TRUE OR FALSE: THE EXPANDING “FALSE BY NECESSARY IMPLICATION” DOCTRINE IN LANHAM ACT FALSE ADVERTISING, AND HOW A REVITALIZED PUFFERY DEFENSE CAN SOLVE THIS PROBLEM

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INTRODUCTION

In September of 2000, McNeil Nutritionals began marketing Splenda, its new no-calorie sweetener, using the tagline “made from sugar so it tastes like sugar.”¹ The company spent approximately $235 million in advertising and promotional materials to establish its unique brand identity that capitalizes on Splenda’s sugar origin and sugar-like taste.² The campaign was effective—in 2007, Splenda was the leading no-calorie sweetener in dollar sales in the United States.³ However, this seemingly innocuous tagline led to a flurry of ongoing legal troubles for McNeil.⁴ Merisant, a competitor that produces popular sweeteners Equal and Nutra-Sweet, sued McNeil for false advertising based on this statement, leading a court to devote dozens of pages to determining the truth of the simple claim, “Made from sugar so it tastes like sugar.”⁵ The court parsed through highly complex linguistic and scientific testimony and consumer survey evidence, but did not conclusively determine whether this statement is true or false.⁶ The case was highly

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² Id. at 512.
³ Id. at 513.
⁴ Id. at 513-14.
⁵ Id. at 525-28.
⁶ Id. The parties eventually reached an undisclosed settlement agreement.
publicized, particularly since a simple advertising claim could cause such a long-winded, convoluted legal dispute centering on the distinction between true and false.7

The “Splenda case” is a recent example of federal false advertising law, a fascinating body of law that has been expanding since Congress overhauled the Lanham Act in 1988.8 Under Section 43(a)(1)(B)9, competitors can sue each other for false or misleading advertising, and they often succeed in obtaining injunctions that remove the offending advertisements.10 These lawsuits lead to many consequences for the involved parties and for society as a whole.11 Furthermore, courts have been reaching alarmingly inconsistent results when deciding Section 43(a)(1)(B) cases.12 This deep-rooted confusion and inconsistency will

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8 See generally Jean Wegman Burns, Confused Jurisprudence: False Advertising Under the Lanham Act, 79 B.U. L. REV. 807 (1999). Burns explains that while the statute provides some limitations, “recent judicial decisions and the explosion of advertising on the Internet have considerably expanded the breadth and impact of the federal false advertising law.” Id. at 809. Burns describes section 43(a)(1)(B) as a “potent new weapon” for companies to use against their competitors. Id. at 810. See also Jonathan H. Garside, The Outer Limits of the Lanham Act’s Section 43(a): When Does “Promotion” Become Commercial Defamation?, 74 WASH. U. L.Q. 777, 777-80 (1996).

9 The 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—

(A) 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

(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 likely to be damaged by such act.


10 See, e.g., Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144 (2d Cir. 2007) (affirming the lower court’s injunction ordering removal of defendant’s television commercial). Courts also grant monetary relief in the form of marketplace damages (profits lost as a result of the defendant’s false advertising) and unjust enrichment (defendant’s profits as a result of their false advertising). See, e.g., Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d 683, 689-90 (6th Cir. 2000); George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1539-40 (2d Cir. 1992); Securacom Consulting Inc. v. Securacom Inc., 166 F.3d 182, 189-90 (2d Cir. 1999).

11 Burns, supra note 8, at 808-09. Burns explains that “[a] Lanham Act lawsuit (even if unsuccessful) can effectively forestall a new or rising entrant in a market; it can increase a rival’s cost of doing business; it can induce a firm to avoid hard-edged, but truthful, advertising in favor of ‘safe,’ less-informative ads.” Id. at 809.

12 See infra Part II.B. See also Burns, supra note 8, at 810 (explaining the inconsistency and
likely continue and worsen as Section 43(a) false advertising liability keeps expanding.  

One particularly controversial area in Section 43(a) litigation is the determination of whether an advertisement is true or false. To prevail in a false advertising case, a plaintiff must show that the defendant’s advertisement is false, or at least misleading. The asserted falsity of a competitor’s advertisement is one of the most commonly litigated elements of a 43(a)(1)(B) case and is often the dispositive factor in a court’s decision to grant an injunction ordering removal of the defendant’s advertisement. Although this may seem like a black-or-white issue, the need to make the distinction between true, false and misleading has forced courts to parse through the language and images of the questionable advertisement, often devoting several pages of their opinions to this seemingly simple factual determination.

When an asserted claim in an advertisement is found literally true, then the court denies injunctive relief and dismisses the lawsuit.

Noting that courts often conflict over whether to read the provision narrowly or broadly and over which words of the statute should receive emphasis).

13 See generally Burns, supra note 8; Lillian R. BeVier, Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception, 78 VA. L. REV. 1 (1992); Bruce P. Keller, “It Keeps Going and Going and Going.” The Expansion of False Advertising Litigation Under the Lanham Act, LAW & CONTEMP. PROBS., Spring 1996, at 131. These scholars generally agree that false advertising litigation among competitors has been increasing and that liability is expanding.

14 Johnson & Johnson v. GAC Int’l, Inc., 862 F.2d 975 (2d Cir. 1988). The court outlines the two different theories of recovery for false advertising under Section 43(a): “(1) an advertisement may be false on its face; or (2) the advertisement may be literally true, but given the merchandising context, it nevertheless is likely to mislead and confuse consumers.” Id. at 977. See also Burns, supra note 8, at 864 (explaining that “[t]ruthful claims, even those critical of another’s product and made in the context of a commercial advertisement or promotion, are not actionable under this section of the Lanham Act”).

15 See, e.g., Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997); Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381 (2d Cir. 1986).

16 See, e.g., Castrol, 987 F.2d at 941-47. In this case, a Third Circuit panel devoted several pages to an evaluation of a claim related to engine oil viscosity breakdown. Judge Roth wrote a long dissenting opinion disagreeing with the majority’s evaluation of the claim. Id. at 950-59 (Roth, J., dissenting). See also Ivan L. Preston, The Definition of Deceptiveness in Advertising and Other Commercial Speech, 39 CATH. U. L. REV. 1035 (1990). Preston focuses on Federal Trade Commission false advertising decisions, which are beyond the scope of this Note. Many of Preston’s observations, however, are analogous to Lanham Act decisions and are worth mentioning here. Preston notes:

When Federal Trade Commission (FTC or Commission) or Lanham Act deceptive advertising decisions are lengthy, the reason is almost always the contentiousness involved in identifying which facts do and do not define deceptiveness. Recently, the FTC’s initial decision in Kraft, Inc. devoted forty-four of its seventy-two pages to disagreements over the validity of facts about consumer perception of the challenged advertisements. Another fourteen pages assessed similar disputes over facts about the product’s features.

Id. at 1035.

17 See, e.g., United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1181 (8th Cir. 1998) (holding
a claim literally false, however, it may then grant injunctive relief (provided that all other elements of the relevant provision are met). In the alternative, plaintiffs may argue that although the claim in the advertisement is literally true, it is nevertheless likely to mislead or confuse consumers. Under this theory, courts require some extrinsic evidence of consumer confusion, usually in the form of consumer survey data.

Greater confusion arises when a claim is found to be literally true on its face, but false by “necessary implication.” Under the “false by necessary implication” doctrine, courts examine the context of the full advertisement, rather than looking at the claim in isolation. Claims that appear to be facially true, but are “false by necessary implication,” are then treated as if they are literally false. Therefore, courts may order removal of “false by necessary implication” advertisements without considering extrinsic evidence of consumer deception (as they

that appellant’s television commercial explicitly claims that it “kills roaches in 24 hours,” which is literally true). See also Burns, supra note 8.

18 See, e.g., S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 235 (2d Cir. 2001) (holding that an advertisement depicting water rapidly leaking from plaintiff’s Slide-Loc plastic storage bag was literally false because the water did not actually leak as quickly as portrayed). The court upheld the lower court’s permanent injunction ordering removal of any advertisements making this false claim. Id. The other elements in a 43(a)(1)(B) claim will be discussed in more detail infra Part I. Note that the truth or falsity of a claim in an advertisement is often decided by a District Court determining whether to grant plaintiff a preliminary injunction. At this stage, a party seeking preliminary injunctive relief must establish:

(1) either (a) a likelihood of success on the merits . . . or (b) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly in [the moving party’s] favor, and (2) a likelihood of irreparable harm if the requested relief is denied. Time Warner Cable, 497 F.3d at 152-53. Although the district court’s finding only goes to the likelihood of success on the merits, the appellate court follows a “clearly erroneous” standard of review. Therefore, although the issue of falsity of the claims may not be fully litigated, an appellate court will rely on the district court’s finding without independently reviewing it unless it is clearly erroneous. Id. at 153. This is a procedural point well worth noting, because it causes many critics to worry about encroachment on the First Amendment’s protection of commercial speech. See Julie Hilden, Satellite vs. Cable: How a Federal Appeals Court’s Decision that DIRECTV Engaged in False Advertising Illustrates the Clash between Courts’ Review of Advertising and the First Amendment, FINDLAW, Aug. 21, 2007, http://writ.corporate.findlaw.com/hilden/20070821.html.

19 See, e.g., Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978). This case involved an advertising war between Anacin and Tylenol and will be discussed more fully infra Part I.

20 Id. at 163-64 (using consumer survey data to determine what exact claims the advertisements were portraying); Sandoz Pharms. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222 (3d Cir. 1990).

21 See, e.g., Castrol, 987 F.2d 939; Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997). These cases involved advertisements that did not explicitly state the challenged claim, but rather implied it using clever wording, imagery, or a combination thereof to give a false impression to a potential consumer. Part I, infra, will further explain these tactics.

22 Castrol, 987 F.2d at 941.

23 See, e.g., id.
would for misleading claims).  

It can be difficult to see the distinction between the “misleading” and “false by necessary implication” labels; even courts often muddle the two. A “misleading” claim is usually one that seems to be true on its face, but may convey other meanings that are false. For example, consider an advertisement for a stomach antacid claiming that the product is the “strongest antacid I could buy.” This claim might be misleading because it leads consumers to think that the product treats acid indigestion more effectively than its competitors, while the product may simply have a higher level of other medicinal ingredients. Thus, although the claim is literally true (because the product may indeed contain higher levels of medicine and therefore be the “strongest”), it is misleading because it may convey a false impression to the consumer (specifically, that this product is more effective than its competitors in treating acid indigestion). In such a case, the parties must provide survey evidence showing whether consumers were actually misled, and the court’s decision generally turns on this evidence.

In contrast, some courts would find this claim to fall under the “false by necessary implication.” Under this doctrine, the court would reason that although the “strongest antacid I can buy” may be literally true, this claim necessarily implies that the product provides the best indigestion relief, which is not true. Under this reasoning, then, the court would enjoin the advertisement without considering the way in which consumers actually perceived the message.

The Second Circuit formally adopted the “false by necessary implication” doctrine in the recent Time Warner Cable v. DirecTV case. Although other circuits and lower courts within the Second Circuit have used “false by necessary implication” analysis for the last several years, Time Warner Cable marks the first time the Second Circuit officially announced its acceptance of the doctrine. This is significant for several reasons. First, it shows, on a general level, that liability for defendants in 43(a) false advertising litigation may be

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24 See, e.g., id. at 942 (holding that when a claim is false by necessary implication, it is then grounds for a preliminary injunction, without considering consumers’ actual belief or perception).
25 This is one of the inherent problems with the doctrine that this Note will further discuss infra Part II.
26 This example is adapted from the facts of Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharmcs., Inc., 19 F.3d 125 (3d Cir. 1994).
27 In the real case, the Third Circuit held that the consumer survey evidence did not sufficiently prove that consumers were misled, and therefore denied injunctive relief. Id. at 136.
28 This is merely a hypothetical; the Johnson & Johnson-Merck court did not engage in “false by necessary implication” reasoning. This example, however, demonstrates the tension between misleading and necessary implication reasoning and shows that the line between the two can be very blurry. This confusion will be discussed throughout the remainder of this Note.
29 Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144,158 (2d Cir. 2007).
30 See cases listed supra note 20.
increasing. This creates worrisome implications for companies, as they try to come up with new and creative advertising for their products. In addition, as many scholars note, the “false by necessary implication” doctrine implicates the First Amendment’s guarantee of freedom of speech. Although the First Amendment’s protection for commercial speech is less stringent than, for example, the protection given to political speech, commercial speech (including advertisements) generally still falls within the Amendment’s scope. It is well-settled law that commercial speech is protected unless it is false or misleading. Therefore, the distinctions between “true,” “false,” “misleading,” and “false by necessary implication” bear relevance beyond the world of commerce; these distinctions affect fundamental constitutional rights. Furthermore, this expanding liability for false advertising may be only tenuously connected to the goals of the statute.

This Note explains why the “false by necessary implication” doctrine is a harmful development in false advertising law and proposes a better way for courts to deal with tricky distinctions between truth and falsity. Part I will introduce Section 43(a) and describe the development of the “false by necessary implication” doctrine in greater detail. Using Time Warner Cable as a model, Part II will show that courts are expanding the doctrine too far and applying it inconsistently, often confusing its doctrinal underpinnings. Part II will also demonstrate that the expansion of 43(a) false advertising liability implicates the First Amendment’s guarantee of free speech and may impede an open marketplace of information. In addition, it will explain that overregulation of false advertising underestimates the modern reality of consumer intelligence and ignores the technological resources

32 See Richard J. Leighton, Literal Falsity by Necessary Implication: Presuming Deception Without Evidence in Lanham Act False Advertising Cases, 97 TRADEMARK REP. 1286 (2007). Leighton’s recent article provides a detailed history of the “false by necessary implication” doctrine and describes relevant cases in each circuit. As Leighton explains, “By making it easier to meet the burdens of proving Lanham Act elements and the criteria for receiving injunctive remedies, the necessary implication doctrine may lead to more litigation by sophisticated competitors that hope to use the evidentiary shortcut to obtain an early knockout.” Id. at 1308.

33 Jeffrey P. Singdahlsen, The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act, 77 VA. L. REV. 339 (1991); see also infra Part ILC (explaining how overregulation may chill advertising and hurt consumers instead of helping them).

34 Singdahlsen, supra note 33; Hilden, supra note 18.


37 For a detailed discussion of the Lanham Act’s intent, see infra Part IIA. See also Burns, supra note 8; BeVier, supra note 13.
available to debunk false advertisements. Finally, Part III will argue that courts should apply a new framework when deciding Section 43(a) false advertising cases. This new structure would redefine and expand the puffery doctrine, turning its application into a threshold inquiry instead of a defense. As a result, courts could eliminate trivial or non-credible claims at the outset and focus their attention on the type of false advertising that actually harms consumers.

I. BACKGROUND OF SECTION 43(a)(1)(B) AND THE DEVELOPMENT OF THE FALSE BY NECESSARY IMPLICATION DOCTRINE

A. The Development of Section 43(a)(1)

The Lanham Act, enacted in 1946, was initially intended to prevent unfair competition. The earliest version of section 43(a) did not mention advertising and it is unclear whether any members of Congress considered Section 43(a)’s potential effect on advertising. The Section was not used in connection with false advertising until 1954 and false advertising claims were not widely litigated until the

38 Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144, 159-60 (2d Cir. 2007). Puffery in false advertising refers to subjective overstatements or exaggerations upon which no reasonable consumer would rely in making a purchasing decision, and therefore these statements are not actionable. Id. Part III, infra, will discuss the puffery doctrine and show that it relates to “necessary implication” because both are concerned with consumer perception and sophistication.

39 Keller, supra note 13, at 131-32.

40 The original text read:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or container 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 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.


41 Keller, supra note 13, at 131-32. Keller notes:

Nothing in the legislative history, however, recognizes that a new and potent weapon against false advertising claims was being created. To the contrary, the focus at the time was that section 43(a) provided an express statutory basis for prohibiting false designations of geographic origin, thus bringing U.S. law into conformity with the provisions of various international conventions to which the United States was a party.

Id. at 132.

42 L’Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 650 (3d Cir. 1954) (imposing Section 43(a) liability on defendant clothing retailer who used photos of plaintiff’s superior and
Courts were still reluctant, however, to read the statute broadly, and they limited its application to false advertising claims. The Trademark Law Revision Act of 1988 (TLRA) completely overhauled section 43(a) and, perhaps most significantly, created a private federal cause of action for false advertising. The TLRA attempted to codify some of the interpretations that courts had long been ascribing to section 43(a). The new section 43(a)(1) provides a civil cause of action for those whose goods or services have been misrepresented by another party’s advertising.

Although the new statute broadens and clarifies false advertising law, several issues remain murky. For example, Congress did not clarify whether consumers have standing to sue under 43(a)(1)(B). Although the Supreme Court has never reached this question, circuit courts have agreed that consumers do not have standing to sue under 43(a).

The TLRA did, however, clarify other key questions. For example, the TLRA imposed liability for misrepresentations related to “his or another person’s goods, services, or commercial activities.”

more expensive product for its own ad, thus misrepresenting its product and diverting business from plaintiff).

43 Keller, supra note 13, at 133.

44 Id. at 132-33 (“For example, one line of cases held that the only false advertising claims a plaintiff could challenge under the Lanham Act were those made by defendant about its own products or services, not those made about the plaintiff’s competitive products or services. Other courts permitted Lanham Act challenges addressed only to those false claims involving an ‘inherent quality or characteristic’ of the good or service advertised.”).

45 Garside, supra note 8, at 777.

46 Burns, supra note 8, at 821. See also 133 CONG. REC. 32,812 (1987) (statement of Sen. DeConcini) (explaining that the TLRA was “designed to bring the 41-year-old Lanham Act up to date with present day business and commercial practices and realities”).

47 For the full text of the revised statute, see supra note 9.

48 Burns, supra note 8, at 822.

49 Id. The original statute created liability to “any person” who was injured by false advertising, and some critics argued that this wording included consumers who had been deceived into buying products that they may not have purchased otherwise. Most courts, however, denied standing to consumers. By retaining the “any person” language, Congress failed to clarify this significant issue and left it to the courts to decide. Id.

50 See, e.g., Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.5 (5th Cir. 1996). In this case, Seven-Up successfully enjoined Coca-Cola from disseminating a false sales presentation that Coca-Cola had used to convince independent bottlers to cease distributing Seven-Up in favor of Sprite. Id. at 1381. The court briefly discussed the issue of consumer standing. Id. at 1383 (citing Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971)). For a focused discussion of consumer standing, see James S. Wrona, False Advertising and Consumer Standing under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?, 47 RUTGERS L. REV. 1085 (1995) (concluding that although rationales vary, most courts generally agree that consumers do not have standing to bring Section 43(a) claims). Standing is a complex issue, even for non-consumers. For an examination of competitor-based standing, see Gregory Apgar, Note, Prudential Standing Limitations on Lanham Act False Advertising Claims, 76 FORDHAM L. REV. 2389 (2008).

This stretches potential liability further than the earlier statute, which courts had interpreted to only prohibit advertisements stating false claims about defendant’s own product, not plaintiff’s product.\textsuperscript{52} This is a powerful change because it essentially gives to plaintiffs a cause of action for commercial defamation without some of the additional requirements imposed by state defamation laws.\textsuperscript{53}

Although the TLRA did not specify the required elements of a Section 43(a) cause of action, courts have agreed that a plaintiff must establish five elements: (1) the defendant has made a false or misleading statement; (2) the statement has actually deceived or has the capacity to deceive a substantial portion of its intended audience; (3) the statement is likely to influence consumers’ purchasing decision and is thus material; (4) there is a likelihood of injury to the plaintiff; and (5) the goods which the statement describes traveled in interstate commerce.\textsuperscript{54}

B. \textit{A False or Misleading Statement?}

Although the first element of a Section 43(a) cause of action may seem straightforward, it leads to many controversial issues.\textsuperscript{55} Courts are often forced to analyze the validity of claims based on complex areas of science and technology in which they are not experts.\textsuperscript{56} Furthermore,
advertisements often assert claims about their products or services in catchy phrases or jargon, language for which precise analysis is inappropriate and perhaps even fruitless. Indeed, many popular advertisements make no express claims at all, but rather use imagery or other artistic devices to convey some message about the product.

Courts have created another distinction, presumably intending to ease the task of distinguishing between true and false claims. Under this new judicially-created framework, courts can reach three different outcomes regarding a claim. First, they can find that a claim is literally and unambiguously true. These are the easiest cases, since true claims are not actionable, and a finding of literal truth compels dismissal of the claim.

Alternatively, a court can find a claim to be literally false. This finding is then grounds for injunctive relief. When determining whether a claim is literally false, courts scrutinize the plain meaning of

(8th Cir. 1996). This case concerned a complex claim about the effectiveness of the parties’ hypertension and angina medications. In determining whether the claim was true or false, the court examined highly technical studies about the medications and various issues related to their effectiveness, such as whether the medication works differently when taken on a full stomach. Id. at 512-28; see also Johnson & Johnson v. GAC Int’l Inc., 862 F.2d 975 (2d Cir. 1988); Merisant Co. v. McNeil Nutritional, LLC, 515 F. Supp. 2d 509 (E.D. Pa. 2007); Cytic Corp. v. Neuromedical Systems, Inc., 12 F. Supp. 2d 296 (S.D.N.Y. 1998). These cases all involved highly scientific claims.

See, e.g., Pizza Hut, Inc. v. Papa John’s Int’l, Inc., 227 F.3d 489 (5th Cir. 2000). This case concerned defendant’s tagline, “Better Ingredients. Better Pizza,” which the defendant argued was a catchy phrase not intended to be perceived as portraying a fact. These types of boasting and subjective claims usually fall under the category of non-actionable puffery, which will be discussed more fully infra Part III. Nonetheless, the Pizza Hut court, in considering the context of the claim “Better Ingredients. Better Pizza,” actually found it to constitute an actionable misleading statement. Id. at 501. However, since the plaintiff failed to produce evidence establishing materiality, the court allowed Papa John’s to keep running the advertisement. Id. at 502; see also Burns, supra note 8, at 865. “In these cases, seeking a singular determination of truth or falsity is not only a hopeless task but is also potentially harmful to buyers insofar as the court strikes truthful and beneficial information.” Id. This harm will be discussed more fully infra Part II.

For examples of artistic advertisements, see recent television commercials for popular retailer The Gap. Gap Commercial - Khaki Swing, available at http://youtube.com/watch?v=knW1hGwQEXQ (last visited Jan. 26, 2007). This commercial is a powerful example of an advertisement in which the company seeks to invoke a certain feeling of brand identity, rather than directly conveying information about a product. Commercials like the Gap campaign show that many advertisements are vague and difficult to analyze under a true/false framework.

Burns, supra note 8, at 866.

See, e.g., United Indus. Corp. v. Clorox Co., 140 F.3d 1175 (8th Cir. 1998). In this case, the plaintiff conveyed the explicit message that its roach trap, Maxattrax, kills roaches within 24 hours. Id. at 1178. The court determined that this claim is literally and facially true. Id. at 1181.

See, e.g., Rhone-Poulenc Rorer Pharmas., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511 (8th Cir. 1996). Plaintiffs often plead in the alternative that, if the disputed claim is not found to be false, it is misleading. See United Indus., 140 F.3d at 1183-84. The court here determined that Clorox failed to show sufficient evidence of consumers being misled by the Maxattrax commercial, and therefore the court refused to grant any injunctive relief. Id.

the claim as depicted by the words and images in the advertisement.\textsuperscript{63} For example, \textit{McNeil-P.C.C. v. Bristol-Myers Squibb} involved defendant’s television commercial featuring a headache sufferer explaining that she used to use Tylenol, made by plaintiff, but began taking defendant’s Excedrin which “works better.”\textsuperscript{64} The plaintiff proved this claim’s falsity by exposing weaknesses in defendants’ studies and by offering its own studies showing that Excedrin did not relieve headache pain “better” than Tylenol. The court held that the advertisement was literally false. Thus injunctive relief was appropriate.\textsuperscript{65}

Courts often consider the advertisement’s context in extracting the precise claim that an advertisement is stating, and evaluating whether it is true or false.\textsuperscript{66} It is important to note that considering the context of a message is not the same as determining that a claim is implicit, although some courts overlap the two.\textsuperscript{67} In finding literal falsity, courts assume that consumers were actually deceived and thus do not require extrinsic evidence of consumer perception.\textsuperscript{68}

The third possible outcome is the finding that a claim is ambiguous and potentially misleading.\textsuperscript{69} In such cases, the plaintiff must present
evidence that the public has been or is likely to be misled.  This
evidence commonly consists of, but is not limited to, consumer surveys
indicating what precise message was actually conveyed to the public,
whether this message was true, and whether consumers were likely to
believe the message.  Johnson & Johnson-Merck v. Rhone-Poulenc
Rorer provides a simple example of a true, but possibly misleading,
claim. In this case, the contested advertisement stated that the
defendant’s Maalox antacid product was “the strongest antacid there
is.” The court determined that this claim was literally true but might
mislead consumers into thinking that Maalox’s strength provides more
effective relief, which is not necessarily true. The outcome in these
cases often turns on the statistical reliability of the proffered consumer
surveys.

C. “False By Necessary Implication”

Some courts have recently blurred the lines between true, false
and misleading by inventing a fourth category: “false by necessary
implication.” The 1982 decision in Cuisinarts v. Robot-Coupe is the

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70 See discussion of Johnson & Johnson, 19 F.3d 125, infra note 72 and accompanying text.
71 Id. See also Nova Nordisk v. Becton Dickinson and Co., 997 F. Supp. 470 (S.D.N.Y. 1998). This case involved plaintiff’s NovoFine insulin cartridge system, which was marketed to diabetics. Id. at 472. Defendant, a competitor manufacturer of the insulin cartridges, disputed plaintiff’s claim that its NovoFine is the “shortest and finest needle in the U.S.” Id. The court found that since defendant’s needle was equally short and fine as plaintiff’s, plaintiff’s needle was technically the “shortest and finest” and thus its claim was not literally false. Id. at 474. The defendant also challenged statements in plaintiff’s promotional materials suggesting that only plaintiff’s insulin cartridges were compatible with the Novo system. Id. at 475-76. The defendant argued that this suggestion was false and may mislead consumers into thinking that defendant’s cartridge is incompatible, and provided consumer survey evidence to support this contention. Id. The court carefully scrutinized this data and issued a narrowly-tailored injunction to enjoin only the false claims ambiguously portrayed and perceived by consumers. Id. at 476-79.
72 Johnson & Johnson, 19 F.3d 125.
73 Id. at 126.
74 Id. at 132-33.
75 Id. at 138-39 (Alito, J., dissenting).
76 See, e.g., Castrol, Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993). This oft-cited case involves a Pennzoil advertisement asserting that its motor oil outperforms any leading motor oil against viscosity breakdown. Id. at 941-42. On the basis of various industry tests and standards, the court concluded that Pennzoil does not outperform Castrol against viscosity breakdown, thus finding this claim literally false. Id. at 942-43. Pennzoil’s advertisements also claim that viscosity breakdown leads to engine failure. Id. at 947. In considering the relationship between these two claims, the court found that “[t]he implication is that Pennzoil outperforms the other leading brands with respect to protecting against engine failure, because it outperforms them in protecting against viscosity breakdown, the cause of engine failure.” Id. Thus, the court concludes that this advertisement necessarily implies this false contention, and should therefore be enjoined. Id.
77 Cuisinarts, Inc. v. Robot-Coupe Int’l Corp., No. 81 Civ. 731-CSH, 1982 WL 121559, at *1
earliest and most cited “false by necessary implication” case. The challenged advertisement in that case depicted a headline scoreboard reading “Robot-Coupe: 21, Cuisinart: 0” followed by a sub-headline stating “When all 21 of the three-star restaurants in France’s Michelin Guide choose the same professional model food processor, somebody knows the score—shouldn’t you?” The court held that the advertisement was false because, although it made no explicit or directly false claim, it forced the consumer to conclude that French restauranteurs chose the Robot-Coupe model at a rate of 21 to 0, which is not true.

In determining whether this claim was false, the court did not discuss whether consumers were actually deceived. Rather, the court held that, because this advertisement was “false by necessary implication,” evidence of consumer perception was not necessary. This evidentiary ruling typifies the “false by necessary implication” doctrine. Courts may grant injunctive relief without considering consumer survey data (as they would for a misleading or ambiguous claim). When applying the “false by necessary implication” doctrine, courts first examine the context of the advertisement to determine the precise claim being asserted. In construing the various pieces of information conveyed, a court determines whether the advertisement “necessarily implies” a particular assertion. A “necessary implication” court then evaluates the veracity of the claim and, depending on whether it finds the claim to be true or false, either

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(S.D.N.Y. June 9, 1982).

78 Leighton, supra note 32, at 1291-92 (explaining that this early case was often cited by later necessary implication decisions).


80 Id. The opinion’s confusing language is worth exploring:

I hold that material statements in the ad are facially false. . . . The basic point is that the ad states, by necessary implication, that Robot-Coupe and Cuisinarts both build professional model food processors and that French restauranteurs, presented with two existing alternatives, chose the Robot-Coupe model over the Cuisinarts model by the score of 21 to 0.

I appreciate that the ad does not make that statement in haec verba. That is not necessary. . . .

Furthermore, that statement was false, since it is undisputed that Cuisinarts does not market a professional model food processor . . . .

Id.

81 Id. at *2.

82 See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (categorizing an actionable claim as one which is literally false, either on its face or by necessary implication, or literally true but likely to mislead consumers). Note that in adopting this structure, the court classifies “false by necessary implication” statements as “literally false.” Id.

83 Id.

84 For example, in Cuisinarts, the court found that the scoreboard image and accompanying text of the advertisement, read together, necessarily implied that Robot-Coupe was more popular than Cuisinarts at a rate of 21 to 0. Cuisinarts, 1982 WL 121559, at *2.
dismisses the suit or orders relief. By contrast, a more lenient court would find this type of inexplicit claim to be ambiguous and potentially misleading. The court would then require survey evidence to show whether consumers were actually misled before ordering or denying injunctive relief. The “necessary implication” doctrine allows courts to skip this evidentiary step and order injunctive relief without considering how consumers may have actually perceived the advertisement. In effect, the “false by necessary implication” doctrine allows a court to substitute its own judgment for the consumers’ judgment.

II. “FALSE BY NECESSARY IMPLICATION” HAS EXPANDED TOO FAR

A. No Statutory Basis for this Doctrine

1. The Statute Itself

From a textualist perspective of statutory interpretation, the “false by necessary implication” doctrine lacks legal basis. Section 43(a) proscribes the use of “false or misleading description of fact, or false or misleading representation of fact . . . .” The statute does not mention “implicit falsity” or indicate Congress’ intent to bar anything other than literally false or misleading claims. This simple textualist analysis reveals that courts are reaching beyond the statute to find a basis for the “false by necessary implication” doctrine.

2. Section 43(a) and Consumer Welfare

The “necessary implication” doctrine is also problematic because it clashes with the goals of Section 43(a). Although the original version of the Lanham Act may have been intended to promote competitor welfare, the false advertising statute is now commonly understood to essentially be an anti-fraud law, meant to protect the “duped buyer.” As such, courts should analyze 43(a) claims with consumer welfare in mind. The “false by necessary implication” doctrine obscures this

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85 Southland Sod, 108 F.3d at 1139; see also Avis Rent A Car System, Inc. v. Hertz Corp., 782 F.2d 381 (2d Cir. 1986) (holding that a claim was actually true by necessary implication).
86 This effect will be discussed and criticized more fully infra Part II.
87 Leighton, supra note 32, at 1288 (“There is no explicit basis for the necessary implication in the Lanham Act’s advertising-related provisions.”).
89 Burns, supra note 8, at 874-75. Some critics argue that consumers should have standing to sue under Section 43(a). See, e.g., Wrona, supra note 50.
90 Burns, supra note 8, at 876-77. “Quite simply, the federal courts need to acknowledge
goal because it allows a court to substitute its own interpretation of an advertisement at a key moment when consumer interpretation is relevant. If the statute’s objective is to preserve consumer welfare, then courts should always consult consumer survey data, particularly for the murkier, hidden, or implicit claims. Although this is a relatively new area with scant research, scholars generally criticize the expanding false advertising liability for ignoring actual consumer reactions. These criticisms apply seamlessly to the “false by necessary implication” doctrine and help to explain the judicial confusion and inconsistency in this area. Jean Wegman Burns’ work predates the expanding “false by necessary implication” doctrine, but her solutions reflect the main problems with the doctrine and show that the doctrine is tenuously related to the goals of section 43(a).

3. Treatment of Implied Claims in Other Areas of Law

Several other bodies of federal law, such as perjury, also distinguish between true and false statements. For the sake of comparison, it is worth briefly exploring this area to see how it treats implied assertions. Federal perjury law prohibits false statements by witnesses under oath. Although the perjury statute admittedly differs from the Lanham Act, courts’ application of the law to false statements relates to the discussion.

that, as now drafted and interpreted, the provision is at base a fraud law, with the purchaser as its primary beneficiary.” Id. at 877. This leads many critics to argue that consumers should have standing to bring 43(a) lawsuits. See, e.g., Wrona, supra note 50.

Burns, supra note 8, at 879. Burns proposes a new framework in which courts would discard all presumptions of consumer injury, requiring plaintiffs to present evidence that a substantial number of consumers believed or were likely to believe the misleading claim and that a substantial number of buyers did or were likely to change their purchasing decisions because of being deceived. Id. at 879-80. See also Leighton, supra note 32, at 1308. Although Leighton focuses primarily on the historical development of necessary implication, rather than criticism, he calls the doctrine “oxymoronic.” Id.

Burns, supra note 8, at 880.

The federal perjury statute provides:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury and shall, except as otherwise expressly provided by law, be fined [not more than $2,000] or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.


The most obvious difference is that perjury is a criminal offense, punishable by possible imprisonment, while the Lanham Act only imposes civil liability. In addition, while the Lanham Act is a strict liability statute, a perjury conviction demands that the offense be “willful.”
The seminal federal perjury case, Bronston v. United States, involved a bankruptcy hearing that was held to determine the extent and location of Bronston’s assets. Upon being asked whether he had any bank accounts in Swiss banks, Bronston responded, “No, sir.” The creditor’s counsel followed up by asking whether Bronston had ever had an account in Switzerland, prompting Bronston to respond, “The company had an account there for about six months, in Zurich.” In his subsequent criminal trial, the District Court found Bronston guilty of perjury on the theory that, although his answers were literally true, they implied that he had never had a personal Swiss bank account, which was undisputedly false. The Supreme Court reversed Bronston’s conviction, rejecting the notion that a literally true but impliedly false statement could be grounds for a perjury conviction. In so holding, the court deferred to the federal statute and concluded that neither the pure text nor legislative intent would justify Bronston’s conviction.

Bronston adds to the 43(a) analysis because it supports the idea that courts should not impart a new meaning to the labels “true” or “false.” As the Bronston court suggested, if Congress had intended the statute to include statements that were “false by implication,” it would have expressly included this in the statute itself. Proponents of the “false by implication” doctrine will argue that this doctrine is necessary to promote truthful information, which seems to be the goal of both the perjury and false advertising statutes. These critics, however, overlook the fact that there are alternative (and perhaps more effective and appropriate) methods of maximizing truthful information. For example, in the perjury context, the lawyer can probe the witness and ask further questions.

96 Id. at 354.
97 Id.
98 It was undisputed that at the time of questioning, Bronston did not have a personal Swiss bank account, but his company had previously had one as he described. Id. at 354.
99 Id. at 355-56.
100 Id. at 357-62.
101 Id. at 357-58 (“There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation, this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true. . . . We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution . . . .”).
102 Id. at 357-58.
103 Id. at 358-59 (“If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to mark, to flush out the whole truth with the tools of adversary examination.”). For instance, the attorney in Bronston could have clarified the question and asked, “have you personally ever had a Swiss bank account?”
Similarly, in the false advertising context, there are alternative—and superior—tools to promote the dissemination of truthful information, which will be discussed more fully in Part III. Although the consequences of imposing liability for these statements differ in these two situations, they are both serious. In the perjury context, a finding of “false by implication” could send a defendant like Bronston to jail; in the false advertising context, a finding of “false by implication” could impose high costs on competitors and impede the free flow of information in the marketplace.

B. Courts Misinterpret the Doctrine and Apply It Inconsistently

One of the dangers of the “false by necessary implication” doctrine is that courts are inconsistent in determining its proper application. Time Warner Cable provides an interesting example of a court’s confusion and mistaken application.\(^\text{104}\) Although several other circuits\(^\text{105}\) and some lower courts within the Second Circuit,\(^\text{106}\) have been using this doctrine for many years, the Second Circuit only recently officially adopted the “false by necessary implication” doctrine.\(^\text{107}\) Time Warner Cable, Inc. v. DirecTV, Inc., involved television commercials and Internet advertisements for DirecTV, a satellite cable provider that offers high-definition services.\(^\text{108}\) The plaintiff, Time Warner Cable (TWC), is an analog cable provider which also offers high-definition services; these two companies directly compete against one another in New York City.\(^\text{109}\) In terms of cable service, it is undisputed that digital service (like DirecTV offers) has higher picture quality than analog service (like TWC offers) due to their respective differences in ability to resist interference.\(^\text{110}\) The HD programming provided by both companies, however, yields equivalent picture quality.\(^\text{111}\)

This case concerned various advertisements which are beyond the scope of this Note, but the main issue involves DirecTV’s television commercial featuring William Shatner. In this commercial, Shatner, dressed as his character from Star Trek, says “With what Starfleet just ponied up for this big screen TV, settling for cable would be

\(^{104}\) Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144 (2d Cir. 2007).

\(^{105}\) See, e.g., Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir.1997); Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993).


\(^{107}\) Time Warner, 497 F.3d at 158.

\(^{108}\) Id. at 148-51.

\(^{109}\) Id. at 148-49.

\(^{110}\) Id. at 149.

\(^{111}\) Id.
Although this statement does not seem to be facially false, the court determined that it necessarily implied a claim that DirecTV’s high-definition service is superior to another provider’s service, which is literally false.\(^\text{113}\)

In reaching this conclusion, the court mistakenly applied earlier cases and confused the meaning of “false by necessary implication.” The court first examined the context of the commercial and determined that although the claim does not explicitly mention high-definition service, the words and images in other parts of the advertisement clearly refer to HD picture quality.\(^\text{114}\) Based on this context, the court found that the line “settling for cable would be illogical” referred to cable’s HD picture quality. Since it would only be “illogical” to “settle” for cable’s HD picture if it were inferior to DirecTV’s HD picture, the court determined that DirecTV was making a claim of superior HD picture quality.\(^\text{115}\) It is an undisputed fact that HD picture quality is the same regardless of its source. Therefore, the court found this claim to be “false by necessary implication” and ordered DirecTV to remove this commercial.\(^\text{116}\)

The problem with this determination is that the court made too many leaps of interpretation and failed to show how this implication is “necessary.”\(^\text{117}\) The court was correct in examining the context of the claim in order to ascertain its precise meaning; it is well-settled that the use of context is permissible, and this is not disputed.\(^\text{118}\) The court erred, however, in finding that the claim, even in this context, necessarily implied that DirecTV’s HD picture quality is superior to other providers’ picture quality. Relevant cases from other circuits explain that, in order to apply the “necessary implication” doctrine, the claim must be the only reasonable implication, and it cannot be ambiguous.\(^\text{119}\) *Time Warner Cable* cited these cases,\(^\text{120}\) but then
misapplied their legal underpinnings to the facts presented. Although Shatner’s comment “settling for cable would be illogical” may imply that DirecTV’s HD picture quality is superior, a reasonable viewer could interpret the claim in a variety of other ways. Therefore, although this is one possible implication to be drawn, it is not the only one and is thus not “necessary.”

Furthermore, the television commercial ends with the statement “For an HD picture that can’t be beat, you’ve got to get DirecTV.” This explicitly asserts that DirecTV’s picture quality is not superior; rather the quality is, at best, equal to that of other providers. Even if a viewer interpreted Shatner’s earlier “illogical” claim to mean that DirecTV’s HD quality is superior, the viewer would then be confused upon hearing this conflicting assertion at the end of the commercial. As such, the commercial is actually ambiguous and should be treated as a misleading (not false) claim, which would require the plaintiff to supply extrinsic evidence of actual consumer deception.

The advertisement imparted one possible false implication. This implication, however, is not necessary, and thus the court erred in applying the doctrine. Instead, the court should have required the parties to present evidence showing how consumers actually perceived the advertisement, rather than making their own independent determination.

Although Time Warner Cable is just a single case, it exemplifies the overall problem with the “false by necessary implication” doctrine: courts are confused with respect to how to apply the doctrine to different fact patterns. The case of Tambrands v. Warner-Lambert,

consumer to integrate its components and draw the apparent conclusion, however, the less likely it is that a finding of literal falsity will be supported. Commercial claims that are implicit, attenuated, or merely suggestive usually cannot fairly be characterized as literally false.

[A] message conveyed by a particular advertisement remains so balanced between several plausible meanings that the claim made by the advertisement is too uncertain to serve as the basis of the literal falsity claim, though even in that case it could still form the basis for a claim that the advertisement is misleading.


120 Time Warner Cable, 497 F.3d at 158.

121 For instance, a viewer could reasonably infer that settling for cable would be illogical because it’s more expensive, lacks extra service options, or requires less attractive equipment. There are many possible interpretations of this claim.

122 See discussion of misleading claims supra Part I.B.

123 In addition, Time Warner Cable may be noteworthy because the Second Circuit is considered highly influential, and thus its adoption of the doctrine may have some bearing on the future of Lanham Act false advertising litigation. Leighton explains, “[The false by necessary implication doctrine] is likely to continue to expand both geographically and substantively now that the Second Circuit, arguably the most influential forum for development of the Lanham Act, has adopted and expanded the doctrine.” Leighton, supra note 32, at 1308.

which *Time Warner Cable* cites as authority, provides another example of this confusion. This case involved advertisements for defendant’s EPT home pregnancy tests. These advertisements stated that EPT works “as fast as ten minutes.” In fact, scientific tests reveal that the EPT kits only provide fully accurate results after thirty minutes. The court found that, since the advertisements necessarily implied that EPT kits are fully accurate after ten minutes, they were false and should be enjoined.

The validity of this finding is beyond the scope of this Note, but the court’s exact wording is worth exploring, “Defendants’ advertisements are facially false in that they state by necessary implication that New E.P.T. Plus is a ten-minute test, when in fact the test requires at least thirty minutes for most women to obtain accurate test results.” This is an attempt to state the “necessary implication” doctrine as a rule of law, but it contains an inherent contradiction. The idea that an advertisement is “facially” false means that it expressly, and explicitly, states a false claim. This conflicts with the notion of an implied claim—a statement that is not explicit, but rather implicitly suggests a certain claim. The *Tambrands* court’s statement typifies the confusion and inconsistency arising from the “false by necessary implication” doctrine. Courts should not deem a claim implicit and then, in the same breath, treat it like an express claim for injunctive purposes.

C. Expanding False Advertising Liability Implicates the First Amendment and Relies on Faulty Assumptions about Consumer Intelligence

The “false by necessary implication” doctrine is further problematic because of its conflict with the First Amendment and its assumptions about consumer perception. The doctrine greatly expands potential liability for advertisers because it allows courts to enjoin advertisements that may be literally true without any extrinsic evidence indicating what the consumer actually perceived the advertisement to mean. This is harmful for two reasons. First, it may brush up against the First Amendment’s protection of commercial speech. In addition, the “false by necessary implication” doctrine, and, more generally, expansion of 43(a) liability may simply be unnecessary given the realities of consumer intelligence and increased technology.

125 *Time Warner Cable*, 497 F.3d at 158 n.4.
126 *Tambrands*, 673 F. Supp at 1193.
127 *Id.* at 1193-95.
128 *Id.* at 1194.
1. The First Amendment

It is well-settled that the First Amendment protects advertisements under the “commercial speech doctrine,” although commercial speech is afforded less protection than other types of speech, such as political expression.\(^{129}\) Section 43(a), in effect, provides a cause of action for “commercial defamation,” allowing plaintiffs to sue defendants for false or misleading statements about plaintiff’s own goods.\(^{130}\) Many critics find this interpretation of the Lanham Act to be problematic because courts apply it without the usual First Amendment scrutiny that they would apply in other speech-related contexts.\(^{131}\)

This expansion of liability produces a worrisome chilling effect for advertisers.\(^{132}\) Whereas the regulation of commercial speech in the direct governmental regulation context must be narrowly tailored to achieve a legitimate governmental goal,\(^{133}\) Section 43(a) does not impose any specific limits on the remedy for false or misleading advertisement.\(^{134}\) Therefore, courts often order removal of entire

\(^{129}\) See Hilden, supra note 18; Singdahlsen, supra note 33; Langvardt, supra note 53; see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980) (providing a 4-part test for determining the constitutionality of government regulation of commercial speech). The “Central Hudson test,” as it is commonly known, is as follows:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Id. at 566. This test is significant because it shows the Court’s careful scrutiny of First Amendment issues in the commercial speech context.

\(^{130}\) 28 U.S.C. § 1125(a).

\(^{131}\) Langvardt, supra note 53, at 384 (explaining that only one 43(a) case even mentioned First Amendment issues, whereas “[o]ther courts have simply ignored—whether deliberately, in order to avoid complicating the case, or unintentionally—the implications of the new section 43(a)’s allowance of commercial defamation claims.”). For a general discussion of the tensions between the First Amendment and intellectual property law, see Eugene Volokh, Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Barnett, 40 Hous. L. Rev. 697 (2003).

\(^{132}\) Langvardt, supra note 53, at 389-92; see also Eric Bailey, ‘Legal Weed’ is Just Beer, but Feds Want to Cap Sales, L.A. TIMES, May 29, 2008, available at http://www.latimes.com/news/printedition/front/la-me-weed29-2008may29,0,5065941.story. This article describes a local brewer in small-town Weed, California, who may be prohibited from advertising his beer with the slogan “Try Legal Weed.” Federal regulatory agencies claim that this tagline may mislead consumers into thinking that the beverage has drug-related properties. The article contains several interesting remarks from consumers and the business-owner himself, and it provides an interesting, recent example of the perceived overregulation of commercial speech.

\(^{133}\) Cent. Hudson, 447 U.S. at 567.

\(^{134}\) 28 U.S.C. § 1125(a).
advertisement campaigns, which may contain primarily truthful information with only one small (or insignificant) falsehood or misleading statement.\footnote{Langvardt, supra note 53; Burns, supra note 8, at 808-09. See also Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp., 348 F. Supp. 2d 165 (S.D.N.Y. 2004). This case involved contact lens promotional materials that stated various claims. The court scrutinized each claim, finding some to be literally true and some, such as claiming that 75 percent of lens wearers in a study preferred competitor’s product, to be literally false. Id. When discussing the remedy, the court was careful to only enjoin false statements: “Plaintiff JJVC is entitled to permanent injunctive relief with respect to CIBA’s claims in the challenged advertising insofar as they are based on the 90 Dk/t oxygen transmissibility level . . . .” Id. at 185. This seems sufficiently specific, but this injunction forces CIBA to remove the offending advertisement, which also contains many truthful statements. CIBA will then either forgo new advertising altogether or try to create a new advertisement without the false information. While the former option clearly has a harmful chilling effect, the latter may as well. The fear of further litigation may render CIBA reluctant to include information that a court may deem questionable, even though CIBA believes that information to be accurate. For instance, they may have some information that their tests indicate is true, but a competitor may introduce contradictory test results, leading a strict court to order the removal of the new advertisement. Rather than face the threat of repeat litigation, CIBA may decide to omit this information altogether, even though it is probably true and likely helpful to potential consumers.} This is harmful from a First Amendment standpoint, because it impedes the flow of truthful information and expression.

Opponents of this view may argue that, since Section 43(a) has a provision requiring the false or misleading statement to be “material,” this concern is irrelevant because only significant falsehoods would be enjoined. Thus, they argue, removal of such blatant or influential lies would justify the simultaneous chilling of some truthful information. This argument is valid in theory, but in practice courts usually gloss over the “materiality” analysis, often finding that any advertisement that makes some claim about either party’s good or service has met the materiality requirement.\footnote{See, e.g., Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144 (2d Cir. 2007). The Second Circuit panel delegated the materiality discussion to a mere footnote, where it held, “TWC has met this requirement, as it is undisputed that picture quality is an inherent and material characteristic of multichannel video service.” Id. at 153 n.3; see also Clorox Co. of P.R. v. Proctor & Gamble Commercial Co., 228 F.3d 24 (1st Cir. 2000); Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993). But see Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997). In this case, the court carefully scrutinized the materiality of the challenged advertisement and found that, since the statement in question was not material, there was no need to reach the question of its truth. The challenged advertisement here was Motorola’s press release stating that its SportsTrax device provides updated game information direct from each arena. Id. at 854-55. The NBA argued that this assertion was literally false because Motorola’s reporters collected their information from television and radio broadcasts, not directly from the arena. Id. at 855. The district court did not reach this issue because it found that this statement constituted mere “minutiae” about the SportsTrax product. Id. The Second Circuit agreed with this finding because “[t]he inaccuracy in the statements would not influence consumers at the present time, whose interest in obtaining updated game scores on pagers is served only by SportsTrax. Whether the data is taken from broadcasts instead of being observed first-hand is, therefore, simply irrelevant.” Id. The court also notes that if, in the future, NBA was to market a similar pager, this statement regarding source might become material. Id; see also Richard J. Leighton, Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs,
by the “false by necessary implication” doctrine, allows courts to remove advertisements that, although almost entirely truthful, may contain a modicum of falsehood.

As a result, potential 43(a) liability creates a chilling effect on advertisers who, faced with the threat of having the advertisement removed or paying money damages, conclude that the advertisement may not be worth the possible costs or consequences. The “false by necessary implication” doctrine increases the chilling effect because of its inconsistent, ad hoc application. A company in a “necessary implication” jurisdiction must be careful in choosing how to advertise, because it is very easy for a court to find a false implication. Companies may choose to forego certain types of advertising altogether, or they may choose to advertise in a “safer” way.

The “false by necessary implication” doctrine is also problematic from a procedural standpoint. In Time Warner Cable, for instance, the Second Circuit held that, rather than making its own independent review of the challenged advertisement, it could properly defer to the District Court’s interpretations of the advertisement’s meaning and its veracity unless that determination was clearly erroneous. This violates the First Amendment’s careful scrutiny of restraints on protected speech. Furthermore, the court upheld the District Court’s decision to enjoin the commercial at a preliminary stage, before the case had even been litigated. This conflicts with the generally accepted free-speech principle of “speak now, pay later.”

Many Lanham Act false advertising decisions have ignored the First Amendment outright, failing to even mention the constitutional guidelines that may limit the Lanham Act’s application to false advertising cases. In Castrol v. Pennzoil, however, the Third Circuit devoted a few pages to the constitutional issues. The court analyzed

Presumptions and Pretexts, 94 TRADEMARK REP. 585, 587 (2004) (explaining that courts often presume materiality because a knowledgeable advertiser would not have made the claim unless he thought it was likely to be effective in persuading consumers to buy the product).

137 Langvardt, supra note 53, at 389-90.
138 497 F.3d at 153.
139 Hilden, supra note 18 (“This makes little sense, however, for a court performing First Amendment review should never check its own independent judgment at the door. To the contrary, the court should conduct its own searching review, as if the meaning of the speech were a question of first impression.”); see also Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147 (1998) (suggesting that preliminary injunctions in intellectual property cases are often unconstitutional).
140 Time Warner Cable, 497 F.3d at 153.
141 Hilden, supra note 18 (“For a court to pull an advertisement because it sees it as clearly false on its face is one thing (though it is still very dubious whether courts should be the arbiters of the truth of speech). To pull an advertisement off the air because, at a preliminary stage, some consumer data—collected by a self-interested party to the dispute (here, TWC)—suggests that some consumers might be misled by it, is quite another.”).
the requested injunctive relief and scrutinized the result to ensure that it did not impede truthful information. The court’s First Amendment analysis may be questionable because it still allowed injunctive relief for a claim that was facially true and only found to be “false by necessary implication,” but it should be commended for its consideration of First Amendment issues. Most other courts have ignored the constitutional issue entirely and failed to scrutinize the injunctions to ensure that they are sufficiently specific and prohibit only false statements. This phenomenon is further evidence of the problems inherent in the “necessary implication” doctrine, both theoretically and as applied by courts.

2. The False by Necessary Implication Doctrine and the Expansion of 43(a) Liability Underestimate Consumer Intelligence and Ignore Modern Technology

Another problem with “necessary implication” is that the doctrine underestimates consumer intelligence and perception. Most modern social scientists subscribe to the view that advertising provides a benefit to both the market and society. As such, the converse may also be

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143 Id. The District Court granted a permanent injunction enjoining Pennzoil from broadcasting, disseminating or publishing statements that claim, either directly or by clear implication, that Pennzoil motor oil outperforms any leading competitor against viscosity breakdown, and other similar claims. The injunction only enjoined statements that the court found to be literally false. Id. As such, the Third Circuit found the injunctive relief to be adequately specific and not constitutionally overbroad, as the defendant had tried to argued. Id. The court also explained that if, in the future, the claim should become true, Pennzoil would then be able to apply for a modification of the present injunction. Id.

144 See, e.g., McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544 (2d Cir. 1991); see also S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232 (2d Cir. 2001). Here, the court did spend some time discussing whether the injunction was sufficiently specific, but it failed to consider the First Amendment-related chilling issues. Id. at 240-41.

145 This is also a common criticism of the expansion of Section 43(a) false advertising liability in general. See, e.g., ROSS D. PETTY, THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY (1992). This Note views the “false by necessary implication” doctrine as emblematic of this expansion. Thus, a criticism of one exposes the weaknesses in the other. There is an emerging body of scholarship that criticizes trademark law in general for ignoring consumer behavior literature. In their recent article, Christensen, DeRosia and Lee show that courts often overlook realities of consumer psychology. Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, Trademarks, Consumer Psychology and the Sophisticated Consumer, 57 EMORY L.J. 575 (2008). Though this article’s detailed methodology is beyond the scope of this Note, it provides an excellent analysis of the many complex factors that affect the behavior of sophisticated consumers.

146 Singdahlsen, supra note 33. Singdahlsen explains that there are two polar views of advertising: one suggesting that advertising is counterproductive and drains societal resources; and the other, more popular position asserting that advertising actually benefits consumers and helps drive a healthy economy. By allowing new products to gain quicker market acceptance, advertising facilitates entry into the market, and this increases the variety of products available for sale. Many scholars have also found that highly advertised products are cheaper for
true. Overregulation of advertising is harmful because it bars new entry
into the market and leads to less competition and corresponding higher
prices.\textsuperscript{147} This Note does not advocate a complete removal of
advertising regulation; courts apply Section 43(a) appropriately and
effectively in many cases. It is clear, though, that some line must be
drawn between too much and too little advertising regulation.

Regardless of its more specific suggestions, this solution\textsuperscript{148} should,
in general, strongly consider and account for modern technology and
consumer intelligence. Most consumers today are highly media savvy
and know how to deconstruct advertisements.\textsuperscript{149} In addition, the growth
of the Internet has provided consumers with many substitutes for
advertising.\textsuperscript{150} Advertisements were once the easiest (or only) way for
consumers to learn details about products.\textsuperscript{151} The development of the
Internet, however, has changed the role of advertising.\textsuperscript{152} Consumers
to buy. See, e.g., Lee Benham, The Effect of Advertising on the Price of Eyeglasses,
15 J.L. & ECON. 337 (1972); Alex R. Maurizi, The Effect of Laws Against Price Advertising: The
Case of Retail Gasoline, 10 W. ECON. J. 321 (1972).

\textsuperscript{147} Singdahlsen, \textit{supra} note 33; BeVier, \textit{supra} note 13; Keller, \textit{supra} note 13.

\textsuperscript{148} This Note proposes a solution \textit{infra} Part III.

\textsuperscript{149} Singdahlsen, \textit{supra} note 33, at 376 (“In reality, consumers appear to recognize that a great
deal of what they are told is overstated and discount the claims accordingly; this may be
especially true with credence goods and durable, experience goods. Such discounting does not
deprive ads of all their informational content, rather it serves as a mechanism by which
consumers protect themselves.”). As technology increases and media become more widespread,
advertising has become more pervasive, often infiltrating unlikely locations, such as bathroom
stalls and school classrooms. Julie Dohrow, Dir., Commc'ns & Mass Media Studies, Tufts Univ.,
Class Lecture: Children and Mass Media (Spring 2005) (on file with author). In response, many
elementary and high schools have implemented media literacy programs to teach students how to
interpret mass media messages. These programs focus on advertising (and often center on
advertisements for potentially harmful products, such as fast food, tobacco, and alcohol).
Teachers, or invited specialists, expose students to common techniques used in advertising and
train students how to avoid falling prey to these tricks. \textit{Id.} This growing phenomenon further
shows that consumers are becoming more sophisticated at an earlier age than ever before, thus
supporting the contention that overregulation of advertising, like the “false by necessary
implication” doctrine, is unwarranted.

\textsuperscript{150} Although advertising may have many goals and agendas, its primary function, from a
consumer welfare standpoint, is to provide information. See Ellen R. Jordan & Paul H. Rubin, \textit{An
Economic Analysis of the Law of False Advertising}, 8 J. LEGAL STUD. 527 (1979). This seminal
work is the starting point for any research related to false advertising. Jordan and Rubin present a
strong anti-regulation view, and, although the doctrine didn’t exist at that time, many of their
arguments could be logically extended to the “false by necessary implication” framework.

\textsuperscript{151} This was the case in 1988, when the TLRA was enacted, before the Internet existed. This
is particularly true for “experience goods,” which must be consumed before being evaluated. \textit{Id.}
Advertising, and the information it disseminates, are important for experience goods because,
without them, the consumer must actually purchase the product and try it. This contrasts with
“search goods,” whose salient characteristics can be ascertained by pre-sale inspection. For
example, an advertisement stating claims about a pair of shoes might not be very important or
influential, because a consumer can try on the shoes before choosing to buy them. For experience
goods, by contrast, advertising may be very influential. For example, a consumer cannot try a
candy bar without buying it. This becomes even more significant for expensive, “big ticket”
experience goods—like high-definition cable television service.

\textsuperscript{152} As a result of the Internet explosion and the way it has changed the advertising and
can now go directly to a product’s Web site to find ample information. Of course, reliance on the information contained in these Web sites carries its own risks. Since the seller maintains these Web sites, they may also contain advertisements or perhaps present information in a way deliberately designed to persuade consumers to purchase their goods. As such, they may have the same reliability issues as traditional advertising.

There are, however, many other Internet-based sources of information to help consumers. Many Web sites that offer online shopping also feature reviews from other buyers. These types of Web sites are very powerful because they allow a potential consumer to retrieve firsthand accounts from millions of other people who have used a particular product, and the consumer does not even need to go to a different site to then purchase the item. This also offers a self-help solution to the problem of false advertising. In the past, if an advertisement convinced a consumer to buy a product that he later found to be different from the way it was portrayed, he had few effective solutions. He could try to return the item, he could simply stop buying products from the company, or he could try to retaliate by telling his friends and acquaintances. These types of Web sites now allow a disgruntled consumer to share his story with millions of people in a quick, simple, and effective way. This will likely change the importance of advertising in computer-age society and, therefore, doctrines like “false by necessary implication” seem outdated.


See, e.g., Zappos.com, http://www.zappos.com. This Web site contains hundreds of brands of shoes for men, women and children, and offers free shipping. The site allows anyone to review the different shoes, and many posters comment on issues such as comfort, appearance, and whether the shoe is true to size. See also Amazon, http://www.amazon.com. This popular online marketplace, most noteworthy for its books, offers reviews on all its products. There are also many Web sites that independently review different products. See, e.g., Camcorderinfo.com, http://www.camcorderinfo.com. This Web site features editorial reviews of video cameras and allows a consumer to search for models and reviews based on different specifications. The site also provides links to related sites and weblogs with further information about these products.

Critics also suggest that, from a First Amendment standpoint, courts should not scrutinize speech when consumers are equally capable and perhaps better suited for this task. Hilden, supra note 18. As Hilden explained, this may be particularly relevant for more expensive products or services:

Here, the savvy viewers considering the DIRECTV-versus-cable issue are unlikely to be led, lemming-like, by Jessica Simpson or William Shatner alone, in their consumer choices. The Internet offers them a cornucopia of resources—including ratings, blog commentary, and expert opinion—to inform their choices. And this choice isn’t an on-the-spot decision; it’s a decision whether to subscribe to a service
III. **THE SOLUTION: REVISING AND EXPANDING THE PUFFERY DEFENSE**

Since the “false by necessary implication” doctrine is problematic, in part because it underestimates or ignores modern realities of consumer intelligence, the most appropriate solution should be based on consumer perception. The puffery doctrine, which considers whether a reasonable viewer would believe a claim, is a powerful legal defense that relates the purported goal of Section 43(a) with its real-life applications. Although courts and critics disagree over how to define puffery, the term generally refers to exaggerated, boasting claims or vague, subjective claims upon which no reasonable consumer would rely. Courts often define puffery by contrasting the disputed claim with an actionable assertion of fact (i.e., they seek to show what puffery is by showing what it is not). Puffery is relevant to this discussion because it often arises in cases involving the “false by necessary implication” doctrine and because it bears upon the modern notions of consumer intelligence that this Note has discussed.

The current state of the puffery doctrine, however, has its own problems. Like “necessary implication,” puffery determinations are

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157 Leighton, supra note 54.

158 *Am. Italian*, 371 F.3d at 390-91. In this case, the plaintiff sought a declaratory judgment that its slogan, “America’s Favorite Pasta” did not constitute false advertising under Section 43(a). One of its competitors, New World, asserted a counterclaim, arguing that this claim violated Section 43(a) because another company, Barilla, was the actual American leader in pasta sales. *Id.* at 389-90. American Italian argued that the phrase “America’s Favorite Pasta” constituted non-actionable puffery, and the district court agreed. *Id.* at 390.

159 Leighton, supra note 54, at 618 (explaining that puffery determinations are often an “I-know-it-when-I-see-it” phenomenon).

160 Time Warner Cable, Inc. v. DirecTV, Inc., 497 F.3d 144, 159-61 (2d Cir. 2007).

161 See supra Part II.C and Part III.

162 Leighton, supra note 54.
often inconsistent and applied in an ad hoc manner. The solution, then, is a revitalized and expanded puffery defense.

If adopted, the proposed new structure will incorporate puffery into the court’s true/false analysis, making it a threshold element of inquiry rather than a defense. For allegedly false claims, courts should ask a series of three questions before beginning to determine the claim’s veracity. This approach will be more effective and efficient in reaching consumer welfare—the heart of 43(a)—because, from the outset, courts will be looking at claims from the viewer’s perspective. The new structure will also be effective because it provides uniformity to courts that are often inconsistent and limits excessive judicial activism by directing the inquiry down specific roads of analysis. As courts begin to apply this new test, companies will respond and ensure that their advertisements conform to the appropriate expectations. This bright-line test will cure the chilling effect because advertisers will know how to protect themselves appropriately.

The proposed new framework sets forth three questions in a specific sequence. First, the court should ask whether the statement, when read or viewed literally, asserts or implies objectively provable facts. In answering this question, the court should also consider whether the advertiser asserts or implies access to these facts. If an advertisement claims to be based on a scientific study, this would lean towards an assertion of objectively provable fact. If the court finds that the statement is not factual, then this statement is puffery and non-actionable. For example, an advertisement claiming that a product is the “best pizza on the planet” would be non-actionable, because this is not a provable factual assertion. No reasonable consumer would ever believe it to be true or allow it to influence their purchasing decisions. If the court answers this question affirmatively, the analysis continues—and the statement may still constitute non-actionable puffery.

Next, the court should ask whether the content and language of the statement negates the impression of objective fact. If the

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163 Id.

164 This new framework is partially adapted from Eric Scott Fulcher, Note, ‘Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation,’ 38 GA. L. REV. 717 (2004). Fulcher criticizes the rhetorical hyperbole doctrine in defamation law, which is analogous to puffery. He then proposes new ways for courts to adjudicate rhetorical hyperbole issues. Many of his concerns are similar to those reflected in this Note’s analysis of false advertising litigation, and his proposed framework is helpful.

165 This prong is partially adapted from Fulcher, supra note 164, at 755.

166 For example, an advertisement stating, “Studies show that 4 out of 5 dentists recommend toothpaste X for tartar control,” clearly implies that the advertiser has access to some factual information supporting this claim. This would weigh against a finding that the claim was puffery.

167 This prong is partially adapted from Fulcher, supra note 164, at 756.
advertisement states a claim that sounds highly fantastic or impossible, then it is probably puffery. Similarly, superlative, hyperbolic or colloquial language is usually non-actionable puffery. The court should also consider whether the statement conveys an absurd analogy or metaphor, because these types of comparisons would probably lack credibility and thus constitute puffery. For the purposes of this question, it is important to note that the court should examine all components of the claim—whether audio, textual, or visual. For example, consider a weight loss pill advertisement depicting radical “before and after” photos of a woman who allegedly lost 25 pounds in one month. A reasonable consumer would recognize that this result is highly improbable, and this would negate any impression of fact that the advertisement may have stated or implied. If the court, at this stage, finds that the content and language of the claim do not negate the impression of fact, they would continue to the next, and last, factor.

Finally, the court should ask whether the advertisement asserts or implies any kind of general superiority.\(^{168}\) If it does, it should be non-actionable puffery. This prong of the test would immunize many claims that are currently actionable under the Lanham Act.\(^{169}\) This question is essential, though, because it acknowledges the fact that these allegedly false claims are not appearing in a vacuum—they are appearing in advertisements, and their viewers are aware of this. Consumers understand that the goal of advertising is to convince them that product X is superior to product Y. As such, consumers discount these claims and thus disregard this information when making purchasing decisions.

If the court finds that the statement does not assert general superiority, the puffery inquiry is complete. The statement is actionable, and the court should then undergo a traditional determination of whether the stated claim is true or false. This initial 3-part inquiry, however, would effectively weed out many questionable or ambiguous claims, because these types of broad, vague or subjective claims often constitute puffery.\(^{170}\) Courts would be left with specific,

\(^{168}\) A blanket statement suggesting, “our product is better than yours,” would fall into this category, even if it referred to a specific characteristic. However, a specific assertion that includes measurable or evaluable claims, such as “our product works 50 times faster than yours,” would still be actionable if found to be false. For example, the claim that Maalox is the “strongest antacid I could buy” would be considered puffery because it makes a general claim of superiority without offering any measurable standard of comparison.

\(^{169}\) This question would change the result of the \textit{Time Warner Cable} case, for example, because the general claim of superior picture quality would be non-actionable. \textit{Time Warner Cable, Inc. v. DirecTV, Inc.}, 497 F.3d 144 (2d Cir. 2007).

\(^{170}\) The proposed test would alter the result in many of the cases discussed in this Note. For example, consider \textit{Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.}, 19 F.3d 125 (3d Cir. 1994). This case, discussed in the Introduction, \textit{supra}, involved an advertisement stating that Maalox is the “strongest antacid I could buy.” \textit{Id.} Under the proposed three-part test, this advertisement would constitute puffery because it does not convey any objective facts upon which a reasonable consumer would rely. Most consumers
information-based claims whose truth or falsity is easier to ascertain. If the court determines that one of these claims is false, it can then issue narrowly-tailored injunctive relief to protect consumers. This remedy should be as specific as possible, so as to reduce the chilling effect. Courts will not have to spend a lot of extra time or resources scrutinizing the specificity of the injunction, however, because this type of judicial restraint is already built into the careful three-part inquiry.

CONCLUSION

This Note aims to show that the “false by necessary implication” doctrine is stretching false advertising liability too far. The doctrine strays from the statute and confuses judges, who are left with confusing and inconsistent guidance with respect to how to apply it. The expansion of potential liability baffles advertisers wishing to avoid legal trouble, and chills legitimate, helpful commercial speech. The “false by necessary implication” doctrine also ignores the state of modern consumerism. Consumers are highly media literate and possess powerful tools for debunking advertisements and discrediting false claims; the court should not police advertisements so stringently when the free market is more effective at this task. As a result of the doctrine, competition decreases and consumers suffer.

The proposed new framework provides a uniform and consistent approach for courts to use, and removes claims before courts are forced to make difficult—and often trivial—distinctions between truth and falsity. This three-prong test eliminates the practical problems inherent throughout 43(a) jurisprudence and provides a sensible solution that addresses the fundamental goal of the statute. By carefully following the specific inquiries in their proper, coherent sequence, courts will place the focus back where it belongs—on the duped buyer.

would realize that this advertisement is trying to convince them of the product’s general superiority and would not be influenced by this broad claim.