A Survey of False Advertising in Cyberspace

*By Cheryl Dancey Balough**

As the internet plays a more important role in marketing, false advertising claims that target companies' use of websites and social media continue to grow. Key cases from mid-2011 through mid-2012 evidence this phenomenon and introduce some new variations to false advertising claims. These cases include claims related to blog posts, pseudonymous online reviews, cybersquatting, and mobile applications.

The Lanham Act provides that:

> 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 . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[1]

False advertising complaints may also be filed under state statutes.[2]

I. Claims Against Competitors

Recent false advertising cases of note include claims that competitors made false statements on their websites that misled potential customers. One such case involved two former partners in a company called McLane Associates, Inc. who separated and subsequently competed for management services projects.[3] McGrath accused PCM of false advertising, alleging that PCM's website included false statements that gave the impression PCM was a larger, more experienced company than it was.[4] McGrath said the website statements were literally false because they reported for PCM data that was actually the combination

* Cheryl Dancey Balough is a principal of Chicago-based Balough Law Offices, LLC. She serves as communications co-director of the Cyberspace Law Committee of the ABA Section of Business Law.

1. Lanham Act § 43, 15 U.S.C. § 1125(a)(1) (2006).

2. *See, e.g.*, Cal. Bus. & Prof. Code §§ 17500–17606 (West 2012); *id.* §§ 17200–17210, 17500–17850 (West 2008 & Supp. 2011).

3. McGrath & Co. v. PCM Consulting, Inc., 2012 U.S. Dist. LEXIS 18584, at *2–4 (D. Mass. Feb. 15, 2012).

4. *Id.* at *6–7.

of PCM's data with McLane data, thereby intentionally misleading potential customers.[5]

The court denied PCM's motion to dismiss, finding that McGrath adequately stated a claim for false advertising. To state such a claim under the Lanham Act, a plaintiff must allege that:

> (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.[6]

The court specifically noted that McGrath's complaint adequately alleged that PCM's website statements constituted commercial advertising because they promoted PCM's services to any consumer who viewed the website.[7] The misrepresentations were material because they could influence prospective clients.[8] Furthermore, when "one operates a website containing alleged false or misleading statements, the party causes those statements to enter interstate commerce through the internet."[9] While the *McGrath* court explained how the PCM website met the criteria for false advertising, other courts assume that website content is commercial advertising that is both material and interstate in nature, much like television promotion and product packaging.[10]

Another recent case, *iYogi Holding PVT Ltd. v. Secure Remote Support, Inc.*,[11] addressed false or misleading content that a company posted on its website blog about a direct competitor, as well as shill reviews. iYogi's complaint, to which Secure Remote Support, Inc. ("SRS") did not respond, alleged that SRS's website blog contained false, misleading, and defamatory statements about iYogi and a hyperlink to "iyogireviewsonline.com," a site containing similar statements.[12] SRS owned and operated the latter website, although the site did not indicate any connection to SRS.[13] iYogi further alleged that SRS "intentionally published false, misleading and defamatory reviews, testimonials and comments regarding Plaintiff's services on other consumer websites (without disclosing the fact that the authors of these negative comments have a material connection with SRS . . .)."[14] The magistrate judge found that iYogi adequately pled false advertising, under both the

5. *Id.*
6. *Id.* at *8 (quoting Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310–11 (1st Cir. 2002)).
7. *Id.* at *10.
8. *Id.* at *15.
9. *Id.* at *17.
10. *See, e.g.*, CJ Prods. L.L.C. v. Snuggly Plushez L.L.C., 809 F. Supp. 2d 127, 146–48 (E.D.N.Y. 2011).
11. 2011 U.S. Dist. LEXIS 144425 (N.D. Cal. Oct. 25, 2011).
12. *Id.* at *3–4.
13. *Id.* at *4.
14. *Id.* at *5.

Lanham Act and California's False Advertising Law, and recommended that iYogi's motion for default judgment and request for an injunction be granted, which the district court adopted.[15]

In some recent contested cases, however, courts have been more reticent to conclude that blog posts or reviews posted under pseudonyms contain literally false or misleading statements that constitute false advertising. In *QVC, Inc. v. Your Vitamins, Inc.*,[16] an appellate court affirmed the lower court's denial of a preliminary injunction against publication of a competitor's blog posts. After Your Vitamins moved promotion of its Healthy Hair, Skin, and Nails product from QVC to QVC's rival HSN, QVC introduced an identically named product.[17] Your Vitamins' owner, Lessman, then posted blog comments on his website complaining about QVC's conduct, alleging that QVC's product is over 90 percent additives, that "there is a significant body of troubling research that connects hyaluronic acid, an ingredient in QVC's [product], to cancer," and that "it is totally useless and potentially harmful."[18] The blog posts expressed similar concerns about two other QVC products and called QVC products " 'ridiculous,' 'embarrassing,' 'sad,' and 'disturbing.' "[19]

The court found that Lessman's posts were not literally false.[20] As to whether the posts were misleading, the court stated that "where the advertisements are not literally false, plaintiff bears the burden of proving actual deception by a preponderance of the evidence. . . . [I]t must show how consumers *actually* do react."[21] The court found that the only evidence of consumer reaction to Lessman's posts were about sixty comments "purportedly left by consumers" and that "only a handful suggested that consumers had been misled into a materially false belief about QVC's products."[22] Moreover, the court stated that blog post comments should be given only limited weight because they "can be very difficult to authenticate" given the popular use of false identities in internet forums to attack corporate rivals and, "[e]ven if a poster is 'legitimate,' doubts will often remain as to the sincerity of the comment."[23]

In *Boykin Anchor Co. v. AT&T Corp.*,[24] the court granted AT&T's motion to dismiss Boykin's false advertising claim because the internet postings at issue were not a commercial advertisement or other promotion. Boykin Anchor competed with just one company, Hilti, for AT&T's purchase of seismic anchors.[25] An AT&T employee, Wong, whose advice impacted what products, including

15. *Id.* at *6, *41–44, *57–58; *see also* iYogi Holding PVT Ltd. v. Secure Remote Support, Inc., 2011 U.S. Dist. LEXIS 144413 (N.D. Cal. Dec. 15, 2011).
16. 439 F. App'x 165 (3d Cir. 2011).
17. *Id.* at 167.
18. *Id.*
19. *Id.*
20. *Id.* at 168.
21. *Id.* (citing Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228–29 (3d Cir. 1990)).
22. *Id.*
23. *Id.* at 168–69.
24. 825 F. Supp. 2d 706 (E.D.N.C. 2011).
25. *Id.* at 708.

seismic anchors, were used by telecommunications companies, developed a "personal relationship with employees of Hilti . . . [and] recommended in internet postings that '[Boykin] anchors should not be used because of performance questions.' "[26] The court acknowledged that Boykin anchors have no performance questions and that Wong's reputation and false statements caused distributors to stop carrying Boykin anchors.[27] Nevertheless, the court granted the defendant's motion to dismiss because Wong's postings were not commercial speech, AT&T did not compete commercially with Boykin, and there was no indication that the postings "were designed to influence consumers to buy products or services provided by Wong or AT&T Services, as opposed to Hilti."[28]

NTP Marble, Inc. v. AAA Hellenic Marble, Inc. offers a contrast. There, NTP Marble (also known as Colonial) filed a false advertising complaint against John Does after discovering numerous negative reviews about its services.[29] When responses to subpoenas revealed that several reviews came from "computers having IP addresses belonging to Hellenic's business office and/or the residence of one of its alleged directors," Colonial filed an amended complaint, naming Hellenic.[30] An Hellenic employee, Moser, who had previously worked for Colonial and also had a criminal background, then drafted a "statement" taking sole responsibility for posting the reviews, and Hellenic argued that it was therefore entitled to summary judgment.[31] Concluding that Colonial had produced evidence "from which a reasonable jury might conclude that Moser did not post all of the Reviews, and/or that he did so with the knowledge or encouragement" of Hellenic, the court denied summary judgment.[32] The court found that a jury could find the reviews constituted false advertising because they "were disseminated over the internet, and warned potential customers of Colonial's purported poor quality goods and workmanship, [and] suggested that customers take their business elsewhere."[33] The court held that the Lanham Act did not require that the reviews name Hellenic because a "violation may be found where the speech is commercial, refers to a specific product or service, and is motivated by economic interests."[34]

Courts have also found false advertising related to cybersquatting. In *Traffic school.com, Inc. v. Edriver, Inc.*,[35] the plaintiffs marketed traffic school and driver's education courses, competing for referrals with the defendants, who owned and managed DMV.org, a website that helped people renew driver's licenses, buy car insurance, view driving records, beat traffic tickets, register

26. *Id.*
27. *Id.*
28. *Id.* at 711.
29. NTP Marble, Inc. v. AAA Hellenic Marble, Inc., 2012 U.S. Dist. LEXIS 24671, at *3 (E.D. Pa. Feb. 24, 2012).
30. *Id.* at *4–5.
31. *Id.* at *5–6.
32. *Id.* at *17–18.
33. *Id.* at *26.
34. *Id.*
35. 653 F.3d 820, 824 (9th Cir. 2011).

vehicles, and find DUI/DWI attorneys. The plaintiffs claimed that the defendants engaged in false advertising "by actively fostering the belief that DMV.org is an official state DMV website, or is affiliated or endorsed by a state DMV."[36] The court found that the website likely misled consumers because anyone in California who googled "dmv" or "drivers ed" would see sponsored listings for "ca.dmv.org" or "California.dmv.org" with links resolving to DMV.org.[37] That site also used state slogans and symbols and linked to web pages that helped consumers complete DMV-related transactions.[38] The court found that DMV.org's disclaimed connection with state DMVs was insufficient because it was "in small font at the bottom of each page, where many consumers would never scroll."[39] DMV.org used similar online marketing strategies in other states, and the plaintiffs showed actual confusion, which caused consumers to share sensitive personal information.[40] The court issued an injunction and awarded attorney's fees.[41]

In *Skydive Arizona, Inc. v. Quattrocchi*,[42] Skydive Arizona, a very large skydiving center, sued SKYRIDE, an internet and telephone-based skydive booking service, for false advertising, trademark infringement, and cybersquatting. Although Skydive Arizona did not accept bookings via SKYRIDE, some of SKYRIDE's numerous websites specifically referred to Arizona, and its registered domain names included skydivearizona.net, arizonaskydive.com, and skydivingarizona.com.[43] The district court granted Skydive Arizona's request for partial summary judgment on its false advertising claim, and a jury found in its favor on the other claims.[44] SKYRIDE disputed the district court's materiality finding, but the appellate court affirmed the lower court, finding Skydive Arizona's "decision to proffer declaration testimony instead of consumer surveys to prove materiality [did] not undermine its motion for partial summary judgment."[45] While the appellate court reversed the lower court's actual damages enhancement, it upheld the other damages of more than $5 million.[46]

II. Consumer Class Action Suits

The past year has also seen several class action complaints for false advertising. Hall of Famer George Brett's company, which sold ionic necklaces, reached a settlement with an Iowa man, who had filed a class action complaint for false advertising, alleging that Brett Bros. falsely claimed its products provided a number

36. *Id.*
37. *Id.* at 827.
38. *Id.* at 827–28.
39. *Id.* at 828.
40. *Id.*
41. *Id.* at 829–34.
42. 673 F.3d 1105, 1108 (9th Cir. 2012).
43. *Id.* at 1109.
44. *Id.*
45. *Id.* at 1111.
46. *Id.* at 1114–15.

of health benefits.[47] Still pending are suits in Florida and California against General Mills related to the company's claims on the internet (and other media) about the digestive health benefits of its YoPlus yogurt.[48] In *Fitzpatrick v. General Mills, Inc.*, the district court granted class certification and, after the Eleventh Circuit—on interlocutory appeal—remanded the case for further consideration, redefined the class to include "all persons who purchased Yo-Plus in the State of Florida until the date notice is first provided to the class."[49] In *Johnson v. General Mills, Inc.*, the district court reconsidered its grant of class certification after the U.S. Supreme Court issued a decision in a separate case that clarified the requirements for a finding of commonality under Rule 23(a) and after the *Fitzpatrick* court redefined the class.[50] The district court concluded that it was appropriate to include fourth generation purchasers in the class, noting, among other points, that the defendant "continued to present an explicit assertion that YoPlus improved digestive health on its website."[51] It will be important to follow the evolution of these cases, along with other recently filed class action suits for false advertising on the internet.[52]

III. Federal Trade Commission Actions

The Federal Trade Commission ("FTC") has the dual role of protecting consumers and promoting competition.[53] It "polices the internet for deceptive ads, and recently brought a slew of cases involving questionable advertising techniques."[54] Given the FTC's statutory authority,[55] the agency can bring actions for deceptive marketing practices where private actions, including class actions, were unsuccessful. In a case involving negative-option marketing, the FTC successfully obtained a settlement when private plaintiffs could not obtain personal jurisdiction over the defendants.[56] The FTC filed a broader case against the defendants for multiple online deceptive activities related to selling health and beauty supplements, operation of penny auctions, and a very broad research service.[57] The FTC claimed the online purchasers were not adequately informed

47. Thompson v. Brett Bros. Sports Int'l, Inc., No. 12-cv-0055-JAJ, slip op. at 1 (S.D. Iowa May 15, 2012) (order).

48. Fitzpatrick v. General Mills, Inc., 2011 U.S. Dist. LEXIS 138939 (S.D. Fla. Dec. 2, 2011); Johnson v. General Mills, Inc., 278 F.R.D. 548 (C.D. Cal. 2012).

49 *Fitzpatrick*, 2011 U.S. Dist. LEXIS 138939, at *4. The Eleventh Circuit's decision is *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011).

50. *Johnson*, 278 F.R.D. at 550 (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)).

51. *Id.* at 551.

52. *See, e.g.*, De Keczer v. Tetley USA, Inc., No. 12-cv-02409-HRL (N.D. Cal. filed May 11, 2012); *In re* Match.com, No. 10-cv-02651-L (N.D. Tex. filed Nov. 16, 2011).

53. Fed. Trade Comm'n, Federal Trade Commission Annual Report 2012, at ii (Mar. 2012), *available at* http://www.ftc.gov/os/highlights/2012/ftc-highlights.pdf.

54. *Id.* at 9.

55. Federal Trade Commission Act §§ 4, 5, 12, 13, 15 U.S.C. § 44, 45, 52, 53 (2006).

56. *See* Fasugbe v. Willms, 2011 U.S. Dist. LEXIS 56569 (E.D. Cal. May 26, 2011) (court granted motion to dismiss plaintiffs' first amended complaint for failure to allege personal jurisdiction); Fasugbe v. Willms, 2011 U.S. Dist. LEXIS 93483 (E.D. Cal. Aug. 22, 2011) (court granted motion to dismiss plaintiffs' second amended complaint on the same ground).

57. FTC v. Willms, 2011 U.S. Dist. LEXIS 103160, at *3 (W.D. Wash. Sept. 13, 2011).

that the service was not "free" and that they were being enrolled in a recurring fee program unless they opted out shortly after placing an order.[58] After the FTC obtained an injunction, the defendants agreed to a settlement order, including an injunction banning them from using "negative-option" marketing and a judgment of $359 million, which was suspended upon the defendants meeting certain obligations.[59]

The FTC successfully pursued two groups of internet marketers of açai berry supplements. The first group of defendants, using negative-option marketing, offered a "free" sample, but the sample was free only if the customer returned the unused portion of the sample within fourteen days after having obtained company authorization.[60] The defendants did not disclose to consumers that, by signing up for a free sample, they also signed up for monthly shipments of the product unless they cancelled the plan.[61] Under an agreed order, the defendants were banned from selling any product with a negative-option feature and paid $1.5 million to the FTC.[62] The second group of defendants marketed açai berry products using fake internet news sites, such as nbssnewsat6.com, channel9investigates.com, channel2local.com, and channel9heathbeat.com, which featured fake news reports touting the benefits of açaiberry products.[63] The defendants agreed to a permanent injunction and a payment of $1.345 million.[64]

Another FTC action targeted a party that used paid search results on Google's search engine and Google ads on third-party websites to attract consumers who were in debt.[65] The company claimed it could reduce a consumer's debt by 70 percent but failed to disclose that its own fee was up to 30 percent of any savings and that the consumer's debt would continue to increase while it paid money to the defendant.[66] The company agreed to a final judgment of $3.3 million and an injunction preventing it from making such representations in the future.[67]

Mobile apps were also targeted by the FTC. The apps "AcneApp" and "Acne Pwner" claimed to treat acne with colored lights emitted from smartphones or

58. *Id.* at *4.

59. Stipulated Final Judgment and Order at 9–11, 18–24, FTC v. Willms, No. 11-cv-828-MJP (E.D. Wash. Feb. 22, 2012), *available at* http://www.ftc.gov/os/caselist/1023012/120223jwillmsstip.pdf.

60. Complaint at 5–8, FTC v. Cent. Coast Nutraceuticals, Inc., No. 10-cv-4931 (N.D. Ill. Aug. 5, 2010), *available at* http://www.ftc.gov/os/caselist/1023028/100816centralcoastcmpt.pdf.

61. *Id.* at 8–9.

62. Stipulated Order at 8–16, 19–25, FTC v. Cent. Coast Nutraceuticals, Inc., No. 10-cv-4931 (N.D. Ill. Jan. 3, 2012), *available at* http://www.ftc.gov/os/caselist/1023028/120109centralcoaststip.pdf.

63. Amended Complaint at 3–6, FTC v. IMM Interactive, Inc., No. 11-cv-2484 (N.D. Ill. Mar. 14, 2012), *available at* http://www.ftc.gov/os/caselist/1023232/120321copeaccmpt.pdf.

64. Stipulated Final Judgment at 2, 8–19, FTC v. IMM Interactive, Inc., No. 11-cv-2484 (N.D. Ill. Mar. 15, 2012), *available at* http://www.ftc.gov/os/caselist/1023232/120321copeacstip.pdf.

65. Complaint at 3–4, 7, FTC v. FDN Solutions, LLC, No. 12-cv-00820-JST (C.D. Cal. May 25, 2012), *available at* http://www.ftc.gov/os/caselist/1123078/120606fdncmpt.pdf.

66. *Id.* at 3–7.

67. Stipulated Final Judgment and Order at 2, 5–12, FTC v. FDN Solutions, LLC, No. 12-cv-00820-JST (C.D. Cal. May 25, 2012), *available at* http://www.ftc.gov/os/caselist/1123078/120606fdnstip.pdf.

mobile devices.[68] There were about 3,300 downloads of Acne Pwner at 99 cents each and about 11,600 downloads of AcneApp at $1.99 each.[69] After the FTC charged that the claims for both apps were unsubstantiated, the defendants agreed to stop making claims that their apps could treat acne.[70]

IV. Conclusion

Cases involving alleged false advertising in cyberspace have increased significantly in number but with varying degrees of success. Courts have recently found in favor of companies complaining of false advertising when a competitor's website contains false or misleading statements. On the other hand, not all courts are willing to conclude that similar statements in blog posts or pseudonymous reviews constitute false advertising given concerns about the true identity of posters and a lack of clarity regarding the credence consumers give to such posts and reviews. Courts have found, however, that the use of misleading domain names can give rise to false advertising claims. Recent class action complaints by consumers alleging false advertising on company websites have yielded mixed results, but the FTC has been very successful in reaching settlements in both internet and mobile application cases. As the internet and social media continue to grow as favored vehicles for marketing, we are likely to see many more cases involving false advertising using these media with perhaps a clearer pattern of what it will take for a plaintiff to prevail.

68. *In re* Brown, FTC Docket No. C-4337 (Oct. 13, 2011) (decision and order); *In re* Finkel, FTC Docket No. C-4338 (Oct. 12, 2011) (decision and order).

69. *See supra* note 68.

70. *See supra* note 68.