



## SECOND CIRCUIT PROVIDES CLEARER PICTURE ON ITS FALSE ADVERTISING DOCTRINE

by

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On August 9, 2007, the U.S. Court of Appeals for the Second Circuit affirmed in part, vacated in part, and remanded for further proceedings a Southern District of New York ruling that banned DIRECTV from disseminating in any Time Warner Cable, Inc. (“TWC”) cable market certain television commercials and Internet advertisements found likely to violate the Lanham Act on literal falsity grounds. *See Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007). The case concerned claims made in some of DIRECTV’s advertisements about the picture quality of DIRECTV’s high definition (“HD”) programming. In evaluating DIRECTV’s HD quality claims, the Second Circuit provided a clearer picture on its false advertising doctrine.

Specifically, the Second Circuit made three clarifications to its false advertising doctrine:

- An advertisement can be literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message;
- The category of non-actionable “puffery” encompasses visual depictions that, while factually inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them in navigating the marketplace; and
- The likelihood of irreparable harm may be presumed where the plaintiff demonstrates a likelihood of success in showing that the defendant’s comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even though the plaintiff is not specifically identified by name.

*The Disputed Advertisements.* The dispute arose from DIRECTV’s “Source Matters” consumer

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awareness advertising campaign (the “Campaign”), which focused on making consumers aware that in addition to buying an HD television set, consumers must also receive HD programming from the “source” (*i.e.*, DIRECTV) to obtain HD-standard picture quality.

As part of the Campaign, DIRECTV began running a television commercial in October 2006 featuring Jessica Simpson portraying her character Daisy Duke from the movie *Dukes of Hazzard*. In the commercial, Simpson states “You’re just not gonna get the best picture out of some fancy big screen TV without DIRECTV.” DIRECTV also debuted a commercial in October 2006 featuring William Shatner in his role as Captain Kirk from the *Star Trek* television and film franchise. In the commercial, immediately after praising DIRECTV HD picture quality, Shatner states “settling for cable would be illogical.” Both the Simpson and the Shatner commercials originally ended with the tagline “For picture quality that beats cable, you’ve got to get DIRECTV.” In response to objections from Time Warner Cable, DIRECTV revised both commercials in December 2006 by replacing the original tagline with the tagline “For an HD picture that can’t be beat, get DIRECTV.”

In addition to the television commercials, the Campaign also included Internet advertising (the “Internet Advertisements”) in the form of demonstrative advertisements on the DIRECTV website and banner ads on third party websites. The advertisements featured a split screen which was highly pixelated and included an indiscernible image on one side and a sharp and clear image on the other side. The highly pixelated image was labeled “OTHER TV” and the sharp and clear image was labeled “DIRECTV.” The demonstrative advertisement on the DIRECTV website was accompanied with the text “If you’re hooking up your high-definition TV to basic cable, you’re not getting the best picture on every channel. For unparalleled clarity, you need DIRECTV HD.”

***The Dispute.*** Because it was not disputed that DIRECTV’s HD picture quality is equivalent to TWC’s HD picture quality, TWC claimed that each of these advertisements was literally false. TWC further argued that as DIRECTV’s direct competitor, it was entitled to a presumption of irreparable injury and injunctive relief. DIRECTV asserted that the revised Simpson and Shatner commercials were not literally false because no single statement in the commercials explicitly claimed that DIRECTV HD is superior to cable HD in terms of picture quality. DIRECTV did not deny that the Internet Advertisements’ depictions of cable were facially false. Rather, it argued that the Internet Advertisements did not violate the Lanham Act because the images constituted non-actionable “puffery.”

On February 5, 2007, the District Court issued a decision granting TWC’s motion. The District Court determined that TWC had met its burden of showing that the assertion in the Simpson commercial that a viewer cannot “get the best picture out of some big fancy big screen TV without DIRECTV” and Shatner’s statement that “settling for cable would be illogical” could only be understood as making the literally false claim that DIRECTV HD is superior to cable HD in picture quality. The District Court found that the Internet Advertisements’ facially false depictions of cable’s picture quality could not be discounted as mere puffery because consumers were generally confused about HD technology which could lead them to actually rely on the images in deciding whether to hook up their HD television sets to DIRECTV or analog cable.

***The Second Circuit’s Decision: False by Necessary Implication.*** The Second Circuit found that the statement in the Simpson commercial, that a viewer cannot “get the best picture” without DIRECTV is “flatly untrue” and affirmed the District Court’s determination that the Simpson commercial is likely to be proven literally false.

With regards to the Shatner commercial, the Second Circuit felt a more in-depth analysis was

required because the issue turned on a tension between two key cases, *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978) and *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381 (2d Cir. 1986). DIRECTV argued that the District Court ruling was clearly erroneous because the statement at issue “settling for cable would be illogical” does not explicitly compare the picture quality of DIRECTV HD and cable HD. DIRECTV argued that the District Court’s determination of literal falsity based on its subjective perception of the implied message conveyed by the commercial as a whole is improper under the Second Circuit’s previous decision in *American Home Products*. TWC, on the other hand, argued that the District Court decision properly considered context to determine the implied falsity pursuant to its previous decision in *Avis Rent A Car*.

The apparent conflict between *American Home Products* and *Avis Rent A Car* revolves around when it is appropriate for a district court to consider its subjective impression to determine an implied falsity in an advertisement. As the Second Circuit framed it:

*American Home Products* counsels that when an advertisement is not false on its face, but instead relies on indirect intimations, district courts should look to consumer reaction to determine meaning, and not rest on their subjective impressions of the advertisement as a whole. *Avis Rent A Car*, on the other hand, instructs district courts to consider the overall context of an advertisement to discern its true meaning, and holds that the message conveyed by an advertisement may be viewed as not false in the context of the business at issue, even [when] the written words are not literally accurate.

The Second Circuit reconciled the apparent conflict by adopting the “false by necessary implication” doctrine, which is already recognized in the First, Third and Fourth Circuits. Under this doctrine, a district court evaluating whether an advertisement is literally false must analyze the message conveyed in full context. If the language or graphic is susceptible to more than one reasonable interpretation, the advertisement cannot be literally false. As the Second Circuit summarized “where the advertisement does not make an unambiguous claim ‘the court’s reaction is at best not determinative and at worst irrelevant.’” However, if the words or images, considered in context, are unambiguous and necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.

Applying the “false by necessary implication” test to the Shatner commercial, the Second Circuit affirmed the District Court finding that Shatner’s assertion that “settling for cable would be illogical” was an unambiguous false claim that cable’s HD picture quality is inferior to that of DIRECTV when made in the context of Shatner praising DIRECTV’s amazing picture quality.

**Puffery.** With regard to the Internet Advertisements, DIRECTV did not contest that the pixilated distorted images used to represent cable are literally false depictions of the picture quality provided by cable’s digital or analog service. Instead, DIRECTV asserted that the images were permissible non-actionable puffery because the images are so grossly distorted and exaggerated that no reasonable buyer would take them to be accurate depictions of cable television. TWC argued that because consumers are so highly confused about HD technology, they could be misled and confused by the advertisements. Generally, puffery is defined as a non-specific favorable statement relating to a product or service which cannot be proven and is not likely to be relied upon by consumers – giving advertisers a limited degree of latitude in what they can say about their products and services. In its decision, the Second Circuit widened this latitude.

The Second Circuit acknowledged that it has had little opportunity to explore the concept of puffery

in the false advertising context. The Second Circuit had previously recognized a form of puffery characterized by a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion (e.g., “DIRECTV is the best!”). However, it was not until the present case that the Second Circuit formally acknowledged another form of puffery recognized in other circuits in the form of “an exaggerated, blustering and boasting statement upon which no reasonable buyer would be justified in relying.” Considering this latter form of puffery, the Second Circuit found that the District Court had erred in rejecting DIRECTV’s puffery defense holding that no reasonable buyer would actually be fooled by the Internet Advertisements into thinking that cable’s picture quality is so poor that the image is almost entirely obscured.

**Irreparable Harm.** The general rule in the Second Circuit is that a plaintiff must submit proof which provides a reasonable basis for believing that the false advertising will likely cause it injury. More specifically, the Second Circuit has held this to mean that likelihood to cause injury may be presumed where the plaintiff demonstrates a likelihood of success in showing that a defendant’s comparative advertisement which mentions the plaintiff’s product by name is literally false. Although neither the Simpson nor Shatner television commercials identified TWC by name, the Second Circuit found that the rationale for a presumption of irreparable harm applies with “equal force” to this case because of the nature of the television services market. As the Second Circuit stated, “given the nearly binary structure of the television services market, it would be obvious to consumers that DIRECTV’s claims of superiority are aimed at diminishing the value of cable – which... is synonymous with TWC in the areas covered by the preliminary injunction.” Based on the quasi-duopoly nature of television services, the Second Circuit found that the District Court did not err in presuming that TWC has “a reasonable basis” for believing that the advertisement will likely cause it injury even though the advertisements never call TWC by name.

**Conclusion.** For advertisers, the decision in *Time Warner Cable, Inc. v. DIRECTV, Inc.* is a double-edged sword. On the one hand, it clarifies that outrageous visual depictions can count as puffery, so advertisers can feel confident that these types of claims should not be subject to attack from competitors. On the other hand, it also provides the courts with a wide degree of latitude with respect to implied claims, giving them power to determine, without the need for consumer survey data, whether a claim is false by implication, by looking at the words and images in an advertisement in context. That is good news for the challengers, but not so good for the challenged. Because a survey is not required to establish a claim of literal falsehood, as opposed to a claim of implied falsehood, it is much less costly for a challenger to bring a claim of literal falsehood when one is available. Expanding the scope of what can be literally false to claims that do not explicitly make a false assertion will likely lead to an increase in such claims being brought. So what is the bottom line? While the Second Circuit has now made clear that the puffery defense exists for grossly exaggerated visual images, advertisers still need to be careful about how far they take it. All of the claims that are implied by an advertisement as a whole, including the visual images, need to be considered before an advertisement’s publication and distribution.