

Second Circuit Breaks New Ground in Adopting “False by Necessary Implication” Doctrine and Reconciling the Doctrine with the Court’s False Advertising Precedent

In a significant decision that breaks new ground for false advertising law in the Second Circuit, the Court of Appeals has accepted the “false by necessary implication” doctrine and reconciled that doctrine with the Court’s prior holdings that a plaintiff must rely on survey evidence when alleging that the challenged advertisement is implicitly false. The Court also held for the first time that irreparable harm can be presumed in a false advertising case where the plaintiff is likely to succeed in showing that the defendant’s comparative advertisement is literally false and that consumers in the relevant market “would undoubtedly understand” that the advertisement referred to the plaintiff, even if the advertisement does not mention the plaintiff by name. Finally, the Court explained that the defense of “puffery” applies not only to statements, but also to visual depictions and images that are so grossly exaggerated that no reasonable consumer would take them at face value.

The case, *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 2007 U.S. App. LEXIS 18846 (2d Cir. Aug. 9, 2007), involved allegations that DIRECTV’s television and internet advertising for its high-definition (“HD”) service falsely asserted that DIRECTV HD was superior to cable HD in terms of picture quality. One television advertisement featured actor William Shatner touting the “amazing picture quality of . . . DIRECTV HD” and that “settling for cable would be illogical,” and carried a closing tagline: “For an HD picture that can’t be beat, get DIRECTV.” On appeal, DIRECTV maintained that none of the advertising statements explicitly compared the parties’ HD services and that, accordingly, the district court erred in finding the advertisement to be literally false based on its own subjective perception of the advertisement’s general message. In prior false advertising cases, the Court of Appeals had held that where a plaintiff alleges that the challenged advertisement is false by implication, the district court should weigh consumer survey evidence and not rest on its own subjective impressions. In other cases, however, the Court had made clear that the true meaning of an advertisement depends upon the advertisement’s overall context, and that even if the express statements made in an advertisement were not literally accurate, it does not follow that the advertisement is necessarily false. Thus, for example, in *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381 (2d Cir. 1986), the Court held that “text must yield to context,” and concluded that the Hertz advertisement at issue stating that Hertz had more new cars than Avis had cars – even though Avis’ fleet was larger than Hertz’s if the cars Avis owned but were no longer available for rental were included in the total – was not false under the Lanham Act in light of the context of the advertisement, its audience and the market at issue.

The Court of Appeals reviewed and reconciled its earlier opinions and held that if the words or images of an advertisement “considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.” In so holding, the Court followed the First, Third, Fourth and Ninth Circuits, which had previously adopted this “false by necessary implication” doctrine. The doctrine provides a false advertising plaintiff with more leeway in arguing that a challenged advertisement is “literally false” because it permits a finding of literal falsity based on a combination of an advertisement’s express statements, images and context. A finding of literal falsity is important because it may trigger liability under the Lanham Act without the need to present consumer survey evidence, which is required when an

AUGUST 2007

advertisement is deemed to be impliedly false. At the same time, the Court of Appeals made clear that a plaintiff must come forward with survey or other extrinsic evidence where an advertisement is susceptible to more than one reasonable interpretation.

DIRECTV also ran a related HD advertising campaign over the internet that purported to compare its programming to basic cable by displaying and comparing two images. One image, captioned "DIRECTV," showed an exceptionally sharp and clear picture, while the image captioned "OTHER TV" displayed a highly pixelated and distorted picture. Notwithstanding that the image used to represent cable service was an inaccurate depiction of the picture quality provided by cable, the Court of Appeals held that DIRECTV's internet advertisements were protected under the "puffery" defense. The Court relied on its earlier opinions addressing puffery in the context of express claims and statements, and acknowledged that its definition of puffery "[d]id not translate well into the world of images." Nevertheless, the Court held that "if a visual representation is so grossly exaggerated that no reasonable buyer would take it at face value, there is no danger of consumer deception" and the puffery defense operates to bar liability for false advertising. The Court relied on testimony by Time Warner's own witnesses in concluding that the images used in DIRECTV's internet advertisements and comparisons were "so obviously hyperbolic" that "no reasonable buyer would be justified in relying" on the advertisements "in navigating the marketplace."

Finally, the Court held that irreparable harm can be presumed in a false advertising case where the plaintiff demonstrates a likelihood of success in showing that the defendant's comparative advertisement is literally false or false by necessary implication, and consumers in the relevant market "would undoubtedly understand" that the advertisement referred to the plaintiff, even if the advertisement does not mention the plaintiff by name. Thus, although DIRECTV's advertisements comparing its HD services to those of cable did not mention Time Warner by name, Time Warner "is 'cable' in the areas where it is the franchisee," and the presumption of irreparable harm was deemed to apply with as much force as where a comparative advertisement mentions the plaintiff by name. This holding is a significant expansion of the presumption of irreparable harm, but likely only operates where the plaintiff is the only other competitor in the market in question.

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