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Advertising

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IX. ADVERTISING

A. *Television Programming and Advertising Standards*

Commercialization of television may increase following the recent decision in *United States v. National Association of Broadcasters*,[1] where the U.S. District Court held that the termination of an antitrust action by a consent decree was proper, thereby effectively eliminating the National Association of Broadcasters (NAB) Television Code and the self-regulating measures contained therein.

The NAB is a television industry trade association, whose membership includes the major T.V. networks and over 500 individual stations. Membership in the organization is voluntary and entitles participants to display the NAB "Seal of Good Practices." The NAB promulgates, inter alia, a Television Code, which sets forth guidelines and standards for television programming and advertising; compliance with this Code is necessary to maintain NAB membership.[2] The Justice Department, on its own initiative, sued the NAB,[3] alleging that three advertising standards contained in the NAB Television Code violated antitrust laws, specifically, Section 1 of the Sherman Act, which declares illegal, every contract, combination or conspiracy which restrains trade.[4] The challenged standards set limitations on the number of minutes per hour allowed for commercials (time standards), the number of commercials permitted during one hour (program interruption standards), and the number of products which could be advertised during one commercial (multiple product standards).[5]

Both parties moved for summary judgment; the United States argued that the purpose of the NAB standards was to artificially manipulate the supply of commercial T.V. time, resulting in increased advertising costs. The NAB argued that the provisions were sensible voluntary guidelines, which served important social concerns by limiting commercialization of television.[6]

The court denied NAB's entire motion and denied the United States' motion as to the time standards and program interruption stan-

1. United States v. National Assoc. of Broadcasters, 553 F. Supp. 621 (D.D.C. 1982).
2. United States v. National Assoc. of Broadcasters, 536 F. Supp. 149, 152 (D.D.C. 1982).
3. *Id.*
4. Sherman Act, 15 U.S.C. § 1 (1983).
5. 536 F. Supp. at 152.
6. *Id.*

dards, stating that a trial was necessary to resolve disputed factual issues under the rule of reason standard.[7] The court granted the United States' motion as to the multiple product standard, which prohibited the advertisement of more than one product during a commercial shorter than sixty seconds. The court concluded that this provision was per se violative of the Sherman Act because it caused some advertisers to purchase more commercial time than they might economically desire, and was therefore plainly an anti-competitive standard. An injunction was issued, prohibiting the NAB from enforcing the multiple product standard.[8]

Following the above-mentioned decision, the NAB voluntarily submitted to a consent decree, thereby avoiding the time and expense of trial.[9] The instant proceeding was held pursuant to the Tunney Act,[10] which provides that consent decrees, which terminate antitrust actions, must be in the "public interest."[11] The purpose of the Tunney Act is to prevent injudicious use of consent decrees where the government has initiated the antitrust action.[12] To that end, the Act requires that the Judiciary Department disclose the rationale of the proposed consent decree,[13] that the public be granted an opportunity to comment on the proposal,[14] and that the court explicitly determine that the consent decree is in the public interest.[15]

When determining whether a consent decree is in the public interest, the court must consider such things as whether a consent decree will effectively remedy the anti-competitive activity without depriving private plaintiffs the opportunity to recover against the defendants, due to the lack of a trial,[16] and that the decree will cause "as little injury as possible to the general public"[17] and important private interests.

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7. *Id.* at 158. Section 1 of the Sherman Act applies only to agreements which are unreasonably restrictive of competition. Whether an agreement is unreasonably restrictive is decided according to one of two standards, the rule of reason or the per se rule. The rule of reason analysis is used with "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint and the reasons why it was imposed." *Id.* at 154, citing National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

8. 536 F. Supp. at 163, 170.

9. 553 F. Supp. at 621.

10. *Id.*

11. 15 U.S.C. §§ 16(b)-(h) (1973).

12. United States, 553 F. Supp. at 622.

13. 15 U.S.C. § 16(b) (1973).

14. 15 U.S.C. § 16(d) (1973).

15. 15 U.S.C. §§ 16(e), (f).

16. 553 F. Supp. at 623.

17. *Id.*

The court addressed the public interest concern by considering two issues; whether the consent decree would deprive future private plaintiffs of prima facie evidence against NAB and whether Action for Children's Television (ACT) argument was meritorious.[18]

The court found that although the consent decree may deprive future potential plaintiffs the opportunity to use the judgment as prima facie evidence, the consent decree did not contravene the public interest. The court stated that the legislative policy of encouraging defendants to promptly settle actions and thereby save the government the time and expense of litigation outweighed the speculative interests of subsequent plaintiffs.[19]

Secondly, the court considered ACT's recommendation that the proposed judgment be revised to allow continued NAB regulation of commercials during children's television programming because children are impressionable and should be shielded from excessive advertising.[20] The court concluded that although ACT's concerns were valid, the consent decree was an effective means of ameliorating the anticompetitive practice. Since the consent decree would provide full antitrust relief, it could not be rejected due to the societal concerns. The court pointed out that individual stations and the FCC were still free to curtail and regulate children's advertising and that ACT may encourage them to do so.[21]

The court therefore held that the consent decree was not contrary to the public interest and entered the final judgment accordingly.[22]

This decision, although consistent with antitrust principles, by eliminating self-regulation by a trade association, seems contrary to public policy in general. The court found the consent decree to be in the public interest according to antitrust law, but did not fully consider the possible adverse societal effects resulting from the deregulation of television advertising.

Television ads currently occupy 14 minutes of every hour during prime time programming, (KGO, ABC affiliate, San Francisco). If an average of seven two minute ads occur each hour, the program is thereby interrupted every 6½ minutes.[23] As one commentator has suggested, the approval of the consent decree in this case may cause T.V.

18. *Id.*
19. *Id.*
20. *Id.* at 624.
21. *Id.* at 624-25.
22. *Id.* at 625.
23. 47 Fed. Reg. 49024 (Oct. 29, 1982).

viewing to "become a moving billboard of advertising, interspersed every 3¼ minutes with the story line."[24]

While the court was justified in remedying the anti-competitive practices of NAB according to antitrust law, "it is clear from the cases that other factors are not irrelevant."[25] The court should "attempt to harmonize competitive values with other legitimate public interest factors,"[26] and "would be justified in rejecting the proposed decree or requiring its modification if it concluded that the decree unnecessarily conflicts with important public policies."[27]

The court here, seemed solely concerned with remedying the antitrust violation, and did not give full consideration to the possible far-reaching effects of the decision. Although individual stations and the FCC can set their own standards, it is likely that, in an effort to pay for the rising cost of broadcasting, television viewers will be further bombarded by commercials.

Following this decision and "due to the uncertainty cast over broadcast self-regulation," the NAB dissolved their Radio and Television Code, which besides regulating commercial time, also addressed such things as advertisements for liquor and contraceptive products. Therefore, the industry-wide standards were abolished and the broadcasters left to set their own internal standards.[28]

Susan Fox

B. *Consumer Reaction Testing and Comparative Advertising*

In 1946, an estimated $3.34 billion was spent on advertising in the United States.[1] In 1979 the figure rose to $49.69 billion.[2] According to the latest survey, the total amount of expenditures for 1982 exceeded $66 billion,[3] with over $9.5 billion spent on television advertising

24. *Id.*

25. United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 150 (1982).

26. *Id.* at 153.

27. *Id.* at 151.

28. Los Angeles Times, Jan. 22, 1983.

1. Advertising Age, April 30, 1980, at 260.

2. *Id.*

3. Advertising Age, May 30, 1983, at 42 col. 4. This figure takes into account network advertising ($16.2 billion), spot advertising ($4.3 billion), and local advertising ($3.8 billion).

alone.[4]

Given the tremendous growth in the advertising industry in recent years, it is not surprising that litigation involving false advertising has also increased dramatically. As new products are introduced into the market, manufacturers attempt to gain a competitive advantage for their product through the use of creative advertising. Since these attempts often result in the use of deceptive tactics, the necessity for establishing guidelines to indicate the boundaries which separate what is fair practice and what is unfair practice becomes paramount.

Regulation of advertising practices was slow to develop. Initially, courts were reluctant to permit a cause of action for false advertising.[5] Litigation was generally limited to tort actions alleging "passing off."[6] Realizing the inadequacies of the common law tort in protecting businesses from the effects of false advertising, legislators enacted Section 5 of the Federal Trade Commission Act.[7] The statute had limited utility in that it was only enforceable by the Federal Trade Commission and not by private parties.[8] To remedy this problem Congress passed the Trademark Act of 1920, a statute that was only marginally effective as it required proof that the false representations were made with the *intent* to deceive.[9]

In 1938, Representative Fritz Lanham, a lawyer from Texas, introduced a bill in Congress which concerned possible revisions to the Federal Trademark Act of 1920. The Lanham Act, enacted in 1946, expanded the remedies available for false advertising claims by competitors, particularly in Section 43(a) which states:

> Any person who shall, affix, apply, or annex, or use in connection with any goods or services . . . 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 . . . shall be liable to a civil action by any person . . . who believes that he is or

4. Advertising Age, April 18, 1983, at 31, col. 1. Figures for the previous year (1981) were $8.4 billion.

5. Note, *Implied Misrepresentations in Advertisements under Section 43(a) of the Lanham Trademark Act: American Home Products Corp. v. Johnson & Johnson*, 47 Alb. L. Rev. 97, 102 (1982).

6. "Passing off" was defined by the Ninth Circuit as "the selling of a good or service of one's own creation under the name or mark of another." Smith v. Montoro, 648 F.2d 602, 604 (1981).

7. 47 Alb. L. Rev. 97, 105 (1982).

8. *Id.*

9. *Id.* at 106.

is likely to be damaged by the use of such false description or representation.

A private right of action was thus articulated. A method was provided "by which commercial interests could protect their property rights when they were threatened by false and misleading statements by competitors without reliance on government law enforcement or regulatory action."[10] Yet Section 43(a) did not attain its full potential as a cause of action for false advertising until the middle 1970's. It was at this time that the court first held that a literally correct statement may still be actionable under Section 43(a) if the advertisement misled or deceived the public.[11] In *American Home Products Corp. v. Johnson & Johnson*,[12] the court held that implied misrepresentations are also covered by Section 43(a). The court noted that "clever use of innuendo, indirect intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed."[13] The court also stated that "the truth or falsity of the advertisement usually should be tested by the reactions of the public."[14] The Code of Advertising of the Council of Better Business Bureaus states: "[a]n advertisement as a whole may be misleading although every sentence separately considered is literally true."[15] Therefore, if the statements made in the advertisement are not literally false but the plaintiff maintains that the ad is an implied misrepresentation, the court will require that a consumer reaction test be administered to ascertain whether the public is in fact misled by the ad. Consumer reaction tests are generally regarded as more accurate method of determining if consumers are deceived than the alternative procedure of having trial court judges review the evidence and make that determination. However, the tests remain subject to the courts' scrutiny as to their credibility. The issue of the utilization of a consumer test and its credibility was recently examined in *Coca Cola Co. v. Tropicana Products, Inc.*,[16] where the District Court of New York originally held that a preliminary injunction to prevent a television commercial from being aired will not be issued unless the results of a

10. Section 43(a) of the Lanham Trademark Act as a Private Remedy for False Advertising. 37 Food, Drug, Cosm. L.J. 264, 271 (1982).

11. American Brands Inc. v. R.J. Reynolds Tobacco Co. 413 F. Supp. 1352, 1356 (1976).

12. 577 F.2d 160 (1978).

13. *Id.* at 165.

14. *Id.*

15. Note, Comparative Advertising, Commercial Disparagement and False Advertising, 71 Trade-Mark Rep. 620, 633 (1981).

16. 538 F. Supp. 1092 (S.D.N.Y. 1982), *rev'd*, 690 F.2d 312 (2d Cir. 1982).

credible consumer reaction survey reveal that viewers are likely to be misled, decieved or confused by the advertisement. On appeal, however, the circuit court held that notwithstanding the questionable credibility of the consumer reaction test, a sufficient showing was made to support a preliminary injunction.[17]

In *Coca-Cola*, an action was brought against Tropicana alleging false and misleading advertising in violation of the Lanham Act. The advertisement in question was a television commercial for Tropicana's "Premium Pack" processed orange juice. Coca-Cola claimed that it suffered irreparable injury in the nature of lost sales of its product, "Minute Maid" processed orange juice, because of Tropicana's misleading contentions. The commercial featured Olympic gold-medalist Bruce Jenner squeezing a fresh orange into a "Premium Pack" container while the commercial's announcer stated that the product was "pure pasteurized juice as it comes from the orange." Coca Cola asserted that this sequence as visually depicted would deceive consumers into believing that Tropicana is fresh-squeezed orange juice. Coca Cola commissioned ASI Market Research to conduct a consumer reaction test and submitted the results along with expert testimony to support its claims of false advertising under the Lanham Act. This consumer reaction test was administered in three shopping malls, using 500 women appearing to be between the ages of 18 and 65, who had purchased orange juice within the last 3 months and had regularly used bottled or cartoned orange juice. After being shown the Jenner commercial the women were asked the following questions: "What ideas was this commercial trying to get across to you about Tropicana Orange Juice?;" "What did they show in the commercial about Tropicana Orange Juice?;" and "What did this portion of the commercial suggest to you?" (referring to the sequence in which the orange was squeezed into the Tropicana carton). Using the responses ASI compiled, Coca Cola's advertising expert conducted his own analysis and concluded that 43% of those interviewed thought that "Premium Pack" contained fresh-squeezed orange juice. This figure was arrived at after the responses of all 3 of ASI's questions were combined together and answers mentioning "freshness" were isolated.

At the trial level, Tropicana brought its own expert who testified that ASI's consumer reaction survey was ambiguous as to what message the viewers actually believed the commercial conveyed. Tropicana's expert claimed that the test was ambiguous in terms of its

17. 690 F.2d 312 (2d Cir. 1982).

methodology, execution, interpretation and design and should therefore be discredited as an indicator of the level of consumer deception generated by the Jenner commercial.

The lower court recognized the ambiguity of the advertisement in the sequence which showed Jenner squeezing an orange into a Tropicana carton, which was suggestive of fresh-squeezed orange juice, while an oral disclaimer negates this suggestion by stating that the product was processed orange juice. However, the lower court stated that although a more thorough survey might well have substantiated Coca Cola's claims, the ASI survey was not probative of consumers' perceptions concerning the advertisement. The court proceeded to conduct its own analysis of the consumer reaction test findings and concluded that no more than half of the 15% of responses were actually misled to believe that Tropicana was fresh-squeezed orange juice.[18]

There is no minimum number of deceived viewers required before a court will issue a preliminary injunction.[19] However, the lower court, in denying a preliminary injunction, found that the degree of confusion was insubstantial when balanced against the fact that Trpicana would be forced to spend a large sum of money and time in revamping the Jenner commercial or creating a new commercial. In addition, Tropicana would lose sales for its product in the period it was left without a commercial, while competitors (including Coca Cola) would continue promoting their products.

There are two relevant requirements that must be met for a court to issue a preliminary injunction: 1) the likelihood of suffering irreparable harm if relief is not granted, and 2) a likelihood of success on the merits.[20] On appeal, the circuit court held that these two requirements were met by Coca Cola. The lower court erred in analyzing the test results in the context of weighing the merits of Coca Cola's case in chief. Instead, the test results should have been used by the court to determine the likelihood of irreparable injury to Coca Cola.

The circuit court stated all that is required for a finding of irreparable injury is a showing that a "not insubstantial number of consum-

18. It seems ironic that where the major issue involved in a case is the accuracy of the methodology and interpretation of a particular consumer reaction survey, the court would, on its own initiative, further confound the survey's credibility by omitting several of its responses and subsequently attempt to deduce some rational conclusions from the remaining responses. Perhaps the court then realized the absurdity of its action and thus proceeded to reject the survey's results in toto.

19. Coca-Cola Co. v. Tropicana Products, Inc. 538 F. Supp. 1091, 1096 (1982).

20. 690 F.2d 312, 314-15 (1982).

ers were clearly mislead by [Tropicana's] ad."[21] In light of Coca Cola's ("Minute Maid") erratic but generally declining sales statistics both prior to and subsequent to the Jenner commercial, the appellate court held that Coca Cola had met its burden. The appellate court further held that Coca Cola had demonstrated it was likely to succeed on the merits of its claim of false advertising. The court found that the Jenner commercial was false on its face.[22] In fact, Tropicana orange juice is not squeezed directly into the carton as visually depicted, but is heated and sometimes frozen before it is packaged. In addition, the audio portion of the commercial which stated that Tropicana orange juice is "pasteurized juice as it comes from the orange" was blatently false; pasteurized juice does not come directly from oranges as represented.[23]

The circuit court held that once the requirements for a preliminary injunction were met, a balancing of the hardships, as performed by the lower court, was inappropriate. Having been found to have abused its discretion, the district court's ruling was reversed and a preliminary injunction was issued.

Methodological flaws have also been the subject of inquiry in cases where the claims made in the advertisement themselves are based on consumer preference tests (i.e., comparative advertising).

Comparative advertisements are those which "specifically identify competitors or competing products by name, trademark, or picture instead of by general references such as to 'Brand X' or 'a leading brand' ".[24] This practice has not always been accepted by television networks. Advertisers did not favor the idea of providing free exposure to the competitor by making specific reference to the other product. The use of comparative advertisements also increased the likelihood of being sued by the competitors. In 1971, a major television network accepted a comparative advertisement for the first time and the tenor of the advertising industry today is reflective of this practice.[25]

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21. *Id.* at 317.

22. *Id.* at 317-18.

23. *Id.* at 318.

24. 47 Alb. L. Rev. 97, 126 (1982).

25. Comparative advertising is so common today that all of the major television networks have developed their own set of guidelines. For example, the NBC guidelines of January 16, 1974 require: (1) the identified products must actually compete; (2) competitors must be fairly and properly identified; (3) advertisers must not discredit, disparage or unfairly attack competitors, their products or other industries; (4) identification of the competitor or his product "must be for comparison purposes and not simply to upgrade by association"; (5) related or similar properties or ingredients should be compared, "dimension to dimension, feature to feature, or wherever possible by a side-by-side demonstration";

A recent case, *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*,[26] dealt with this issue of methodologically flawed consumer preference tests in a comparative advertisement. The court held that a television commercial advertising a product violated the Lanham Trademark Act if it depicted consumer preference test results or utilized methodology so as to deceive a reasonably intelligent consumer about the product's inherent qualities or characteristics.[27] *Sassoon* involved a television commercial made by Bristol-Meyers to promote its beer-enriched shampoo, "Body on Tap." The commercial featured high fashion model Christian Ferrare holding a bottle of Body on Tap and stating "[I]n shampoo tests with over 900 women like me, Body on Tap got higher ratings than Prell for body. Higher than Flex for conditioning. Higher than Sassoon for strong, healthy looking hair." As each of the shampoos were mentioned, that shampoo was shown on the screen.

The shampoo preference test mentioned in the advertisement was conducted by an independent market research firm, Marketing Information Systems, Inc. ("MISI"). The procedure of this test (called "blind monadic testing") was to have approximately 200 women in each of four groups try *one* shampoo only and rate that shampoo on a qualitative scale of six ratings ranging from "outstanding" to "poor." MISI tabulated only the top two rankings ("outstanding" and "excellent") for each of the shampoos and discarded the remaining four rankings from their data. MISI determined that a larger percentage (36%) of women who tried Body on Tap rated it in the top two rankings than the percentage of women who tried Sassoon shampoo (24%). These figures provided the basis for the assertion made in the Ferrare commercial that women preferred Body on Tap to Sassoon.

Vidal Sassoon, manufacturer of one of the competing shampoos mentioned in the advertisement, brought this suit against Bristol-Meyers claiming that the Ferrare commercial violated the prohibition of Section 43(a) of the Lanham Trademark Act against false and misleading advertising. Sassoon claimed that the shampoo preference tests were portrayed in a misleading way and that the methodology of the test itself was inherently biased. Sassoon claimed that: 1) only 200 women tested each shampoo, not 900 as the commercial implied; 2) each woman tested only one shampoo, therefore, no product-to-product comparisons were actually made; 3) only 2/3 of the partici-

(6) the compared property must be "significant" in terms of product "value or usefulness" to the consumer; and (7) the difference must be "measurable and significant."

26. 661 F.2d 272 (1981).

27. *Id.*

pants in the shampoo test were over 18 years of age;[28] and 4) only the two top categories of rankings were revealed in the results in the commercial.

Sassoon asserted that the directions given to the women in the group testing Sassoon shampoo were contrary to Sassoon's own directions. In addition, those women testing Sassoon shampoo were permitted to use other brands of shampoo during the testing period. Hence, according to Sassoon, the responses of the women in this test group were inaccurate. Sassoon alleged that as a result of these flaws, viewers would be deceived by the allegedly inaccurate test results and would purchase Body on Tap rather than Sassoon shampoo. To support this claim Sassoon commissioned ASI Market Research Inc. to conduct a consumer reaction survey to determine if in fact consumers were deceived by the Ferrare commercial. Six hundred thirty-five participants were asked four questions concerning the statements made in the advertisement. Results from this survey indicated that 95% of those interviewed thought that *each* of the 900 women in the shampoo preference test mentioned by Ferrare in the advertisement had tried two or more brands of shampoo. Moreover, 62% of those polled were convinced by the commercial that Body on Tap was a competitively superior product.[29] Based on the evidence, the district court issued a preliminary injunction for violation of Section 43(a). On appeal, the Second Circuit affirmed.

In the course of ruling that Bristol-Meyers' television commercial violated the Lanham Act, the court examined cases interpreting the Act and the legislative history of the Act. In that the statute itself does not address consumer preference testing,[30] the court noted that the meaning of the statute must be read in light of its purpose, and that purpose was to protect the consumer from the effects of false advertising. As was stated at the Congressional hearing, another chief purpose motivating the legislators to enact this statute was to update existing legislation in the area so as to "conform to legitimate present-day business practice."[31] To accomplish these ends, the courts have given the language of the Act a broad interpretation.

28. This later proved to be an important consideration by the court in that Body on Tap had appealed disproportionately to the teenage market prior to the commercial. Bristol-Meyers succeeded in increasing adult usage of Body on Tap (through the Ferrare commercial)—a market segment which Sassoon had previously fared very well with.

29. *Sassoon*, 661 F.2d at 276.

30. This is certainly not surprising since when section 43(a) was enacted, comparative advertising was non-existent.

31. *Sassoon*, 661 F.2d at 277.

The court stated that the prohibition of Section 43(a) applies to misrepresentations made with reference to the "inherent quality or characteristics" of a product. The court then took note that Bristol-Meyers did not *patently* describe the quality of Body on Tap in a false way. In fact, the misrepresentations allegedly made in the advertisement concerned tests results and methodology, not the "inherent quality" of the product. However, it was found that the consumer preference test results and methodology were depicted in a misleading fashion such that the reasonably intelligent consumer would be deceived about the product. The result of the advertisement was that consumers were misled into believing Body on Tap was a competitively superior shampoo. Since the qualities of the product involved did not lend themselves to objective measurements,[32] the court stated that "the consumer test truly becomes the message of inherent superiority."[33]

Sassoon satisfied the additional requirement of making an adequate showing of the possibility of irreparable injury.[34] The court determined that a reasonable basis for this showing was presented since both Bristol-Meyers, Body on Tap and Sassoon shampoo competed for the same market and if the commercial was seen often enough, viewers might have been less likely to purchase Sassoon shampoo.[35]

The court in *Sassoon* determined that the methodology of the consumer preference tests (in addition to the manner in which the test results were portrayed) was flawed, and subsequently issued a preliminary injunction. However, in similar circumstances, the courts have been hesitant in making this evaluation. In *American Home Products Corp. v. Abbott Laboratories*,[36] the court held that in order to determine whether the test methodology provides a sufficient basis for claims asserted in a comparative advertisement, it is first necessary to carefully examine test design and execution, and to summons experts to testify in the areas of statistics, market research and psychology. The decision to enjoin an advertisement should be made only after careful consideration of "substantial proof of invalidity . . . [to prevent] . . . unpredictable judicial decisions that might severely disrupt the standard practices of the advertising and business communities."[37] The court added that evidence of an alternative test which would be meth-

32. The "qualities" of a shampoo product are, for example, that it offers "stronger, more manageable hair" or "more body and bounce."

33. *Sassoon*, 661 F.2d at 278.

34. *Id.*

35. *Id.* at 278-79.

36. 522 F. Supp. 1035 (1981).

37. *Id.* at 1039.

odologically superior (while still being practical) may be necessary before a court will enjoin an advertisement.[38] With this added element, "the need to remedy harm caused by representations surmised upon erroneous tests . . . [is balanced] . . . against the need to keep judicial interference to a minimum."[39]

In certain cases, it will be clear that an advertisement should be enjoined, as it is patently false or ambiguous. In other cases an unambiguous true statement made in an advertisement will not be enjoined. However, in most instances the representations will be somewhere in the middle. It is in these cases that the utmost care must be exercised to balance the interests of both parties. If the purpose of the Lanham Act is to give relief (in the form of an injunction) against statements made which cause injury, it seems inconsistent to require that the plaintiff (who has the burden of proof) prove additional elements. For example, it may place an unwarranted burden on the plaintiff to require that he devise a more accurate alternative preference test as suggested in *American Home Products*. On the other hand, alleged violators of the Lanham Act should not be subjected to claims that are proven meritless only after a costly, time-consuming trial. Astronomical expenses are incurred in conceiving and developing strategic advertising campaigns, and those who do so accurately have the right to enjoy advantages in marketing. If a preliminary injunction is issued, then later retracted, the fruits of their efforts may be lost. In an age where the needs and desires of consumers are constantly changing, the temporary withholding of an advertisement from the media may result in tremendous losses to the defendant. Competitors could therefore use the preliminary injunction as a strategic method of alleviating competition, at least temporarily. Therefore, the decision to enjoin an advertisement should be made only after a careful weighing of these conflicting interests.

As the Board of Directors of the American Association of Advertising Agencies has purported:

> When used truthfully and fairly, comparative advertising provides the consumer with needed and useful information. However . . . extreme caution should be exercised because comparative advertising, by its very nature, can distort facts

38. *Id.*

39. Note, *Section 43(a) of the Lanham Act: A Statutory Cause of Action for False Advertising*, 40 Wash. & Lee L. Rev. 383, 417 (1983).

and misrepresent the truth.[40]

Loretta Naughton

40. Trade-Mark Rep. 620, 639 (1981).