found to be literally false.¹⁷⁰ The decision adopts a dictionary definition of interchangeability, "mutual substitution without loss of function or suitability," without considering whether in this advertising context consumers would limit the advertising claim to fit rather than also including quality.¹⁷¹

The remedy ordered by the ITC in both of these cases was the exclusion of products that violated complainants' trademarks. In *Cast Iron Stoves*, the order was a broad exclusion order since the copying of nonfunctional features violated common law trademarks.¹⁷² In *Tupperware*, the exclusion order was limited to those products in packaging that used the Tupperware name or trademark.¹⁷³ In both cases, the ITC issued cease and desist orders against the false advertising as well.

In summary, while occasionally false advertising charges before the ITC involve advertising claims completely distinct from allegations of passing off or false designation or origin (e.g., "can withstand temperatures . . ." and "molybdenum blades,") these cases are rare. Still rarer are cases where the ITC has actually ordered the cessation of false advertising. Therefore, the ITC has not yet become an agency for addressing general problems of false advertising for imports.

IV. Unresolved Section 337 Issues

The ITC cases that analyze advertising issues suggest three areas of concern. First, in areas where FTC law differs from Lanham Act jurisprudence, which should the ITC follow?¹⁷⁴ Second, how should the ITC approach section 337's requirement of injury to a domestic industry in an advertising case and should it also consider consumer interests in determining the injury?¹⁷⁵ Third, what reme-

¹⁶⁹ *Id.* at 2147.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 3 I.T.R.D. at 1164.

¹⁷³ 6 I.T.R.D. at 2134-35.

¹⁷⁴ See *infra* notes 183-94 and accompanying text.

¹⁷⁵ See *infra* notes 195-213 and accompanying text.

dies are appropriate in ITC advertising cases?¹⁷⁶ Each of these issues will be discussed in turn.

A. Federal Trade Commission or Lanham Act Precedent

While *Cast Iron Stoves* approvingly adopts precedent under both the FTC and Lanham Acts,¹⁷⁷ most ITC advertising cases only discuss precedent under the Lanham Act.¹⁷⁸ This appears to be the more appropriate standard for the ITC because despite participation by the Commission Investigative Attorney,¹⁷⁹ it primarily functions like a federal district court hearing a case litigated by private parties.¹⁸⁰ Furthermore, also like a court, it is required to initiate, investigate, and hear every case that is properly filed before it.¹⁸¹ In contrast, the FTC staff acts as complaint counsel in its administrative proceedings. It only initiates cases where it has reason to believe the FTC Act has been violated and that are in the public interest.¹⁸²

Although the majority of ITC advertising cases appear to adopt Lanham Act precedent, in *Certain Caulking Guns*, the ITC appears closer to adopting FTC precedent.¹⁸³ The ITC stated that it did not need evidence of consumer advertising interpretation; it could decide for itself whether advertising was unfair or deceptive.¹⁸⁴ This holding implies that the ITC has advertising expertise comparable to the FTC.¹⁸⁵ Most courts in Lanham Act cases will only interpret express claims, not implied ones, without evidence of consumer interpretation.¹⁸⁶ The ITC cited its earlier decision in *Cast Iron Stoves* as precedent for its holding even though that decision contains no authority for such a holding beyond the explicit false use of pictures of Jotul stoves in the respondents' advertising and the false description of the Taiwanese stoves as Scandinavian.¹⁸⁷ The language in *Caulking Guns* is not as troubling as it first appears when the entire decision is examined. The complainant alleged that respondents' use of cut-away drawings of caulking guns would confuse consumers since the complainant first used this common advertising technique in the

¹⁷⁶ See *infra* notes 214-25 and accompanying text.

¹⁷⁷ See also *In re* Certain Nut Jewelry, 9 I.T.R.D. 1595, 1598 (Nov. 1986)(citing both FTC and Lanham Act precedent).

¹⁷⁸ See, e.g., *In re* Certain Vertical Milling Machines, 6 I.T.R.D. (BNA) 1259, 1274-76 (Mar. 1984); *In re* Certain Caulking Guns, 6 I.T.R.D. (BNA) 1432, 1452-53; *In re* Certain Plastic Food Storage Containers, 6 I.T.R.D. (BNA) at 2147-48.

¹⁷⁹ See *supra* note 111 and accompanying text.

¹⁸⁰ VAKERICS, *supra* note 8, at 522.

¹⁸¹ 19 U.S.C. § 1337(b)(1) (1988).

¹⁸² 15 U.S.C. § 45(b) (1988).

¹⁸³ 6 I.T.R.D. (BNA) 1432, 1452 (1984).

¹⁸⁴ *Id.* at 1453.

¹⁸⁵ See *supra* note 37 and accompanying text.

¹⁸⁶ See *supra* notes 75-78 and accompanying text.

¹⁸⁷ 6 I.T.R.D. (BNA) at 1453.

caulking gun market.¹⁸⁸ The ITC held that the complainant had not proven consumer confusion and held that false advertising therefore had not been proven. Liability was found only for patent infringement.¹⁸⁹ Thus, while the ITC suggested it had expertise like the FTC to interpret advertising without evidence of consumer interpretation, it declined to find liability in the absence of such evidence.¹⁹⁰ As this Article makes clear, the ITC has reviewed so few advertising cases that its expertise level is more akin to that of a district court than the FTC.

This analysis also suggests that the ITC should not adopt the FTC doctrine of advertising substantiation.¹⁹¹ Under this doctrine the FTC requires advertisers to have a "reasonable basis" for their advertising claims.¹⁹² The FTC may stop any advertising that lacks such a basis without proving the claims are false.¹⁹³ Rather it should require complainants to prove the falsity of the advertising just as most courts in Lanham Act cases have done when faced with this issue. Most Lanham Act courts have rejected this doctrine because it is contrary to the language of the statute and because the courts are skeptical of their own expertise and of the plaintiff's private interest in stopping a rival's advertising where the advertising is not proven false.¹⁹⁴

B. Proving Injury and Consumer Interest

Two troubling findings of this Article stand in stark contrast to each other and emphasize the ITC's need to develop a consistent standard for proving industry injury. First, the only two cases where the ITC ordered advertising claims to cease, *Cast Iron Stoves* and *Food Storage Containers*, involved associative claims by small marketers offering consumers a lower priced alternative to the market leader.¹⁹⁵ The ITC found industry injury and condemned these ads without extrinsic evidence of whether consumers were likely to be deceived by the ads (i.e., passing off had occurred) or whether consumers understood the ads to make comparability claims.¹⁹⁶

Second, in several other cases where the ITC found advertising claims to be false, it failed to order their cessation because it rejected industry injury arguments based on lost sales.¹⁹⁷ Thus, it rejected the arguments that it had accepted in *Cast Iron Stoves* and *Food Storage*

¹⁸⁸ *Id.* at 1452.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *supra* notes 47-50 and accompanying text.

¹⁹² See *supra* note 47 and accompanying text.

¹⁹³ See *supra* note 53 and accompanying text.

¹⁹⁴ See *supra* note 70 and accompanying text.

¹⁹⁵ See *supra* notes 150-73.

¹⁹⁶ See *supra* notes 163-64, 170.

¹⁹⁷ See *supra* notes 149-50 and accompanying text.

*Containers.*¹⁹⁸

In *Certain Vertical Milling Machines*,¹⁹⁹ for example, the ITC found a number of instances of false advertising, including the use of trade names that infringed on the complainant's trademarks, the use of a photograph of complainant's product in advertising that purported it was respondent's product, and a false claim of patent protection.²⁰⁰ The ITC noted a decrease in complainant's sales and an increase in sales of imported products, but attributed these market changes to complainant's price increase and a general decrease in the price of imports.²⁰¹ The vast majority of imported machines were marketed by companies that had not engaged in any unfair acts, and the Commission held that there was "no direct evidence that . . . the unfair acts [had] caused substantial injury to the domestic industry."²⁰² While this holding justifies not issuing a general exclusion order against all such vertical milling machines, it is a narrow interpretation of section 337's requirement of proof that "the threat or effect of which [unfair act] is . . . to destroy or substantially injure an industry in the United States."²⁰³ The holding does not explain the Commission's reluctance to issue a cease and desist order against particular companies to cover the challenged practices.

In the past, the ITC has interpreted its authority more broadly to cover conceivable lost sales.²⁰⁴ Such an interpretation is more consistent with the Lanham Act,²⁰⁵ which requires that the plaintiff prove that the defendant's advertisement "likely" has caused or will cause injury to the plaintiff.²⁰⁶ Likely injury is presumed in cases of comparative advertising.²⁰⁷ Proof of actual lost sales caused by the advertising is required to obtain an award of damages, but not required for injunctive relief.²⁰⁸

A liberal interpretation of the proof of injury requirement is also consistent with recent congressional concerns. Prior to the passage

¹⁹⁸ See 3 I.T.R.D. (BNA) 1158; 6 I.T.R.D. (BNA) 2133.

¹⁹⁹ 6 I.T.R.D. (BNA) 1259 (1984).

²⁰⁰ 6 I.T.R.D. (BNA) at 1274-75. See also *In re Certain Solder Removal Wicks*, 582 F.2d 628 (C.C.P.A. 1978)(false advertising claims of "patent pending" held not injurious).

²⁰¹ 6 I.T.R.D. (BNA) at 1276.

²⁰² *Id.*

²⁰³ 19 U.S.C. § 1337(a)(1)(A) (1988).

²⁰⁴ H. REP. No. 571, 93d Cong., 1st Sess. 78 (1974)(relying on *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955)). But see *In re Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper and Components Thereof*, Inv. No. 337-TA-82, Pub. No. 1138 at 18 (1981)(dissenting Commissioner asserting the report "is not an expression of Congressional intent that any conceivable lost sale established a tendency to substantially injure.").

²⁰⁵ See *supra* note 66 and accompanying text.

²⁰⁶ See, e.g., *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980).

²⁰⁷ See, e.g., *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988).

²⁰⁸ *Id.*

of the Omnibus Trade and Competitiveness Act of 1988,²⁰⁹ the House Ways and Means Committee suggested that this requirement might unduly discourage proper complainants from filing section 337 cases before the ITC and estimated that half of the litigation costs of a section 337 case are devoted to proving this element.²¹⁰ For this reason, the 1988 Act eliminated the injury requirement for cases involving statutory intellectual property matters.²¹¹ This amendment, however, did not affect cases alleging false advertising.

To become an effective agency against false advertising, the ITC must develop consistent standards for proving injury. Since the Lanham Act does require some proof of likely injury,²¹² completely eliminating the requirement of injury is too extreme. The statute could be amended to be consistent with the Lanham Act case law or the ITC could simply decide to follow earlier precedent to be consistent with the Lanham Act. In either event, the ITC should strive to consistently consider the consumer benefits from competition in determining whether the industry is injured by the alleged false advertising.²¹³

C. Remedies

The Omnibus Trade and Competitiveness Act of 1988 made important clarifications to the ITC's remedial authority under section 337. First, it imposes deadlines of 90 days (or 150 days in complicated cases) for the granting of temporary relief, comparable to a district court preliminary injunction.²¹⁴ These deadlines were added to prevent the ITC from unduly delaying temporary relief, but Congress anticipated that the ITC would still conduct a hearing before granting such relief (unlike a district court temporary restraining order).²¹⁵ Second, the Act empowers the ITC to require the complainant to post a bond before ordering temporary relief.²¹⁶ This step limits the harassment of respondents through temporary relief.²¹⁷ Third, the Act raises the maximum penalty for violating cease and

²⁰⁹ Pub. L. No. 100-418, 102 Stat. 1107 (1988).

²¹⁰ H. REP. NO. 100-40, 100th Cong., 1st Sess. 156 (1987).

²¹¹ See 19 U.S.C. § 1337(a)(1)(B),(C), (D) (1988).

²¹² See *supra* notes 84-89.

²¹³ For example, the FTC has extolled the virtues of comparative advertising including associative claims. See 16 C.F.R. § 14.15 (1989); Dee Pridgen & Ivan L. Preston, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*, 14 GA. L. REV. 635, 673-79 (1980). The FTC rarely challenges comparative advertising claims, particularly those that explicitly name the competitor. See Ross D. Petty, *The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?*, 10 J. PUB. POL'Y & MARKETING (forthcoming 1991)(less than 20% of recent FTC cases challenge comparative claims, but over half of Lanham Act lawsuits challenge such claims).

²¹⁴ 19 U.S.C. § 1337(e)(2) (1988).

²¹⁵ See H. REP. NO. 100-40, 100th Cong., 1st Sess. at 115 (1987).

²¹⁶ 19 U.S.C. § 1337(e)(3).

²¹⁷ See H. CONF. REP. NO. 100-576, 100th Cong., 2d Sess. 635-36 (1988).

desist orders and settles an internal ITC debate by clarifying that such orders may be imposed in addition to exclusion orders.²¹⁸

Yet despite these amendments, remedial questions remain. It has not yet been decided, though it seems likely, that the ITC can use its cease and desist authority to order affirmative information disclosures or corrective advertising. Both the FTC and the Lanham Act courts have imposed such orders under similar remedial authority.²¹⁹ In contrast, there is no authority for the ITC to order consumer refunds or competitor damages.

The ITC also needs to limit the role of exclusion orders in false advertising cases. It likely will not be in the public interest to completely exclude products, otherwise legally imported, merely because they are falsely advertised here.²²⁰ This remedy goes far beyond those under the FTC or Lanham Acts.²²¹

A final issue involves false advertising in a domestic context. One could question whether the ITC should intervene at all in a purely domestic false advertising case, where the domestic importer, not a foreign firm, is responsible for false advertising. In cases like *Cast Iron Stoves*, the ITC had no difficulty exercising jurisdiction over domestic dealers who purchased the stoves from domestic distributors, but in that case the product itself violated a common law trademark.²²² In *Cardiac Pacemakers & Components Thereof*, the ALJ dismissed a case involving imported components with significant other uses beyond the pacemaker that allegedly infringed upon a U.S. patent and held that no nexus existed between importation and the unfair act.²²³

It is not clear what the ITC would do in a case where the only unfair practice concerning an imported product was its false advertising by domestic dealers.²²⁴ In a carefully worded footnote, Vice Chairman Liebler has recognized this question, but reserved judgment on it.²²⁵

V. Conclusion

Competitor challenges to advertisements today in many different forums are commonplace. While the FTC considers advertising

²¹⁸ 19 U.S.C. § 1337(f)(1) (1990). For a synopsis of the debate, see *In re Certain Compound Act Metal Cutting Snips*, 8 I.T.R.D. (BNA) 1307, 1310-11 nn. 14-19; Saxon & Newhouse, *supra* note 123, at 47 n.10.

²¹⁹ See *supra* notes 55, 56, 61, 91 and accompanying text.

²²⁰ Moreover, the exclusion order is often ineffective. See Saxon & Newhouse, *supra* note 123, at 59.

²²¹ See *supra* notes 51-63, 82-89 and accompanying text.

²²² See *supra* note 154 and accompanying text.

²²³ Inv. No. 337-TA-162, ALJ Order No. 37 (1984).

²²⁴ *In re Certain Apparatus for Installing Electrical Lines*, 7 I.T.R.D. (BNA) 1869, 1876.

²²⁵ See *id.* at 1876 n. 23.

as often benefiting consumers, the ITC, like most Lanham Act courts, fails to account for any such benefit. Given this similarity to the Lanham Act, it is somewhat surprising that section 337's condemnation of "unfair methods of competition and unfair acts" has not yet made the U.S. International Trade Commission anywhere near as popular a forum as district courts under the Lanham Act.²²⁶ The ITC has only considered false advertising as an adjunct to other allegations of unfair practices such as trademark infringement, passing off, and false designation of origin.²²⁷

There exist two possible explanations for the limited number of ITC advertising actions.²²⁸ First, in some cases, the Commission has found no proof of injury to the domestic industry.²²⁹ These decisions suggest a requirement that the complainant present a high level of proof to show that the false advertising caused it to lose sales.²³⁰ Such a difficult standard is more akin to common law requirements that discouraged such suits rather than the more modern Lanham Act standard for injunction cases.²³¹

Second, when the majority of advertising for imported products is done by the domestic firm that imported them rather than the foreign firm that manufactured them, the ITC has not stated whether it will consider a suit only against the domestic importing firm. While issuing an exclusion order against such products clearly is inappropriate, the ITC's cease and desist authority is roughly comparable to remedies typically imposed by the FTC and Lanham Act district courts. In such cases the ITC offers the litigants the advantage of time limits to ensure that the case proceeds promptly. From the perspective of public policy, the ITC has the advantage of Presidential review and possible veto if foreign policy concerns merit such action.²³²

Perhaps the simplest explanation for the small number of ITC advertising cases is the lack of experience of advertising lawyers with this forum and the lack of experience of the ITC bar with advertising issues. Like the early years of the Lanham Act, time and gradual experience may correct these deficiencies. Indeed, perhaps with experience the ITC will develop a consistent treatment of industry injury in advertising cases that explicitly examines the consumer benefits from enhanced competition.

²²⁶ See *supra* notes 10-14 and accompanying text.

²²⁷ See *supra* notes 143-44, 150.

²²⁸ See *supra* notes 136-73 and accompanying text.

²²⁹ See *supra* notes 146-48 and accompanying text.

²³⁰ See *supra* notes 197-204.

²³¹ See *supra* notes 94, 205-08 and accompanying text.

²³² See *supra* note 115 and accompanying text.

