

# Washington University Law Review

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Volume 68

Issue 3 *Federalist Society Symposium: The Presidency and Congress—Constitutionally Separated and Shared Powers*

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January 1990

## Lanham Act Revision Provides Relief for Misleading Comparative Advertisements: Does It Go Too Far?

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### Recommended Citation

Sherry L. Gunn, *Lanham Act Revision Provides Relief for Misleading Comparative Advertisements: Does It Go Too Far?*, 68 WASH. U. L. Q. 707 (1990).

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## NOTES

### LANHAM ACT REVISION PROVIDES RELIEF FOR MISLEADING COMPARATIVE ADVERTISEMENTS: DOES IT GO TOO FAR?

Advertisers choose their words with care, to put their products in the best possible light without falsely depicting other products so as to subject themselves to civil liability. A recent revision to the Lanham Trademark Act requires advertisers to choose their words even more carefully, or face drastic consequences.

The Trademark Law Revision Act,<sup>1</sup> expands the federal law of false advertising by amending Lanham Act section 43(a) to proscribe false or misleading representations about another's goods, services, or commercial activities.<sup>2</sup> The section previously prohibited false representations only about one's own goods or services.<sup>3</sup> The revised section 43(a) effec-

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1. Pub. L. No. 100-667, 102 Stat. 3935 (codified as amended at 15 U.S.C. §§ 1051-1127 (1982 & Supp. 1989)).

2. The amended section provides:

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

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) 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.

Lanham Act § 43(a), 15 U.S.C. section 1125(a) (Supp. 1989).

The revised section 43(a)(1) codifies court interpretations of the previous section 43(a). See Driscoll, *The "New" 43(a)*, 79 TRADEMARK REP. 238, 239 (1989) (discussing the codification of judicial interpretation of § 43(a)). However, this Note is concerned with section 43(a)(2), which creates a cause of action previously unavailable. See *infra* notes 28-33 and accompanying text.

3. The former Lanham § 43(a) provided:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region

tively creates a federal cause of action for commercial disparagement or defamation<sup>4</sup> arising from comparative advertising.<sup>5</sup> Because the legislative history on this particular aspect of the Revision Act is sparse, the courts are left to decide the extent to which the amended section 43(a) codifies or rejects the common law of disparagement and defamation; what types of advertisements are “false” and “misleading” within the meaning of the statute; and what restraints the first amendment imposes upon the prima facie elements, defenses, and remedies.

Part One of this Note reviews the history of false advertising under the Lanham Act. Part Two summarizes the changes in section 43(a). Part Three examines the first amendment concerns raised by these changes and recommends an interpretation of the revised section 43(a) consistent with the statutory language, the policies motivating the revision, and first amendment requirements.

## I. HISTORY OF FALSE ADVERTISING UNDER THE LANHAM ACT

The Lanham Act, originally enacted in 1946,<sup>6</sup> repealed the Trademark

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in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982), amended by 15 U.S.C. § 1125(a) (Supp. 1989).

4. The revision is intended to prohibit “a kind of commercial defamation.” 134 CONG. REC. H10411-07 (1988).

5. The amendment affects comparative advertising more significantly than other forms of advertising because a defendant’s representations about another’s products are most likely to occur in the context of a comparative advertisement. “Comparative” advertisements, as used in this Note, include advertisements in which a competing product or producer is expressly or impliedly identified. For example, the advertiser might name or picture the competing product or use a phrase such as “the leading brand” or “the other guy” in a context in which the audience will be able to identify “the other guy.” See Sterk, *The Law of Comparative Advertising: How Much Worse is “Better” than “Great,”* 67 TRADEMARK REP. 368, 369 (1977) (There is no “clear line” between comparative and non-comparative advertisements; all advertising falls “on a continuum ranging from the clearly comparative to the exclusively non-comparative.”).

Comparative advertisements were not as common when the Lanham Act was enacted in 1946 as they are today. See Sterk, *supra*, at 368 & n.2 (tracing the prevalence of comparative advertisements to a 1960’s Avis rental car company “We Try Harder” campaign which implicitly identified the Hertz rental car company as “Number One”). See also Conlon, *Comparative Advertising: Whatever Happened to “Brand X”?*, 67 TRADEMARK REP. 407, 407 (1977) (NBC accepted television commercials which identified competitors by name and the Federal Trade Commission asked ABC and CBS to do the same. (citing Federal Trade Commission News Summary, No. 7—1972 (March 16-31, 1972))); Federal Trade Commission News, No. 1-0320 (March 20, 1972).

6. The Lanham Act was enacted on July 5, 1946. See ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1982 & Supp. 1989)).

Acts of 1905<sup>7</sup> and 1920.<sup>8</sup> The Trademark Act of 1920 allowed a private cause of action only for false designations of the origin of goods<sup>9</sup> made with intent to deceive.<sup>10</sup> The Lanham Act significantly expanded the scope of federal protection against unfair competition.<sup>11</sup> Section 43(a) of the original Lanham Act allowed plaintiffs to recover for a defendant's false representations without showing intent to deceive.<sup>12</sup> Further, section 43(a) proscribed "any false description or representation" in connection with "any goods or services," and, therefore, did not appear limited to claims of false designation of origin.<sup>13</sup>

7. Act of February 20, 1905, ch. 592, 33 Stat. 724 (repealed by Lanham Act of 1946, § 46(a), 60 Stat. 444 (1946)).

8. Act of March 19, 1920, ch. 104, 41 Stat. 533 (repealed by Lanham Act of 1946, § 46(a), 60 Stat. 444 (1946)).

9. False designations of origin may be geographic, such as advertising potatoes grown in Missouri as "Idaho potatoes." More commonly, however, a false designation of origin claim involves an allegation that the defendant is palming off his or her goods as the plaintiff's. For example, the defendant might use the plaintiff's trademark or a confusingly similar mark on the defendant's product, causing consumers to believe that the product originated with the plaintiff. In such a case, the defendant gains the advantage of the public goodwill associated with the plaintiff's mark, and the plaintiff may lose sales. If the defendant's product is of inferior quality, the plaintiff's reputation may be injured. Judge Learned Hand explained the injury caused by false designations of origin by stating that a merchant's mark:

. . . carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask.

*Yale Electric Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928).

10. Ch. 104, § 3, 41 Stat. 533 (1920), *repealed by Lanham Act*, ch. 540, § 46(a), 60 Stat. 444 (1946). Section 3 of the 1920 Trademark Act provided:

That any person who shall wilfully and with intent to deceive, affix, apply, or annex, or use in connection with any article or articles of merchandise . . . a false designation or origin . . . tending to falsely identify the origin of the merchandise . . . shall be liable to an action at law for damages and to an action in equity for an injunction, at the suit of any person, firm, or corporation doing business in the locality falsely indicated as that of origin.

*Id.* Section 3 was criticized for three reasons: proving intent to deceive was too onerous a burden for plaintiffs to bear; the section applied only to goods, not to services; and the section failed to proscribe misrepresentations other than false designations of origin. Note, *Damage Standards for False Advertising Under the Lanham Act: A New Trend Emerges*, 20 RUTGERS L.J. 125, 130 (1988) ("[A]lmost no decisions can be found in which relief was granted under section 3." (citing Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U.L. REV. 1029, 1034 (1957))).

11. One of the express purposes of the Lanham Act was "to protect persons engaged in [interstate] commerce against unfair competition." 15 U.S.C. § 1127 (1982), *amended by* 15 U.S.C. § 1127 (Supp. 1989) (content of intent statement unchanged).

12. 15 U.S.C. § 1125(a) (1982), *amended by* 15 U.S.C. § 1125(a) (Supp. 1989). For the text of section 43(a) prior to the 1988 Revision Act, see *supra* note 3.

13. *Id.* In addition, the original Lanham Act allowed recovery "by any person who believes

The courts, however, hesitated to interpret section 43(a) liberally.<sup>14</sup> For example, in *Chamberlain v. Columbia Pictures Corp.*,<sup>15</sup> the Ninth Circuit refused to allow a cause of action for an alleged misrepresentation that did not involve a false claim that the defendant's product originated with the plaintiff.<sup>16</sup> The plaintiffs, trustees of Samuel Clemens' estate, claimed all rights possessed by Mark Twain at his death.<sup>17</sup> The complaint alleged that the defendant produced a motion picture facetiously representing Mark Twain as its author.<sup>18</sup> The plaintiffs did not allege that the defendant promoted the movie as Mark Twain's, but that the association of Twain's name with the defendant's "corny" production detracted from the fame of Twain's name and injured the plaintiffs' ability to sell Twain's works.<sup>19</sup> The court held that the plaintiffs failed to state a cause of action under section 43(a) because they did not allege that the defendant appropriated their property rights by palming off<sup>20</sup> its movie as Twain's.<sup>21</sup>

Section 43(a) received a broader interpretation in *L'Aiglon Apparel*,

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that he is or is likely to be damaged by the use of any such false description or representation." *Id.* The 1920 Act allowed recovery only by persons in the locality falsely designated. *See supra* note 10.

Although courts face some difficulty in determining who may recover under the "is likely to be damaged" standard, Congress did not disturb this language in the 1988 revision. *See* Thompson, *Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADE-MARK REP. 341, 341 (1989) (the legislative history contains "a wealth of conflicting statements on the question of consumer standing"). *See also* J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27:4 (2d ed. 1984 and Supp. 1989) (discussing standing under § 43(a)). Because the revision did not change the relevant statutory language, this Note does not attempt to resolve the issue.

14. *See* Keller, *Private Regulation of Advertising Under Section 43(a) of the Lanham Act*, 2 1985 ANN. SURVEY AM. L. 563, 566 (1985) (§ 43(a) was not used aggressively to combat false advertising for ten years).

15. 186 F.2d 923 (9th Cir. 1951).

16. *Id.* at 925.

17. *Id.* at 923.

18. *Id.* at 924.

19. *Id.*

20. *See supra* note 9.

21. *Id.* at 925. *See also* *Samson Crane Co. v. Union National Sales, Inc.*, 87 F. Supp 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950). In *Samson Crane*, the district court refused to allow a cause of action under section 43(a) in the absence of an allegation that the defendant falsely represented that its product originated with the plaintiff. *Id.* The plaintiff and defendant operated retail clothing stores in Massachusetts. *Id.* The plaintiff complained that the defendant falsely represented that its stores were operated by an international union. *Id.* at 220. The court held that the complaint failed to state a cause of action because there was no misrepresentation about the goods themselves, and because the defendant had not attempted to palm off its goods as the plaintiff's. *Id.* at 221-22. The court reasoned that Congress intended to proscribe only unfair competition closely akin to common law palming off. *Id.* at 222.

*Inc. v. Lana Lobell, Inc.*<sup>22</sup> In *L'Aiglon*, the Third Circuit allowed a cause of action without an allegation of palming off.<sup>23</sup> The plaintiff alleged that the defendant's advertisements pictured a dress manufactured by the plaintiff, when the defendant actually sold an inferior dress.<sup>24</sup> The court noted that the language of the statute was clear and precise,<sup>25</sup> and did not require palming off.<sup>26</sup>

Although the *L'Aiglon* decision expanded the reach of section 43(a), courts still did not interpret the section to prohibit all false representations. Until the Revision Act, the statute required that the defendant cause the falsely represented goods or services "to be transported or used in commerce."<sup>27</sup> Because a seller usually does not cause a competitor's goods to move in commerce, misrepresentations the seller made about another's goods were not prohibited by former section 43(a). For example, in *Bernard Food Industries v. Dietene Co.*,<sup>28</sup> the defendant, Dietene, prepared a chart comparing its custard mix to the plaintiff's custard mix.<sup>29</sup> The chart contained erroneous data regarding the plaintiff's mix, but accurately described the defendant's mix.<sup>30</sup> The Seventh Circuit held that because the case involved only disparagement of a plaintiff's product and the defendant made no false representations about its own product, the plaintiff could not recover under section 43(a).<sup>31</sup> Despite sharp criticism,<sup>32</sup> courts consistently followed *Bernard* and refused to apply former

22. 214 F.2d 649 (3d Cir. 1954).

23. *Id.* at 650.

24. *Id.* The plaintiff's concern was that consumers seeing the defendant's advertisement, which offered a dress for \$6.95 and pictured the dress the plaintiff advertised for \$17.95, would believe that the plaintiff was charging an exorbitant price, when in fact the defendant was selling a different and inferior dress. *Id.* This was not palming off because the defendant used its own name in the advertisement, and did not represent that it was selling plaintiff's dress. *Id.*

25. *Id.* at 651. For the text of the former section 43(a), see *supra* note 3.

26. 214 F.2d at 651.

27. See *supra* note 3. This limitation stems from the Lanham Act's primary emphasis on trademark infringement and closely related forms of unfair competition, such as false designations of origin. In cases of infringement and false designations of origin, it is the defendant's product which bears the infringing mark or false designation. See *supra* note 9 and accompanying text.

28. 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

29. *Id.* at 1280. Dietene's chemist analyzed Dietene's egg custard mix and Bernard's eggless custard mix, and prepared the chart, which was distributed to five of Dietene's executive and administrative employees and perhaps nine of its thirty-two salesmen. *Id.* at 1280-81.

30. When he made the chart, the Dietene chemist did not know that Bernard also manufactured an egg custard mix, and therefore, the chart did not accurately represent Bernard's product. *Id.* at 1280.

31. *Id.* at 1283.

32. See, e.g., Marx, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False*

section 43(a) to false representations about a plaintiff's product.<sup>33</sup>

Responding to criticism of the *Bernard* rule, Congress revised section 43(a)<sup>34</sup> to create a federal cause of action for commercial defamation.<sup>35</sup> The revised section prohibits misrepresentations about "another person's goods, services, or commercial activities."<sup>36</sup> Because the revision specifically regulates representations made in "commercial advertising or promotion about another's product," the amendment significantly expands the federal law of comparative advertising.<sup>37</sup> The amendment proscribes "misleading" representations as well as false ones, an addition which further expands protection under section 43(a).<sup>38</sup>

## II. THE REVISED SECTION 43(A)

### A. *The Influence of Common Law Defamation and Disparagement*

The legislative history of the Revision Act indicates that the amendments were intended in part to create a federal cause of action for commercial defamation.<sup>39</sup> However, the statute also prohibits claims previously actionable as commercial disparagement. The principal dis-

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*Advertising*, 40 WASH. & LEE L. REV. 383, 408-09 (1983) ("A false statement by the defendant about a plaintiff's product has the same detrimental effect as a false statement about the defendant's goods. Both tend to mislead the buyer about the qualities of the goods and their relative merits."). In 1988, the United States Trademark Association Trademark Review Commission criticized *Bernard's* "tortured interpretation" of section 43(a). The Commission stated:

Section 43(a) is a broadly remedial section which extends deeply into false advertising. It is difficult to justify on policy grounds denying protection to a manufacturer whose business is being injured by clearly false and disparaging representations about its products. It is even more difficult to justify the public deception and disruption of fair competition that would almost certainly result.

United States Trademark Association Trademark Review Commission, Report and Recommendation on the United States Trade System and the Lanham Act, 251 PLI/Pat 95 (1988). See also note 4 and accompanying text.

33. Note, *Damages Standards for False Advertising Under the Lanham Act: A New Trend Emerges*, 20 RUTGERS L.J. 125, 137 (1988) (no court has held disparagement of a plaintiff's product actionable under § 43(a)). In cases in which the misrepresentations concern the plaintiff's product, the plaintiff might pursue a disparagement action under state law.

34. See S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1988). (*Bernard* rule is "illogical on both practical and public policy levels. . .").

35. 134 CONG. REC. H10,411-07 (1988).

36. See *supra* note 2.

37. *Id.* See Kobak & Fleck, *Commercial Defamation Claim Added to Revised Lanham Act*, Nat'l L.J., October 30, 1989, at 33, 35 col. 2 (predicting that this "major" amendment may produce a deluge of claims). See *infra* note 96.

38. For a discussion of the meaning of "misleading" as used in the revised section 43(a), see *infra* notes 50-71 and accompanying text.

39. See *supra* note 4.

inction between the two torts is that commercial disparagement is a false statement denigrating the quality of goods, whereas commercial defamation is a false statement imputing fraud, deceit, dishonesty, or other morally reprehensible conduct to the producer of goods.<sup>40</sup> The revised section 43(a) incorporates both concepts by proscribing misrepresentations about the “nature, characteristics, [or] qualities” of “goods, services or commercial activities.”<sup>41</sup> Misrepresentations about goods or services are the essence of disparagement, and misrepresentations about commercial activities may be actionable as defamation.<sup>42</sup>

The inclusion of “commercial activities” in the Act may cover more than traditional defamation claims.<sup>43</sup> The Act’s coverage is not limited to statements imputing morally reprehensible conduct to another; conceivably, even a misrepresentation imputing morally neutral or laudatory conduct to another is actionable if misleading or false.<sup>44</sup>

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40. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1259 (D. Mass. 1981) (“Defamation of a corporation injures the reputation of the corporation itself, while product disparagement injures the reputation of its products.”), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff’d* 466 U.S. 485 (1984). The *Bose* court noted that comments which disparage a product often defame the producer as well. 508 F. Supp. at 1259. In *Bose*, the disparaging statement appeared in a *Consumer Reports* magazine article which compared Bose’s loudspeaker to other brands and asserted that instruments heard through Bose’s speaker seemed to wander “about the room.” 466 U.S. at 490. A more accurate description of the sound heard through the speakers was that it tended to wander “along the wall.” *Id.* The Supreme Court decided that Bose could not recover for the disparagement because it failed to demonstrate that Consumers Union made the statement with actual malice. *Id.* at 511. See *infra* notes 151-54 and accompanying text. See also *Allen Mfg. Co. v. Smith*, 224 A.D. 187, 229 N.Y.S. 692 (N.Y. App. Div. 1928) (allowing action for disparagement and dishonest business practices when the defendant distributed pamphlets, falsely represented to be reports of the U.S. Department of Agriculture, which falsely described the qualities of the plaintiff’s So-Bos-So fly spray for cattle).

41. See *supra* note 2.

42. See *supra* note 40.

43. For example, a plaintiff in a section 43(a) action will have to prove only that a representation is misleading, while a plaintiff in a defamation action must prove that a representation is false.

44. For example, some businesses advertise “no-frills” service, and emphasize that they do not provide the “extras” their competitors do, and therefore do not have to charge a high price. Even if the advertiser does not expressly state that the competitor overcharges for the extras, the competitor who does not provide such extras or who does not charge any more for them may have a cause of action under the revised section 43(a).

This view is consistent with the Federal Trade Commission’s rule that giving a consumer a different product than the one represented is deceptive even if the substitute is more valuable and of better quality. See *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) (affirming FTC’s finding of deception for mislabeling “California white pine,” a type of yellow pine, as “white pine” despite Algoma’s argument that its California white pine was not inferior to genuine white pine and saved the consumer money). The Court explained, “Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied.” The Court also stated, “The public is entitled to



The revision also alters the common law pleading requirement for disparagement and defamation. A plaintiff in a common law disparagement action must allege and prove: the statement denigrating her goods is false; the defendant made the statement with actual malice; and the plaintiff suffered special damages.<sup>45</sup> A plaintiff in a common law defamation action must establish only that the defendant made a false statement imputing reprehensible conduct to the plaintiff in the production of his or her goods.<sup>46</sup> The plaintiff's burden of pleading and proof is less stringent under the Revision Act.<sup>47</sup> According to the revised section 43(a), the plaintiff is entitled to relief upon a showing that the defendant made a false or misleading commercial misrepresentation of the plaintiff's goods, services or commercial activities, and that the plaintiff "believes that he or she is or is likely to be damaged."<sup>48</sup> The plaintiff need not show that the defendant acted with any culpable mental state,<sup>49</sup> or that the misrep-

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get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *Id.* at 78.

45. C. McMANIS, *UNFAIR TRADE PRACTICES IN A NUTSHELL* 336 (1988).

46. *Id.* at 330-31. See also J. NOWACK, R. ROTUNDA & J.N. YOUNG, *CONSTITUTIONAL LAW* § 16.33 at 931 (3d ed. 1986).

47. Kobak & Fleck, *Commercial Defamation Claim Added to Revised Lanham Act*, NAT'L L.J., October 30, 1989, at 33, 35 col. 1. (Under the revised § 43(a), "special damages, such as lost sales or lost customers, need not be pleaded or proved.").

48. Lanham Act § 43(a) 15 U.S.C. § 1125(a) (Supp. 1989). See *supra* note 2 for the text of the revised section 43(a). See also *supra* note 13 and accompanying text (discussing the belief that one is or is likely to be damaged).

49. However, according to judicial interpretation of former section 43(a), a rebuttable presumption of actual consumer confusion arises if the defendant intended to confuse consumers. In *My-T-Fine Corp. v. Samuels*, 69 F.2d 76, 77 (2d Cir. 1934), Judge Learned Hand stated, "[A] latecomer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile . . . . He may indeed succeed in showing that it was; that however bad his purpose, it will fail in execution; if he does, he will win . . . . But such an intent raises a presumption that customers will be deceived." *Accord* *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 760 (2d Cir. 1960). See also *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (consumer deception presumed when defendant spent substantial funds on its advertising campaign designed to influence the public). Compare *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956) (intent to deceive is a factor in determining the likelihood of confusion). See also Preston & Richards, *Consumer Miscomprehension and Deceptive Advertising: A Response to Professor Craswell*, 68 B.U.L. REV. 431, 437 (1988) ("[Advertisers] are professionals in communication. We suspect that when their copy is obscure, it is because they have deliberately attempted to engender miscomprehension.").

A showing of actual consumer confusion, through the defendant's failure to rebut the presumption of confusion raised by intentional misconduct, or through the plaintiff's independent evidence of confusion, entitles the plaintiff to monetary relief. *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356 (7th Cir. 1965), *cert. denied*, 382 U.S. 839 (1965); *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958).

resentations imputed morally reprehensible conduct to the plaintiff.

### B. *False or Misleading Representations*

Although former section 43(a) prohibited only "false" representations, the Revision Act proscribes "misleading" representations as well.<sup>50</sup> "Misleading" is not defined by the Revision Act.<sup>51</sup> Therefore, courts interpreting the revised section 43(a) must define the scope of the statute's language.<sup>52</sup> Material omissions and inadequately substantiated claims may fall within the meaning of "misleading."

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50. See *supra* notes 2 and 3 for the texts of the revised and former statutes.

51. In construing "misleading," courts are likely to consider the meaning given to "deceptive" under the Federal Trade Commission Act 15 U.S.C. § 45(a)(1) & (2) (1988), because this statute has long been used to regulate advertising. To determine whether an advertisement is deceptive, the Federal Trade Commission considers the net impression the ad creates and whether the impression conveys a "material representation . . . that is likely to mislead the consumer . . . acting reasonably in the circumstances." *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984), *appeal dismissed sub nom. Koven v. FTC*, No. 84-5337 (11th Cir. Oct. 10, 1984). Prior to *Cliffdale*, the FTC found advertisements deceptive if the net impression created by the advertisement had the capacity to deceive even "ignorant . . . unthinking and . . . credulous" consumers. *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F.2d 73, 75 (1910); *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944).

An application of the net impression test may be found in *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950). The FTC found a likelihood that consumers would be misled by Lorillard's advertised assertion that *Reader's Digest* magazine ranked Lorillard's Old Gold brand cigarettes lowest in nicotine content of cigarettes tested by the magazine. *Id.* at 57-58. Although *Reader's Digest* reported that Old Gold cigarettes had the lowest nicotine content, the article concluded that the differences in nicotine content were insignificant and should not serve as the basis for choosing one brand of cigarettes over another. *Id.* at 57. The FTC found Lorillard's advertisement deceptive because it created the impression that the magazine article recommended the cigarettes. *Id.* at 58. See also *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933) (respondents, who did not actually grind wheat into flour, were ordered to cease using "milling" in their name absent a disclaimer that the company did not grind grain).

For clarity, this Note will regard "false" claims as those which a plaintiff can demonstrate to be literally untrue while "misleading" will include some statements which are not demonstrably false.

52. The ordinary meaning of "misleading" seems to encompass an intent to deceive or causing actual deception. BLACK'S LAW DICTIONARY 902 (5th ed. 1979) ("misleading" defined as "[d]elusive; calculated to lead astray or to lead into error"); WEBSTER'S NEW WORLD DICTIONARY 479 (concise ed. 1974) (mislead defined as "1. to lead in a wrong direction; lead astray. 2. to deceive or delude. 3. to lead into wrongdoing."). Courts construing the revised section 43(a) will have to decide whether "misleading" requires that consumers are actually misled, or only that consumers are likely to be misled. See *supra* notes 49-51 and accompanying text. Under the former section 43(a), the standard for injunctive relief was likelihood of confusion. See *supra* note 49. Congress codified the likelihood of confusion standard in the revised section 43(a)(1), but did not codify a "likelihood" standard for section 43(a)(2), the subsection dealing with comparative advertising. See *supra* note 2. The omission implies that consumers must actually be misled before a plaintiff can obtain relief. However, because Congress did not explain how courts should interpret "misleading," courts should continue to apply a "likelihood" test.

### 1. *Material Omissions*

Under former section 43(a), courts generally refused to allow a cause of action for a defendant's failure to disclose a fact material to a consumer's purchase decision because an omission is not a "representation" and is not "false," and therefore was not prohibited by the former statute.<sup>53</sup> During review of the Lanham Act revisions, the Senate Committee on the Judiciary deleted a provision expressly creating a cause of action for material omissions. The Committee deleted the provision due to concern over the heavy burden it would place on advertisers required to disclose all facts important to consumers' purchase decisions in every advertisement, and because the Committee concluded that the courts should decide whether omissions are actionable.<sup>54</sup> However, by adding the word "misleading" to section 43(a), Congress may have opened the door to actions based on failure to disclose material facts because an advertiser's failure to reveal material facts can convey a misleading impression of the advertised goods or services.<sup>55</sup>

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53. For example, in *McNeilab, Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 521 (S.D.N.Y. 1980), the defendants advertised that Anacin contained "the pain reliever doctors recommend most" without revealing that the pain reliever was aspirin. The omission did not violate section 43(a). *Id.* at 532. In contrast, the same omission violated § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988). *American Home Products Corp. v. FTC*, 695 F.2d 681, 689 (3d Cir. 1982). The different results may be explained by the difference in the language and purposes of the statutes. The former section 43(a) prohibited false representations, not omissions, while section 5 of the Federal Trade Commission Act prohibits deceptive acts or practices. Further, the Lanham Act is designed primarily to insure fair competition while the Federal Trade Commission Act is designed to protect consumers as well. *See* 15 U.S.C. § 1127 (1988) (Lanham Act intended "to protect persons engaged in [interstate] commerce against unfair competition"); *see also* H.R. REP. NO. 1613, 75th Cong., 1st Sess. 3 (1937) (The Wheeler-Lea amendment, which added the phrase "unfair or deceptive acts or practices" to § 5 of the Federal Trade Commission Act, ma[de] the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.").

54. S. REP. NO. 515, 100th Cong., 2d Sess. 7, 41, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5603-04.

55. *See supra* note 53. The Committee left resolution of the issue to the courts. *Id.* at 41, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5604 ("It is the committee's intention that . . . misrepresentations resulting from omissions . . . should continue to be decided on a case-by-case basis, and that [the deletion] should not be regarded as either limiting or extending applicable decisional law.").

Even if not literally false, an omission can still mislead. *See supra* note 53. Despite the broader language, however, courts may still conclude that omissions are not representations. *See supra* note 53 and accompanying text. The Federal Trade Commission identified three district types of omissions in *In re International Harvester*, 104 F.T.C. 949 (1984). The FTC ruled that it is deceptive to "tell only half the truth, and to omit the rest," when the failure to disclose creates a "misleading impression." *Id.* at 1057. In addition, it is deceptive to "simply remain silent . . . under circumstances that constitute an implied but false representation." *Id.* at 1058. However, "pure omis-

Because the revised section 43(a) prohibits misleading representations about a plaintiff's product as well as a defendant's, determining whether an omission is actionable will be difficult. Courts will have to decide what the defendant must disclose in a comparative advertisement about a competitor's product as well as about its own.<sup>56</sup> To avoid this difficulty, one solution is for courts to disallow all claims of omissions under section 43(a).<sup>57</sup> Another solution is to allow a cause of action under 43(a) when the omission of a material fact so affects the impression created by the advertisement that it is tantamount to a misrepresentation.<sup>58</sup>

## 2. *Lack of Substantiation*

Because former section 43(a) proscribed false, as opposed to merely unsubstantiated, representations, courts generally refused to award relief to plaintiffs alleging only that the defendant did not provide scientific or other reasonable support for her claims.<sup>59</sup> However, some courts inter-

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sions," i.e., silence "in circumstances that do not give any particular meaning to [the] silence," are not deceptive. *Id.* at 1059.

56. For example, a restaurant may wish to advertise that its medium pizza costs \$10.00 while its competitor's medium pizza costs \$12.00. Must the restaurant disclose that the competitor's price includes two toppings or that the competitor's pizza is an inch larger in diameter? Even if such facts are important to a consumer, it seems quite plausible that the advertiser might not be aware of them, or, if aware of them, might not think they are important. Knowledge of the false or misleading nature of the representation is not required for a § 43(a) violation. *See supra* note 2. The advertiser might decide to abandon the comparative advertisement rather than risk liability for failing to disclose facts she did not know or did not recognize as significant. *See infra* notes 118-120 and accompanying text.

57. *See supra* note 53 and accompanying text.

58. *See supra* note 55.

59. Morrison, *The Emerging Burden of Proof Rule in Drug Advertising Cases*, 78 TRADEMARK REP. 551, 554 (1988) (citing *U-Haul International, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1248; 212 USPQ 49, 57 (D. Ariz. 1981), *aff'd* 681 F.2d 1159, 216 USPQ 1077 (9th Cir. 1982) ("U-Haul . . . could not sustain its burden of persuasion by its repeated assertions (and proof) that Jartran had done little, if any, testing of Jartran trucks or trailers, and no comparative testing of U-Haul products."); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253, 208 USPQ 612, 622 (D. Del. 1980) ("The plain language of [s]ection 43(a), which prohibits false rather than unsubstantiated representations, requires that a plaintiff establish not merely that the defendant's claim lacks substantiation, but also that it is false or deceptive.")).

The FTC prohibits advertisements which make express or implied claims about a product's performance or efficacy if the advertiser made the claim without a reasonable basis for its accuracy. In *American Home Products v. FTC*, 695 F.2d 681, 684, 702-03 (3d Cir. 1982), the FTC issued a cease and desist order against AHP for an advertisement which stated that Anacin contained more of the most effective pain reliever than other brands. The claim was literally true; Anacin actually contained more of the most effective pain reliever, aspirin, than other brands. *Id.* However, no scientific studies proved that a larger dose of aspirin relieved pain faster or more effectively than the smaller dose used in other brands. *Id.* Because AHP could not prove that the implied claim of more effec-

preting the former section 43(a) adopted the Federal Trade Commission's (FTC's) rule that inadequately substantiated advertising claims are deceptive.<sup>60</sup> In *Upjohn Co. v. Riohom Corp.*,<sup>61</sup> the defendant, Riohom, advertised its product, Rivixil, as a cosmetic and hair growth product that was clinically tested and "shown to be safe."<sup>62</sup> Upjohn, which also manufactured a hair growth product, obtained a preliminary injunction against dissemination of the advertisement because no scientific tests demonstrated that Rivixil was a cosmetic or did anything other than stimulate hair growth, and because Riohom's clinical safety tests were flawed.<sup>63</sup> Although few courts apply the lack of substantiation standard to section 43(a) claims,<sup>64</sup> the *Upjohn* opinion may indicate a trend toward acceptance of the substantiation standard, at least in cases involving over-the-counter drugs.<sup>65</sup>

According to the FTC's standard, if an advertiser lacks a reasonable basis for a performance claim at the time it is made, the claim violates the Federal Trade Commission Act even if the advertiser can later prove its literal truth.<sup>66</sup> The FTC reasons that the advertiser who makes a per-

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tive pain relief was supported by competent scientific studies, the FTC found the advertisement deceptive. *Id.*

60. Morrison, *supra* note 59, at 555-56.

61. 641 F. Supp. 1209, 1 USPQ 2d 1433 (D. Del. 1986).

62. *Id.* at 1223, 1 USPQ 2d at 1442.

63. *Id.* at 1223-24, 1 USPQ 2d at 1442-43. Specifically, Riohom tested only fifty-nine subjects and used a different concentration of the active ingredient minoxidil, which was used in Rivixil. *Id.*

64. Morrison, *supra* note 59, at 559. It is important to distinguish cases in which the defendant's test proves that the defendant's claim is false (e.g., the advertiser claims that its product works faster than any other, but the study shows that another product is equally fast) from cases in which the defendant's test simply fails to prove that the claim is true (e.g., the advertiser claims that its product works faster than any other, but the study did not test all brands). In the first type of case, the plaintiff can demonstrate falsity by using the defendant's test as evidence. In the second, the plaintiff must introduce other evidence of falsity unless the court is willing to shift the burden of proving substantiation to the defendant.

65. See Morrison, *supra* note 59, at 555-59. Claims of inadequate substantiation are particularly potent when the safety or performance of over-the-counter drugs are involved because consumers lack the resources or knowledge to personally verify claims about drug products, and because the inherent health and safety risks posed by unsubstantiated claims of a drug's safety or performance are very great. See, e.g., *American Home Products v. FTC*, 695 F.2d 681 (3d Cir. 1982) (concern for consumer safety a significant factor). To protect consumers of over-the-counter drugs, and perhaps other products, courts may be willing to implicitly shift the burden of proof in section 43(a) cases by requiring a defendant to demonstrate a reasonable basis for the claim rather than requiring the plaintiff to establish falsity. Morrison, *supra* note 59 at 559 ("Even in non-drug cases a strong policy argument can be made that the defendant be required to substantiate its advertising claims.").

66. *Pfizer, Inc.*, 81 F.T.C. 23 (1972) ([t]o meet the requirement of a reasonable basis for a claim, an advertiser must actually rely upon competent, well-controlled scientific tests conducted prior to

formance or safety claim implies that the claim is substantiated by competent tests.<sup>67</sup> When the claim is not adequately substantiated, the consumer is misled about whether the claim is substantiated rather than about the truth of the safety or performance claim itself.<sup>68</sup>

Whether inadequately substantiated representations fall within the language of the revised section 43(a) is open to debate.<sup>69</sup> The former section, proscribing "any false description or representation," could be interpreted to include implied claims of substantiation. In contrast, the revised section 43(a) proscribes any false or misleading description or representation of fact which "misrepresents the nature, characteristics [or] qualities of goods, services, or commercial activities."<sup>70</sup> Whether a performance or safety claim is substantiated does not seem to concern the nature, characteristics, or qualities of goods or services. However, a plaintiff might argue that a defendant's scientific research is a "commercial activit[y]" covered by the statute, and that the adequacy of the research relates to the nature, characteristics, or quality of the activity.<sup>71</sup>

### C. *Another Person's Goods, Services or Commercial Activities*

In revising section 43(a), Congress intended to provide a cause of action for plaintiffs whose products are misrepresented in others' advertisements.<sup>72</sup> To accomplish this goal, Congress prohibited misrepresentations about "another person's goods, services or commercial

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making the advertising claim.). *Pfizer* found a lack of substantiation unfair, but it might also be considered deceptive.

67. *Id.* Substantiation claims may be express ("Studies show that our product works the fastest") or implied ("Our product works the fastest"). See Morrison, *supra* note 59, at 559 (urging that express and implied establishment claims should be actionable under § 43(a)).

68. *Id.*

69. The legislative history is silent on this issue.

70. For the text of the statute, see *supra* note 2.

71. Congress did not define "commercial activities," and it is not clear whether the phrase covers all aspects of a business enterprise. If a company pays an independent research laboratory to design and perform tests for its products, it does not seem that the independent research is part of the advertiser's *commercial* activities.

If competitors are not directly injured by an advertiser's lack of substantiation, allowing such actions are beyond the purpose of section 43(a). See *supra* note 11. However, manufacturers who expend substantial funds on adequate research may have to charge more for their products than those who do not conduct competent research, and therefore, advertisers who conduct research are indirectly injured by their competitors' lack of research. On the other hand, the advertiser who conducts research can disclose this fact in the advertisement, making his or her product appear more reliable and, therefore, worth a higher price.

72. See *supra* notes 4, 32-35 and accompanying text.

activities.”<sup>73</sup> However, Congress did not indicate whether the defendant must specifically identify the plaintiff’s product in the advertisement, or whether a misrepresentation directed generally at competitors’ products allows all competitors to recover.<sup>74</sup> Because of the potential size of damage awards under section 43(a),<sup>75</sup> allowing recovery to every competitor seems harsh. However, the statute provides that any plaintiff who believes that he is likely to be injured<sup>76</sup> is entitled to relief.

Under the former section 43(a), courts generally allowed injunctive relief upon a showing that consumer confusion was likely, and awarded monetary damages only upon a showing of actual confusion.<sup>77</sup> Because Congress did not express an intent to modify this rule, courts will probably continue to apply it to cases arising under the revised section 43(a). Under such a standard, if a defendant’s misrepresentations refer generally to competitors, injunctive relief is available upon a showing that consumers are likely to be misled; monetary damages are available only upon a showing that consumers were actually misled.<sup>78</sup>

#### D. Commercial Advertising or Promotion

The revised section 43(a) proscribes only misrepresentations made in commercial advertising or promotion.<sup>79</sup> This limitation arose from Congress’ desire to avoid constraints imposed by the first amendment.<sup>80</sup> Because commercial speech receives minimal first amendment protection,

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73. For the text of the statute, see *supra* note 2.

74. An advertiser could compare her product to a limited class of competing products, such as “the other leading brands.”

75. See *infra* notes 93-96 and accompanying text.

76. Courts construe the “belief of injury” language to require a plaintiff to show “a reasonable basis for the belief that . . . [he] is likely to be damaged as a result of the false advertising.” *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 278 (2d Cir. 1981). *Accord Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 316 (2d Cir. 1982); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980). See also *supra* note 13.

77. Note, *Damage Standards for False Advertising Under the Lanham Act: A New Trend Emerges*, 20 RUTGERS L.J. 135, 141 (1988). The rule provides relief for all violations, but allows monetary relief only when monetary injury is most likely—when consumers are actually confused. However, actual confusion is presumed when the defendant acts intentionally. See *supra* note 49 and accompanying text. Therefore, monetary awards may be available even if the plaintiff cannot demonstrate that confusion occurred.

78. The additional element of a reasonable belief of injury also helps to guard against windfall awards to uninjured plaintiffs. See *infra* notes 127-34 and accompanying text.

79. See *supra* note 2.

80. 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988) (statement of Senator DeConcini).

the provision avoids some constitutional concerns.<sup>81</sup>

The language also limits the section's scope. Apparently, a competitor's statements outside the advertising or promotional context are not regulated by the revised section.<sup>82</sup>

### *E. Strict Liability for Violation; Media Innocent Violation Defense*

The former section 43(a) did not require any culpable mental state for liability.<sup>83</sup> The amendment retains strict liability,<sup>84</sup> but alters the section's treatment of transporters and media defendants.

Under the former statute, a defendant who did not make the false representation, but who moved misrepresented goods in commerce, was liable only if the defendant acted with knowledge of the falsity of the misrepresentation.<sup>85</sup> This provision no longer exists in the revised section 43(a). Transporters are now subject to strict liability along with other defendants. However, the amendment imposes liability only on a defendant who "uses" the *misrepresentation* in commerce.<sup>86</sup> This change may entirely exclude liability for merely moving the product in commerce. However, if transporting goods may be considered "use" of the misrepresentation, transporters are subject to strict liability for that use.

The Revision Act expressly provides an innocent violation defense for some defendants.<sup>87</sup> Under the amended section 43(a), a media defendant or other defendant "engaged solely in the business of printing the . . .

81. The Senate retained the limiting language "in order to eliminate House fears." Senator DeConcini expressed the view that the phrase was "intended only to eliminate any possibility that the language might be applied to political speech" and that "nonprofit organizations would be as liable for misrepresentations as profit organizations." 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988) (statement of Senator DeConcini). As the Senator's comment suggests, even nonprofit organizations advertise to raise funds or promote their views.

Although the intent to exclude political speech is clear, no mention is made of religious speech. Religious speech is probably excluded, however, because a misrepresentation must concern goods, services, or commercial activities to violate section 43(a), the advertisements of nonprofit groups are affected only if the group engages in such commercial activities as selling goods or services.

82. Section 43(a)(1) still covers language used on product labels. *See supra* note 2. However, statements issued only to employees, or some other group outside a promotional context, such as the statements at issue in the *Bernard* case, are apparently outside the revision's scope. *See supra* note 28-30 and accompanying text.

83. *See supra* note 3. However, Courts generally held that a willful misrepresentation raised a rebuttable presumption of actual consumer confusion. *See supra* note 49. The revision did not change this rule.

84. *See supra* note 2.

85. *See supra* note 3.

86. *See supra* note 2.

87. The defense appears in Lanham Act § 32(2), 15 U.S.C. § 1114(2) (Supp. 1989).



violating matter for others [who] establishes that he or she was an . . . innocent violator" is subject only to an injunction.<sup>88</sup> Therefore, innocence is an affirmative defense which limits the plaintiff's remedies, but does not excuse a media defendant from liability.

### F. Remedies

Prior to the revision, section 43(a) did not expressly provide for monetary remedies.<sup>89</sup> Courts, however, awarded monetary damages and injunctive relief without explicit statutory authority.<sup>90</sup> The revision codified and expanded case law, making the following remedies available: injunctions, treble damages, defendant's profits, destruction of violating matter, costs, and attorney's fees in exceptional cases.<sup>91</sup> Although the remedies are designed to be compensatory rather than punitive,<sup>92</sup> the large awards,<sup>93</sup> strict liability,<sup>94</sup> and no requirement of actual injury<sup>95</sup> make the revised section 43(a) very attractive to plaintiffs attacked by a competitor's advertisements.<sup>96</sup>

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88. 15 U.S.C. § 1114(2) (Supp. 1989). Placing the burden of proving innocence on the defendant, and imposing an injunction even on those who can prove their innocence, creates first amendment concerns. See *infra* notes 114-121 and accompanying text.

89. See *supra* note 3. Lanham Act sections for remedies were limited to remedies for infringement of registered trademarks. See Lanham Act §§ 34-36, 15 U.S.C. §§ 1116-1118 (1982), codified as amended at 15 U.S.C. §§ 1116-1118 (Supp. 1989).

90. Driscoll, *The "New" 43(a)*, 79 TRADEMARK REP. 238, 244 (1989) (courts awarded remedies, but circuits split over whether attorney's fees could be awarded).

91. Lanham Act §§ 34-36, 15 U.S.C. § 1117(a) (Supp. 1989).

92. Lanham Act § 34(a), 15 U.S.C. § 1117(a) (Supp. 1989).

93. See, e.g., *U-Haul International, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986) (sustaining award of forty million dollars under former § 43(a)).

94. See *supra* note 49 and accompanying text.

95. See *supra* note 77 and accompanying text.

96. See *supra* note 37. Commentators warn that predatory use of the statute could drive some defendants out of business, or cause some advertisers to refrain from comparative or other informational advertising. See Comment, *Monetary Relief for False Advertising Claims Arising Under Section 43(a) of the Lanham Act*, 34 U.C.L.A. L. REV. 953, 973-74 (1982). Such behavior vitiates the statute's purpose of promoting competition, and ultimately injures consumers. Monetary remedies for corrective advertising favor large businesses, which can afford to pay for corrective advertising. Smaller competitors may be driven out of business if they are unable to pay for such corrective advertising. Comment, *supra*, at 973-74 (commenting on *U-Haul International, Inc., v. Jartran, Inc.*, 793 F.2d 1034, 1037, 1041-42 (9th Cir. 1986) (Jartran ordered to pay the amount it spent on its advertising plus the amount U-Haul spent on corrective advertising, rounded to the nearest million and doubled for a total judgment of forty million dollars plus attorney's fees)).

### III. FIRST AMENDMENT CONSTRAINTS ON THE REVISED SECTION 43(A)

Although Congress intended to avoid first amendment constraints on the revised section 43(a) by limiting its scope to commercial advertising or promotion,<sup>97</sup> some commercial speech is constitutionally protected.<sup>98</sup> By regulating misleading as well as false speech, the new section 43(a) raises first amendment concerns.<sup>99</sup> To the extent misleading comparative advertisements are constitutionally protected, courts must formulate the standard of protection that is to apply.<sup>100</sup>

#### A. First Amendment Protection of Commercial Speech

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>101</sup> the Supreme Court recognized that commercial speech is not completely outside first amendment protection.<sup>102</sup> The Court noted that commercial speech provides useful information to consumers<sup>103</sup> by increasing their awareness of the products available in the market.<sup>104</sup> Advertisements discussing the specific attributes of the advertised product lead to more informed purchase decisions.<sup>105</sup> In addition to increasing consumer awareness, commercial speech enhances competition by spurring competitors to charge prices comparable to those advertised by others or to offer comparable goods or services.<sup>106</sup> The Court concluded that the first amendment protects commercial speech.<sup>107</sup> However, the

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97. See *supra* notes 80-82 and accompanying text.

98. See *infra* notes 114-121 and accompanying text. U.S. CONST., amend. I provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

99. See *infra* notes 135-42 and accompanying text.

100. See *infra* notes 122-42 and accompanying text.

101. 425 U.S. 748 (1976).

102. The Court defines commercial speech as "speech which does 'no more than propose a commercial transaction.'" *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973)).

103. *Id.* at 765.

104. *Id.* The Court stated, "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Id.*

105. *Id.* The Court stated that the "free flow of commercial information is indispensable" when it contains facts upon which to base "private economic decisions." *Id.*

106. When competitors' prices vary significantly, "information as to who is charging what becomes more than a convenience." *Id.* at 764.

107. The Court emphasized the consumer's right to receive commercial speech as well as the advertiser's right to disseminate commercial speech. *Id.* at 756 ("[T]he protection afforded [by the

Court decided that commercial speech should receive a lower degree of protection than non-commercial speech because commercial speech lacks the expressive significance of religious, political, or other ideological speech.<sup>108</sup> Moreover, because potential profits are a significant incentive to engage in commercial speech, the Court reasoned that commercial speech is less likely to be chilled by fear of sanction than other forms of speech.<sup>109</sup>

### 1. *The First Amendment and Comparative Advertising*

Comparative commercial speech may deserve greater protection than other forms of commercial speech. Courts should determine the level of protection with reference to whether the rationale for protecting commercial speech is served. Comparative advertisements do not simply praise a single product; they evaluate one product with reference to another. Such comparisons help the consumer choose between available products.<sup>110</sup> In this respect, comparative advertisements may be as valuable as independent reports comparing products,<sup>111</sup> and thus may generally be entitled to greater first amendment protection than other advertisements.<sup>112</sup>

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first amendment] is to the communication, to its source and to its recipients. . . ."). The plaintiffs were consumers of prescription drugs. *Id.* The Court recognized their right to receive advertising about those drugs. *Id.* at 756-57.

108. *Id.* at 771 n.24. Although this is true for much commercial speech, some advertisements contain significant artistic expression. For example, some television commercials feature the music of popular artists and display images similar to those contained in non-commercial music videos. Such commercials often do not identify the product until near the end of the commercial.

109. *Id.* at 771-72 n.24. (Because an advertiser is better able to verify the accuracy of claims about his own product than anyone else, and because advertisements are "the sine qua non of commercial profits," proper regulation is not likely to chill the speech, thus making "it less necessary to tolerate inaccurate statements for fear of silencing the speaker.").

110. See *supra* note 106 and accompanying text. See also Nye, *In Defense of Truthful Comparative Advertising*, 67 TRADEMARK REP. 353, 353 (1977) (Comparative advertising benefits consumers by lowering prices and disseminating information freely; therefore "as long as the advertiser's claim is true, his comparison may be disparaging, it may be derogatory, it may be downright nasty.").

111. Senator DeConcini observed that consumer reporting is not covered by section 43(a). 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988).

112. The Supreme Court applies a balancing approach to determine whether speech is protected by the first amendment, and, if protected, what degree of protection should apply. See *Virginia Citizens*, 425 U.S. at 766 (balancing individual and societal interests against governmental interests in banning advertising); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("a difference in content [of protected speech] may require a different governmental response"). In *Young*, the Court explained that sexually explicit movies, although constitutionally protected, receive lower first amendment protection than other speech. *Id.* The Court stated, "Every schoolchild can understand . . . our duty to defend the right to speak . . . . But few of us would march our sons and

## 2. *The First Amendment and False or Misleading Commercial Speech.*

Although false speech receives protection in some contexts,<sup>113</sup> demonstrably false commercial speech is outside the realm of first amendment protection.<sup>114</sup> The deceived consumer is not informed by false commercial speech, and will be less likely to make an informed purchase decision. Therefore, competition to offer better quality at lower prices is not enhanced by false commercial speech.

First amendment concerns are more prevalent in the context of misleading commercial speech, because the revised section 43(a)'s prohibition of misleading advertisements may include literally truthful statements.<sup>115</sup> Although the Supreme Court has indicated that misleading commercial speech is not protected by the first amendment,<sup>116</sup> it is not clear whether "misleading," as used by the Court, includes advertisements intended to mislead consumers, those which actually mislead consumers, or those that are merely likely to mislead consumers.<sup>117</sup>

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daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice." *Id.* at 70.

An example of commercial speech which receives lower first amendment protection is professional advertising. *See, e.g.,* *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising").

113. The Supreme Court has long recognized that some false speech must be protected by the first amendment to avoid chilling protected speech. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (in a defamation action involving a public figure, the plaintiff must prove that the defendant's false statements were made with actual malice before monetary damages are awarded; a non-public figure plaintiff must prove at least negligence); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (court may not enjoin defamatory speech prior to publication, even when the defendant "customarily" publishes defamatory matter because such a restraint is the "essence of censorship").

114. *See supra* notes 104-07 and accompanying text for discussion of first amendment protection of commercial speech.

115. For example, the statute may prohibit misleading omissions or unsubstantiated claims. *See supra* notes 53-71 and accompanying text.

116. *See, e.g.,* *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980) (to fall within first amendment protection, commercial speech must concern lawful activity and not be misleading). *Accord* *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69 (1983). *But see infra* notes 122-29 and accompanying text. *Central Hudson* and *Bolger* both involved overbreadth challenges to prohibitions of commercial speech. Such prohibitions are not deemed overbroad if the plaintiff's speech is false or misleading. *Central Hudson*, 447 U.S. at 566. The *Central Hudson-Bolger* analysis may not apply to section 43(a) cases because (1) the analysis applies only to overbreadth challenges; and (2) section 43(a) grants injunctions and substantial monetary remedies, thereby going farther than a prohibition.

117. *See supra* notes 51-52 and accompanying text. In *In re R.M.J.*, 455 U.S. 191, 202 (1982), the Court discussed regulation of speech that is "inherently likely to deceive or where the record

Therefore, it is not clear when constitutional protection is removed from literally truthful but “misleading” speech.

Courts may construe section 43(a) liberally to include advertisements which fail to disclose material facts, or which make express or implied claims without competent scientific substantiation.<sup>118</sup> If construed this way, section 43(a) may impose liability on advertisers who are unaware of material facts or unaware that known facts are material, and on advertisers who reasonably rely on flawed scientific studies, or who unintentionally imply that studies have been performed when they have not.<sup>119</sup> Such an interpretation of section 43(a) could chill some advertising, particularly comparative advertising. For example, an advertiser may decide to abandon a comparative advertising campaign out of fear that it may inadvertently omit a material fact about the competitor’s product. Another advertiser may decide to use simple laudatory advertisements in place of advertisements giving quality or performance information, fearing an attack on the scientific basis for the claim. Some first amendment protection should apply to prevent chilling these forms of commercial speech.<sup>120</sup>

## *B. The Standard of Protection*

If courts conclude that the first amendment affords section 43(a) defendants some protection, courts must then determine the standard of protection. Courts can provide advertisers more protection by: (1) requiring that the remedy imposed is the least restrictive means of preventing and eliminating deception and (2) requiring a showing of fault.

### *1. Least Restrictive Means of Preventing and Eliminating Deception*

Although the Supreme Court has stated that Congress may prohibit false and misleading commercial speech without violating the first

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indicates that a particular form or method of advertising has in fact been deceptive.” The Court’s definition of “misleading” probably does not apply in all contexts because *R.M.J.* involved professional advertising, which is subject to greater regulation than other types of advertising. *See supra* note 113. Therefore, “misleading” in the context of non-professional advertising may be less inclusive than the *R.M.J.* standard.

118. *See supra* notes 53-71 and accompanying text.

119. Damage awards are available upon a showing of either willfulness or actual consumer confusion. *See supra* note 77. Therefore, damages may be awarded even in the absence of fault. *See supra* note 49 and accompanying text.

120. If commercial speech is chilled, then the rationale for not protecting commercial speech as vigorously as other speech no longer exists. *See supra* notes 108-09 and accompanying text.

amendment,<sup>121</sup> the Court's holdings counsel against over-generalization. For example, in *In re R.M.J.*,<sup>122</sup> the Court ruled that "[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may be presented in a way that is not deceptive."<sup>123</sup> The *R.M.J.* Court observed that requiring a disclaimer or explanation to prevent deception is preferable to prohibition.<sup>124</sup> Thus, *R.M.J.* suggests not only that misleading commercial speech receives some first amendment protection, but also that restrictions on commercial speech must not extend beyond that needed to prevent or correct deception.

By allowing plaintiffs to recover treble damages, and the defendant's profits, costs, and attorney's fees in exceptional cases,<sup>125</sup> section 43(a) extends beyond the means necessary to prevent and correct deception. A defendant ordered to pay a large damage award may be unable to stay in business, or unable to sell goods at the competitor's lower price.<sup>126</sup> Vigorous use of section 43(a)'s remedial provisions could have a chilling effect on speech that comes very near, yet does not fall within, that proscribed by the section.<sup>127</sup> In addition, large awards promote preda-

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121. See *supra* note 117 and accompanying text.

122. 455 U.S. 191 (1982).

123. *Id.* at 203. *R.M.J.* struck down a Missouri Supreme Court Rule prohibiting lawyers from listing areas of practice not within certain approved areas. The Court recognized that professional advertising is an area especially susceptible to abuses that the states have a legitimate interest in controlling, and that "the potential for deception and confusion is particularly strong in the context of advertising professional services." *Id.* at 203. The Court explained that these dangers stem from the public's lack of knowledge about professional services, the "absence of any standardization in the 'product,'" and the "limited ability of the professions to police themselves." *Id.* at 202. Despite these dangers, the Court held that states may restrict professional advertising only when "it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." *Id.* at 203. See also *infra* note 124 and accompanying text.

124. *R.M.J.*, 455 U.S. at 203. Despite the dangers of professional advertising, see *supra* note 123, the *R.M.J.* Court ruled that "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* at 203.

In *Virginia Citizens*, 425 U.S. at 771, the Court stated that it foresaw "no obstacle to a State's dealing effectively" with deceptive or misleading commercial speech. A state can deal effectively with such speech by complying with the least restrictive means rule. A more restrictive standard creates the danger of chilling protected speech. See also *Near v. Minnesota*, 283 U.S. 697, 702, 713 (1930) (state may not enjoin defamatory speech prior to publication where such a restraint is the "essence of censorship.").

125. See *supra* notes 89-96 and accompanying text.

126. See *supra* note 96 and accompanying text.

127. See *supra* note 96. "Actual" damages under section 43(a) are necessarily difficult to calculate because the monetary value of goodwill is difficult to measure and because plaintiffs need not prove monetary loss to recover. See, e.g., *Big O Tire Dealers, Inc. v. Goodyear Tire and Rubber Co.*,

tory use of section 43(a).<sup>128</sup>

The availability of monetary damages does not necessarily render section 43(a) more restrictive than needed to eliminate deception. For example, when a plaintiff is forced to pay for advertising in order to correct a false impression left by the defendant's advertising,<sup>129</sup> monetary damages are necessary to prevent ongoing deception. Moreover, awarding a defendant's profits to a successful plaintiff removes the profit incentive to engage in intentionally misleading advertising, and thus, is an effective deterrent to purposeful deception.<sup>130</sup>

Awarding monetary damages only when consumers are actually confused<sup>131</sup> is another means of assuring that section 43(a) is not more restrictive than needed. Even with this safeguard, however, the remedial provisions of section 43(a) may be unnecessarily restrictive.<sup>132</sup> The statute stipulates that remedies must consist of "compensation" only.<sup>133</sup> Construed literally, the statute may not extend beyond what is necessary to prevent and correct deception.<sup>134</sup>

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408 F. Supp. 1219 (D. Colo. 1976), *aff'd as modified*, 461 F.2d 1365, 1375-76 (10th Cir. 1977) (affirming award of \$678,000 actual and \$4 million punitive damages without any evidence of economic loss). Courts treat the cost of corrective advertising as actual damages. *But cf.* Comment, *Money Damages and Corrective Advertising: An Economic Analysis*, 55 U. CHI. L. REV. 629, 630 (1988) (authored by Paul Heald) (corrective advertising awards "are unjustified because they mis-compensate plaintiffs, cause undesirable market behavior, and impose needless costs on businesses and consumers").

128. *See supra* note 96.

129. Note, *Damage Standards for False Advertising Under the Lanham Act: A New Trend Emerges*, 20 RUTGERS L.J. 125, 149 (1988) ("injunctions will not protect plaintiffs against suffering the continuing effects of past false advertisements"). *See also* Warner-Lambert Co. v. FTC, 562 F.2d 749, 752 (D.C. Cir. 1977) (FTC required Warner-Lambert to include the statement, "Listerine will not help prevent colds or sore throats or lessen their severity" in future advertisements to prevent ongoing deception created by prior advertisements).

130. Comment, *supra* note 127, at 631 (defendant's profits are awarded as an estimate of the plaintiff's lost profits, or on a theory of unjust enrichment).

131. *See supra* note 49 and accompanying text.

132. *See supra* note 127.

133. Lanham Act § 35 (a), 15 U.S.C. § 1117(a) (1982 & Supp. 1989). The defendant's profits are determined by the defendant's sales, less costs the defendant can prove. *Id.* The court may also award "such sum as the court shall find to be just." *Id.*

134. Courts granted remedies liberally under the former section 43(a), and some fear a trend toward larger awards under the new statute. *See supra* notes 127, 130, and 133. *See also* Comment, *supra* note 127, at 630 ("the fear that courts will base damages on often substantial advertising budgets adds a new and controversial factor which companies must consider in product marketing and litigation decisions").

## 2. *Fault*

Another way to prevent section 43(a) from chilling protected speech is to require some showing of culpability on the part of the defendant as a prerequisite to the recovery of monetary damages. To succeed in a defamation action, a public figure must prove the defendant acted with actual malice in order to recover monetary damages.<sup>135</sup> Public figures are those who voluntarily thrust themselves into the limelight.<sup>136</sup> Plaintiffs who purchase advertising time to draw consumers' attention to their products almost certainly fall within this definition.<sup>137</sup> Although some businesses do not purchase advertising, courts might conclude that a person who offers goods or services to the public, or some segment of the public, is, nonetheless, a public figure.<sup>138</sup>

Although the public figure doctrine traditionally requires a showing of actual malice, courts may lower the standard to reflect the lower protection given commercial speech.<sup>139</sup> A negligence standard would afford the defendant sufficient protection and avoid the chilling effect strict liability could create.<sup>140</sup> Such a requirement would also protect plaintiffs. Plaintiffs could demonstrate negligence by showing that the defendant unreasonably made unsubstantiated assertions or omitted material facts.<sup>141</sup>

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135. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). When the plaintiff is not a public figure, states are free to define the mens rea required so long as monetary damages are not recoverable without a showing of at least negligence, and the amount of recovery is limited to actual damages when less than actual malice is shown. *Id.* at 347. The *Gertz* Court reasoned that speech about a public figure plaintiff, such as a public official, has more social value than speech about a private person or matter. *Id.* at 344-45. See also *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 749 (1984) (when defamatory statements do not involve a matter of public concern, presumed and punitive damages are recoverable without a showing of actual malice).

136. *Gertz*, 418 U.S. at 345.

137. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 492 (1984) (court did not decide whether Bose Corporation's commercial activities made it a public figure).

138. Even if the plaintiff does not advertise, the information contained in advertising is a matter of public interest. See *supra* notes 104-07, 136 and accompanying text. If an advertiser compares its product to all other brands, and the claim is false as to one competitor with a small business (such as an individual who produces goods at her home and distributes them locally), the plaintiff probably is not a public figure.

139. Negligence is the standard required in a defamation action when the plaintiff is not a public figure. *Gertz*, 418 U.S. at 347.

140. See *supra* notes 118-20 and accompanying text. But see Caswell, *Soldiers of Misfortune: Holding Media Defendants Liable for the Effects of Their Commercial Speech*, 41 FED. COMM. L.J. 217, 230 (1989) (arguing that even a negligence standard for a media defendant's liability for personal injury caused by its advertisements will chill protected speech).

141. See *supra* notes 53-71 and accompanying text. It is reasonable to expect an advertiser to make an investigation before comparing its product to competing products in an advertisement. If a



Such a standard would allow recovery for many plaintiffs, protect the public from negligent advertising,<sup>142</sup> and provide protection to the defendant who innocently and reasonably makes a statement likely to mislead consumers.

### C. *Media Defendants*

Because the first amendment specifically protects freedom of the press,<sup>143</sup> courts are reluctant to impose civil liability upon media defendants because sanctions may chill media coverage of controversial matters.<sup>144</sup> In the context of commercial speech, the concern is that holding media defendants liable for misleading or false advertisements will discourage the media's willingness to accept informational or comparative advertising.<sup>145</sup> Even worse, a large damage award could drive a media defendant out of business, thereby silencing all its speech, not just its commercial speech.<sup>146</sup>

The revised section 43(a)'s treatment of media defendants is troubling in two respects. First, in order to avoid monetary damages, the media defendant must establish the innocence of its violation.<sup>147</sup> The Supreme Court, however, consistently states that media defendants need not prove the truth of their speech,<sup>148</sup> and courts are hesitant to impose monetary

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failure to conduct a reasonable investigation results in material omissions or unsubstantiated claims, the plaintiff could recover under a negligence standard.

142. For a discussion of the injury possible from negligent commercial speech, see Caswell, *supra* note 140, and Case Comment, *Constitutional Law—Eimann v. Soldier of Fortune and "Negligent Advertising" Actions: Commercial Speech in an Era of Reduced First Amendment Protection*, 64 NOTRE DAME L. REV. 157 (1989).

143. See *supra* note 99.

144. Caswell, *supra* note 140, at 230 ("Judges properly recognize that media defendants are unique in two key respects: their business is speech, and their customary objective is to disseminate that speech as widely as possible.")

145. See Case Comment, *supra* note 142 at 164 (courts generally require recklessness to hold a media defendant liable for commercial speech in order to "restrict the scope of the publisher's duty").

146. See Caswell, *supra* note 140, at 230 ("A relatively large award can easily threaten the financial viability of a publication.")

147. See *supra* notes 88-89 and accompanying text.

148. The Court observed in *New York Times v. Sullivan*, 376 U.S. 254 (1964):

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker. . . . The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'

*Id.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963) (erroneous statements must be protected so that free expression will have the "breathing space" necessary for its survival)).

liability on media defendants for negligent commercial speech.<sup>149</sup> The second difficulty with section 43(a)'s treatment of media defendants is that an innocent defendant is subject to an injunction<sup>150</sup> even though the first amendment forbids states from imposing liability without fault upon media defendants in the context of defamation.<sup>151</sup>

Although a media defendant's commercial speech is not entitled to the same first amendment protection as its "core" speech,<sup>152</sup> the press depends on advertising revenues in order to deliver "core" speech at an affordable cost.<sup>153</sup> Therefore, if section 43(a) chills media willingness to accept comparative or informational advertisements, it will also negatively affect the availability of core speech.<sup>154</sup>

These concerns may rarely arise. Most plaintiffs will probably be more interested in suing their competitors than in suing the press, so long as the competitor is available for suit.<sup>155</sup> Further, media defendants with a strictly business relationship with the party placing the advertisement may be able to show their innocence without difficulty.<sup>156</sup> For them, an injunction is not a particularly onerous remedy.<sup>157</sup> Still, the statute allows damage awards against media defendants; therefore, the first amendment concerns may arise in some cases.

149. See *supra* note 145.

150. See *supra* notes 88-89 and accompanying text.

151. Injunctions are not available in defamation actions. See *Near v. Minnesota*, *supra* note 124. The *Near* rule, however, probably does not apply to commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-72 n.24 (1976) (prohibition against prior restraints may not apply in the context of commercial speech).

152. *Virginia Citizens*, 425 U.S. at 726-72 n.24 (states may regulate commercial speech more strictly than core speech).

153. See, e.g., *Morrison*, *supra* note 59, at 555 ("The leading United States advertiser spends over \$1.5 billion per year, and the typical nationally advertised brand is supported by millions of dollars in print, television and promotional advertising.").

154. See *supra* note 146.

155. The innocent violation defense is available only to those "engaged solely in the business of printing the . . . violating matter for others." Lanham Act § 32(2), 15 U.S.C. § 1114(2) (Supp. 1989).

156. Although the rule against prior restraints, *supra* note 151, contemplates that silencing speech is more restrictive than requiring the speaker to pay monetary damages, this is probably not true in the context of paid advertisements. That is, the media would probably rather stop publishing the advertisement than pay damages. If the media prints advertisements as a means of generating revenues, it is unlikely that the media would continue publishing the advertisement after the advertiser was enjoined from using the advertisement, so an injunction against the media defendant would be unnecessary.

157. Although the *Near* Court regarded prior restraints of defamatory speech "the essence of censorship," 283 U.S. at 713, one who publishes advertisements only for profit is clearly more interested in generating revenue than in conveying a heartfelt message. See *supra* note 156.

When a section 43(a) suit is brought against a media defendant, courts must be particularly cautious to assure that the remedy for misleading speech does not chill protected speech. In such cases, the courts should require a showing of at least negligence before awarding monetary damages.<sup>158</sup>

#### IV. CONCLUSION

The Trademark Law Revision Act modified section 43(a) to make more advertisements actionable and more remedies available. The Act offers greater relief to plaintiffs victimized by comparative advertisements than was available at common law or under the former section 43(a). Because the revised section may prohibit some literally true advertising claims along with claims that are demonstrably false, courts must carefully construe the revised section so as to avoid chilling constitutionally protected speech by advertisers and the media. The courts can achieve this objective by awarding only remedies that are needed to correct and eliminate deception, and by requiring a showing of fault for advertisements that are misleading but not demonstrably false.

*Sherry Gunn*

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158. Some courts may find that the first amendment requires a showing of recklessness before media defendants may be subject to liability for damages. *See supra* notes 139-46 and accompanying text.