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The U.S. International Trade Commission: Import Advertising Arbiter or Artifice?

Ross D. Petty*

I. Introduction

Section 337 of the Tariff Act of 1930 condemns:

[un]fair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is —

(i) to destroy or substantially injure an industry in the United States;

(ii) to prevent the establishment of such an industry; or

(iii) to restrain or monopolize trade and commerce in the United States.1

This condemnation of unfair import competition was first enacted as section 316 of the Tariff Act of 1922.2 It was intended to give "more adequate protection to American industry than any antidumping statute the country has ever had" and to "prevent every type and form of unfair practice."3 This language tracked the recommendations of an earlier report that compared the treatment of dumping by Canada with the then criminal treatment of dumping by the United States.4 This report distinguished dumping from other unfair trade practices such as commercial threats, bribery, deceptive use of trademarks, passing off, exploitation of patents, false labeling, and deceptive advertising.5 Thus, in passing the Tariff Act, Congress intended "unfair methods of competition and unfair acts" to include deceptive advertising.6 Since the passage of the Trade Act of 1974, which substantially amended the Tariff Act, the U.S. International Trade Commission has brought over 300 cases under this provision.7

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3 S. REP. No. 595, 67th Cong., 2d Sess. 3 (1922).


5 Id. at 11.

6 Id.

7 The ITC has opened 327 unfair trade practice investigations under section 337. Nearly all of these (320) have been at least preliminarily terminated. Investigations of Unfair Trade Practices in the Import Trade (Fed-Track Guide)(May 31, 1991).
of these cases involve intellectual property issues such as patent, copyright or trademark infringement, or the theft of trade secrets. Others involve issues similar to trademark infringement such as passing off and trade dress misappropriation. Relatively few involve false advertising, and most of those concern a false designation of country of origin. This Article discusses the use of section 337 of the Tariff Act as authority for challenging false advertising generally, not merely false designations of origin.

The modest use of section 337 to challenge the advertising of imported products appears comparable to the limited use of section 43(a) of the Lanham Act in the years immediately following its passage in 1946. In fact, it was not until 1954 that a court first recognized a claim of false advertising under the Lanham Act. Not until the late 1970s did the use of the Lanham Act to challenge false advertising become widely accepted. Today, more advertising cases are litigated under the Lanham Act than by the Federal Trade Commission.

This Article suggests that, like the Lanham Act during its early years, the potential for section 337 as a means of challenging advertising is largely unrealized. In a small effort to remedy this situation, this Article explains its full potential and explains how it may be used to challenge the advertising of imported products.

The following section provides background on other modes for resolving disputes concerning the validity of advertising. It primarily examines industry self-regulation, the Federal Trade Commission, and private litigation under the Lanham Act for later comparison with the International Trade Commission. Part III of this Article

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9 Id. at 495.
10 A recent study of the 269 cases filed before the ITC through September 1987 found that out of 596 allegedly unfair acts cited in the complaints, over 300 involved patent or copyright infringement and another 129 alleged trademark infringement. Passing off/trade dress misappropriation was alleged 71 times, false designation of origin 60 times, but false advertising only 32 times. Robert J. Thomas, Patent Infringement of Innovations by Foreign Competitors: The Role of the U.S. International Trade Commission, 53 J. Marketing 63, 67 (Oct. 1989).
11 Bruce Keller, How Do You Spell Relief? Private Regulation of Advertising Under Section 43(a) of the Lanham Act, 75 TRADEMARK REP. 227 (1985). "[T]he courts construed section 43(a) to require the plaintiffs to plead to prove the elements of a common law passing off claim." Id. at 230.
13 Keller, supra note 11, at 290-31.
describes the International Trade Commission, its procedures, and its advertising cases and decisions. Part IV discusses issues that the case law has not yet addressed and the likelihood that the International Trade Commission will adjudicate more advertising cases in the future.

II. Background: Other Modes for Challenging Advertising

A. Industry Self-Regulation

Perhaps the quickest means for a business to challenge a competitor’s advertising is to file a complaint with one of the many sources of industry self-regulation. Many industry trade associations have advertising codes, as do media and media associations. The National Advertising Division (NAD) of the Council of Better Business Bureaus, for example, has actively investigated advertising complaints since 1971. It is funded by dues paid to the Council of Better Business Bureaus by advertisers and advertising agencies. During 1983-85, forty-three percent of these complaints were from business competitors.

Complaining to the NAD does not require a lawyer or the payment of filing fees. In addition, the NAD acts quickly; it frequently resolves complaints within six months of receipt. The NAD examines approximately one hundred complaints annually. Despite its lack of authority to issue binding orders, the NAD has obtained a discontinuance or modification of the advertisement in about seventy-five percent of its cases, with the remainder of its findings vindicating the challenged advertisement.

If the NAD cannot resolve the complaint to its own satisfaction, the case may be appealed to the National Advertising Review Board (Board). The Board is funded in the same manner as the NAD. It has only decided forty-one cases that have been appealed to it out of the more than 2,000 investigated by NAD since 1971. In sixty-six percent of those cases, the Board upheld the NAD decision; in twenty percent it reversed or modified the NAD decision; and in

17 Id. at 29-33.
18 Id. at 82.
19 Id. at 83.
20 Id. at 209.
21 Id. at 86.
22 Sixty-four percent of all complaints in 1982 were resolved within six months. Id.
23 Id. at 209 (table 6-1).
26 Id.
27 Id. at 218(table 6-4).
fifteen percent the case was dismissed or withdrawn. Advertisers thus far have always complied with Board decisions decided against them.

The NAD's legal standards for determining whether advertising is false or deceptive appear comparable to the Federal Trade Commission's low standards discussed below. For example, in 1984 the NAD took formal action on 105 complaints. Eighty percent of these complaints questioned the adequacy of substantiation of claims in the advertisements, and eighty-three percent challenged misleading statements or depictions.

B. Federal Trade Commission

Commentators have suggested that the Federal Trade Commission (FTC or Commission) has brought relatively few advertising cases recently. Since the FTC is free to decide whether or not to take action in a particular case, a business cannot be confident that the FTC will take effective or timely action in any particular case.

When the FTC does decide to take action, however, the Commission bears the expenses of discovery, litigation, and possibly settlement negotiation. Under section 5 of the FTC Act, it has broad authority to condemn "unfair or deceptive acts and practices." The FTC is able to use its own expertise to determine what claims are made in the advertisement. It then determines if the claims are deceptive or unsubstantiated. To a lesser degree, the FTC also

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28 Id.
29 Id. at 86-87. If the advertiser did not comply with the Board decision, procedures call for referring the complaint to the FTC.
30 Id. at 91.
31 Id. at 226(table 6-8).
32 Id. The NAD also addressed children's advertising issues in 9% of its cases. Id.
33 See, e.g., Stanley E. Cohen, FTC Memo Hits Ad Self-Regulation, ADVERTISING AGE, 39, 42 (Feb. 7, 1983)("During a year when the ad industry self-regulation system identified nearly 60 instances where national advertisers were making claims that could not be substantiated, the Miller management at the FTC failed to act against a single case involving national ads that have run in major media since the present regime took office."); Thomas J. McGrew, Advertising Issues Avoided by the FTC in Past Year, LEGAL TIMES, Jan. 7, 1985, at 12. See also Best, supra note 15, at 17 (the FTC's published decisions for 1982-83 contained 24 advertising cases). But see Joanne Lipman, FTC is Cracking Down on Misleading Ads, WALL STREET J., Feb. 4, 1991 at 6; Kim Foltz, FTC Signals Its Concerns Over Deceptive Campaigns, N.Y. TIMES, Feb. 14, 1991 at D-19(suggesting that the FTC under President Bush is more active).
37 See, e.g., J.B. Williams Co. v. FTC, 381 F.2d 884, 886 (6th Cir. 1967).
polices advertising that it deems to be unfair.38

Under the FTC's Deception Policy Statement, an advertisement would be considered deceptive if it contained a representation, practice, or omission likely to mislead reasonable consumers and if the representation, practice, or omission was material to consumer choice.39 Thus, the FTC can pursue omissions of material information that should be disclosed to prevent the advertisement from being misleading.40

The major advantage of the FTC's deception authority is its relatively low burden of proof. The FTC does not have to prove that the advertiser intended to deceive consumers or knew its advertisements were deceptive.41 The FTC similarly does not need to prove actual falsity of a particular statement.42 Rather, it merely must prove that reasonable consumers are likely to be misled by particular

38 Under the FTC's unfairness jurisdiction and recent policy statement, it would pursue advertising claims as unfair if they are likely to cause substantial consumer injury as determined by the conduct's net effects and consumers could not reasonably avoid such injury. Thus, in a situation where the omission of product information might harm consumers, the FTC would require the disclosure of this information in advertising when the costs to the advertiser, and ultimately purchasers, of doing so, would not outweigh the benefits. Additionally, consumers must not readily be able to determine the missing information by a simple examination of the product. Of course in many cases, the omission of such information might also be deceptive.


The only examples of advertising that the FTC has challenged solely on unfairness grounds involve depictions in advertisements that may influence children to engage in dangerous activities. See, e.g., A.M.F., Inc., 95 F.T.C. 310 (1980)(consent order prohibiting bicycle advertisements showing unsafe riding by children); In re Mego Int'l, 92 F.T.C. 186 (1978)(consent order prohibiting depictions of people using electrical appliances near water); In re Uncle Ben's Inc., 89 F.T.C. 131 (1977)(consent order prohibiting depictions of unsupervised children near active gas stove); In re General Foods Corp., 86 F.T.C. 831 (1975)(consent order prohibiting depiction of naturalist eating wild nuts and berries). Accord, In re Philip Morris, Inc., 82 F.T.C. 16 (1973)(consent order prohibiting placement of sample of razor blades in newspapers where they might injure children).


39 The FTC's Deception Statement is appended to its decision in In re Cliffside Assocs., Inc., 103 F.T.C. 110, 174 (1984).

40 The so-called "pure omission," silence on a subject in circumstances that do not give any particular meaning to the silence, can only be pursued under unfairness. See Crawford, supra note 38, at 310-11; In re International Harvester, 104 F.T.C. 949, 1059-61 (1984).

41 Chrysler Corp. v. FTC, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977); In re Travel King, Inc., 86 F.T.C. 715, 773 (1976).

42 Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979).
representations—even those representations that might be literally true.\textsuperscript{43} In addition, the FTC does not need to prove actual deception caused by the advertisement.\textsuperscript{44} It only must show that the claims are material to consumer choice and that consumers are likely to be misled.\textsuperscript{45} Certain claims, such as express claims and implied claims made intentionally or concerning health, safety, efficacy, or price, are presumed by the FTC to be material.\textsuperscript{46}

The second prong of the FTC's advertising regulation program is its requirement that advertisers have a "reasonable basis" for their advertising claims prior to making them.\textsuperscript{47} According to the 1984 Advertising Substantiation Policy Statement, claims that promise a certain level of substantiation (e.g., "tests prove") must be supported by that level of substantiation.\textsuperscript{48} Claims implying a high level of substantiation to reasonable consumers must have the promised level of substantiation.\textsuperscript{49} For example, comparative claims, specific performance claims, and claims with a scientific aura all imply that tests were performed to substantiate them. All other claims must be substantiated at a level determined by six factors: (1) type of claim; (2) type of product; (3) consequences of a false claim; (4) benefits of a truthful claim; (5) cost of developing substantiation; and (6) amount experts feel is reasonable.\textsuperscript{50}

The standard FTC remedy in an advertising case is a simple cease and desist order.\textsuperscript{51} Should the company later violate it, it would be subject to civil penalties.\textsuperscript{52} A cease and desist order typically prohibits claims that are false or misleading on their face as well as other claims not containing a reasonable basis.\textsuperscript{53} The FTC often specifies the type of reasonable basis. For example, drug efficacy claims must be substantiated by well-controlled, double-blind

\textsuperscript{43} Some argue that the "likely to mislead" standard is a retreat from prior case language requiring only "the tendency or capacity to mislead." See Patricia P. Bailey & Michael Pertschuk, The Law of Deception: The Past as Prologue, 33 AM. U. L. REV. 849 (1984).
\textsuperscript{44} Trans World Accounts, 594 F.2d at 214; Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975).
\textsuperscript{45} Trans World Accounts, 594 F.2d at 214.
\textsuperscript{46} Crawford, supra note 38, at 307.
\textsuperscript{47} In re Pfizer, Inc., 81 F.T.C. 23, 64 (1972). However, while announcing this new doctrine, the Commission did not find Pfizer liable, so there was no basis for an appeal. Id. at 73-74. For a discussion of the history of FTC's advertising substantiation program, see Charles Shafer, Developing Rational Standards for an Advertising Substantiation Policy, 55 U. CIN. L. REV. 1, 5-15 (1986).
\textsuperscript{49} The policy statement is appended to the Commission decision in Thompson Medical Co., 104 F.T.C. at 648.
\textsuperscript{50} Id. at 840. See also id. at 821.
\textsuperscript{53} Pitofsky, supra note 51, at 692.
clinical tests. In many cases, the FTC will also order affirmative disclosures of information necessary to prevent deception. Such disclosures may be ordered for all advertising, often for a limited period of time, or whenever a specified claim is made.

Such remedies have been described as "pathetically inadequate," particularly when imposed after a long period of investigation and litigation. According to one commentator, even if the FTC sought a preliminary injunction in federal district court, a fifty-two week advertising campaign would have run its course. Nonetheless, the FTC has obtained preliminary injunctions in advertising cases. To obtain such relief, the FTC must only prove a likelihood of ultimate success on the merits in its underlying case.

Because of the limited value of injunctive relief, the FTC has attempted to correct the effects of past practices by occasionally ordering corrective advertising. In addition, under section 19 of the Federal Trade Commission Act, the FTC is authorized to seek consumer redress for knowingly dishonest or fraudulent conduct that violates a rule or order of the Commission. It has used this authority to negotiate refunds to consumers in settlements of advertising cases where feasible. These two remedies enhance the deterrence value of FTC actions.

C. Lanham Act Litigation

Most commonly, business rivals challenge each other's advertising under section 43(a) of the Lanham Act, the Federal codification of trademark law. Originally, trademark law only protected a business from a rival's use of a similar trade name or mark where consumer confusion appeared likely over the identity of the producer of the goods in question. But section 43(a) allows injured parties to sue firms that use "[any] false or misleading description of fact, or

54 Thompson Medical Co., 104 F.T.C. at 844.
55 Pitofsky, supra note 51, at 685.
56 Id.
57 See id. at 692-93.
58 Pitofsky, supra note 51, at 693 n.128. Complaints against three marketers of over-the-counter analgesics were issued in 1973, but appeals of the final FTC orders did not occur until 1982 for one and 1984 for the other two. See Sterling Drug Co. v. FTC, 741 F.2d 1146, 1148 n.1 (9th Cir. 1984).
60 Id. at 299 (citing FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981)).
65 Copyright law protects a business from having its advertising copied ("substantially similar" unless under a "fair use" exception) by a rival. See KENNETH A. PLEVAN & MIRIAM L. SHROYER, ADVERTISING COMPLIANCE HANDBOOK 269-95 (1988).
false or misleading representation of fact, which . . . 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 . . . ." Some early cases interpreted prior language to require the plaintiff to prove the defendant was "passing off" its goods as being those of the plaintiff, but modern interpretations apply this language to cover all sorts of false or misleading advertising.

An obvious difference between bringing a private Lanham Act case and complaining to the FTC or NAD is that the complaining firm must bear the cost and burden of pursuing the lawsuit in a private action. This includes proving that its rival's advertising actually is false or misleading. Thus, a plaintiff, unlike the FTC or NAD, cannot simply say that the claims are unsubstantiated and win relief. Of course, in cases where the advertising explicitly or implicitly promises that its claims are supported by proper evidence, the plaintiff may prove falsity by showing a lack of substantiation.

The plaintiff's burden of proving falsity is far from insurmountable. The plaintiff must prove that the false statements either have deceived or have the capacity to deceive a substantial segment of the audience, that the deception is material to the purchasing decision, and that the plaintiff is injured or is likely to be injured by the statement. When fifteen percent of the audience interprets the advertising in a deceptive way, the courts become concerned. Courts also have held that literally true claims may be "false" under the act

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68 See Keller, supra note 11, at 228. The Lanham Act creates a private right of action for businesses harmed by, among other things, false advertising. Id.
69 Id.
71 See, e.g., Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 277-78 (2d Cir. 1981); American Home Prods. Corp. v. Johnson & Johnson, 436 F. Supp. 785, 803 (S.D.N.Y. 1977)(efficacy claim proven deceptive because the weakness of the supporting evidence should have led to a weaker claim of efficacy), aff'd, 577 F.2d 160 (2d Cir. 1978).
73 Coca-Cola Co. v. Tropicana Prods., Inc., 538 F. Supp. 1091, 1096 (S.D.N.Y. 1982), rev'd on other grounds, 690 F.2d 312, 317 (2d Cir. 1982); PLEVAN & SIRKOY, supra note 65, at 9. The FTC reportedly considered a similar standard for its deception policy statement instead of the reasonable consumer test in the statement. See Bailey & Pertschuk, supra note 43. Early FTC cases also have considered this issue. See, e.g., In re Firestone Tire & Rubber Co., 81 F.T.C. 398, 461-62 (1972), aff’d, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); In re I.T.T. Continental Baking Co., 83 F.T.C. 865 (1973)(10-14% is deceptive); In re Benrus Watch Co., 64 F.T.C. 1018, 1032 (1964)(14% is deceptive); In re Rhodes Pharmacal Co., 49 F.T.C. 263, 283 (1952)(9% is deceptive).
when they are misleading.74

Judges ease the plaintiff’s burden by frequently interpreting the meaning of the express claims within the advertisement without requiring evidence of how consumers would interpret them.75 Of course, other judges acknowledge their lack of expertise in this area, as compared to the FTC, and require evidence of consumer interpretation.76 The lack of expertise argument is supported by occasional cases where the court of appeals interpreted the express claims in advertising in a way diametrically opposed to the district court’s interpretation.77 The traditional rule for implied claims is to require evidence of consumer interpretation.78

Two major advantages that mitigate the Lanham Act’s added burden of proof are the speed in which courts resolve these cases and the remedies they impose.79 Under the Lanham Act, a competitor’s advertising may be enjoined within “months or even weeks” of its beginning.80 Often cases are essentially over after a preliminary injunction is issued.81

In order to obtain a preliminary injunction, the plaintiff must prove that (1) he will likely win the lawsuit because the advertising is false, (2) the defendant’s advertising is likely to cause or have caused injury to the plaintiff, and (3) the plaintiff’s injury without the injunction is likely to be higher than the defendant’s injury with the injunction (balancing of the hardships).82 In contrast, the FTC must only prove the first element.83

Proving likelihood of injury caused by the advertisement in

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77 See, e.g., Avis Rent A Car System, 782 F.2d at 384-86; Fur Info. and Fashion Council, Inc. v. E. F. Timme & Son, Inc., 501 F.2d 1048 (2d Cir. 1974). Cf., Coca-Cola Co., 690 F.2d at 312 (court of appeals finds facial falsity where district court finds ambiguity); Bose Corp. v. Linear Design Labs., Inc., 467 F.2d 304 (2d Cir. 1972)(court of appeals held three of four claims were mere “puffing”; district court had not ruled).
79 Keller, supra note 11, at 243.
80 Id. at 243-44 and the cases cited therein at 243 n.99.
81 Id. at 244.
82 PLEVAN & SIROKY, supra note 65, at 25-28. If the challenged conduct has ceased with no reasonable probability that it will be resumed, the court may refuse to issue and injunction. Id. at 28.
83 See supra notes 59-60 and accompanying text.
question is relatively straightforward in injunction cases. It is presumed in cases involving explicit comparative advertisements and can otherwise be proven by establishing direct competition between the plaintiff's products and the defendant's advertised product. Proving injury in cases where damages are sought is more difficult. A court may require proof of lost sales actually caused by the defendant's advertisement. Presenting such proof may expose the complainant to broad discovery of its sales figures and planning documents by its rival. Damages, when awarded, have typically been $678,000 or less, but damages in the amount of $40 million were recently awarded in the case of U-Haul Int'l v. Jartran, Inc.

Lanham Act cases occasionally involve more unusual remedies. Just as the U-Haul court awarded damages based on the corrective advertising that U-Haul disseminated (prior to the corrective advertisements, U-Haul only advertised in telephone book yellow pages), other courts have ordered that offending advertising, labeling, or package inserts be recalled. Courts have also ordered affirmative injunctions requiring letters to consumers or disclosures in future advertising to correct previous advertisements.

D. Other Private Litigation

Under common law, competitors can sue for the torts of passing off, product disparagement, and trade defamation (statements not about the plaintiff’s product, but about the plaintiff’s integrity or character). Passing off can be enjoined after the plaintiff proves a likelihood of consumer confusion, secondary meaning of product or package design, and nonfunctionality of the design or packaging. The courts typically will not order an injunction for disparagement and defamation, and will only award special damages in disparagement cases when they are proven with considerable specificity. The plaintiff in a disparagement case also has the burden of proving

84 Keller, supra note 11, at 244.
85 PLEVAN & SIROKY, supra note 65, at 24-25.
86 Keller, supra note 11, at 244.
87 Id. at 26.
88 Id.
90 Perfect Fit Indus., Inc. v. Acme Quilting Co., 646 F.2d 800 (2d Cir. 1981).
91 PLEVAN & SIROKY, supra note 65, at 38-46.
that the allegedly disparaging claims were false and made with malice.95 Thus, these torts only cover limited types of false advertising and are difficult to prove.96

Occasional antitrust cases have challenged advertising under section two of the Sherman Act’s prohibition against monopolizing and attempts to monopolize.97 The plaintiff must prove that the defendant has an intent to monopolize, a high level of market power, and that the advertising is anticompetitive.98 A few courts have found that “massive” advertising in conjunction with other anticompetitive conduct violates the antitrust laws.99 Other cases have recognized this possibility, but have failed to find liability.100 Courts also have found antitrust liability where the defendant has disparaged the plaintiff’s product.101 Lastly, courts have condemned the introduction and advertising of “new” products called fighting brands, targeted at rival products and often attempting to be “passed off” as them.102

III. International Trade Commission Procedures and Cases

In 1974, sixty years after the establishment of the Federal Trade Commission, the federal agency primarily responsible for advertising regulation, Congress transformed the U.S. Tariff Commission, a purely investigatory agency, into the U.S. International Trade Commission (ITC), an agency with investigatory and adjudicative authority.103 This section first explains the procedures of the ITC as applied to an advertising dispute and then describes several cases involving such disputes.

95 Id.
96 See id.
103 Vakerics, supra note 8, at 6.
A. International Trade Commission Procedures

To challenge the advertising of imported goods, a complainant must file a complaint with the ITC containing far greater detail than the "notice" type complaint that a federal court would allow to initiate a Lanham Act lawsuit. The ITC complaint must include facts that constitute an unfair method of competition or unfair act, including descriptions of known instances of the unlawful act and the names and addresses of the parties responsible for it. The complaint must also define and describe the domestic injury caused by the practices and contain both the theory of injury and the factual basis establishing the injury, such as a reduction in profits or volume of sales. The ITC's Office of Unfair Import Investigations is available to assist in drafting the complaint and to discuss the complaint with the plaintiff before it is filed.

Informal investigation by the Office occurs during the thirty day period after the complaint is filed to assist the ITC in deciding whether to institute a formal investigation. The ITC must hold a public meeting and make that decision before the thirty day period lapses. Unlike the FTC, the ITC begins investigation proceedings in any case where a complaint has been properly filed. The proceeding or trial is conducted by an Administrative Law Judge (ALJ) under rules similar to the Federal Rules of Civil Procedure that govern court trials. Unlike court trials, however, an Investigative Attorney is assigned to facilitate accurate and useful discovery and, after discovery, to advocate an independent position on the issues before the ALJ and the Commission.

After discovery, the ALJ conducts a trial and makes an initial determination concerning the alleged violations. The Commission then determines whether to review the ALJ's determination or merely adopt it as its own. The Commission holds its own hearings focusing on whether to review the ALJ's decision as well as whether the public interest favors imposing a remedy and what form the remedy should take. The ITC must complete its investigation and make its determination on liability and recommendation on a remedy within one year or, "in more complicated cases," within eighteen months of the Federal Register announcement of the invest-

104 See Vakerics, supra note 8, at 512.
106 Id.
107 See Vakerics, supra note 8, at 514.
108 Id.
110 Vakerics, supra note 8, at 518.
112 Vakerics, supra note 8, at 538.
113 Id.
tigation. The President then has sixty days to review and approve or disapprove the determination of liability. Of course, judicial review of final ITC determinations and recommendations is available by the U.S. Court of Appeals for the Federal Circuit.

Section 337 dictates that the primary remedy of the ITC in unfair methods of competition cases is an order excluding the products in question from entry into U.S. commerce. It states that the ITC "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States . . . ." The ITC may decide not to order exclusion if such an order would be contrary to the public interest, or it may limit its order to only the products of certain importers rather than all such products. The ITC has broad discretion in formulating the appropriate remedy. It may also order that goods be temporarily excluded during the pendency of its proceeding to the same extent that federal district courts may order temporary relief. Because these orders operate against goods, it is not necessary for the ITC to have personal jurisdiction over the respondents, who are frequently foreign businesses.

Exclusion orders seem appropriate in cases where the violation is directly related to the product or its packaging: patent, trademark, or copyright infringement; passing off; or the misappropriation of trade dress. Advertising, however, as opposed to labeling and packaging, is separate and distinct from the product. It therefore may be more appropriate in some advertising cases for the ITC to issue a cease and desist order against the unlawful conduct. Such an order is enforceable in federal district court, with a penalty for non-compliance being the greater of $100,000 or twice the domestic value of the goods per day of violation.

Because section 337 creates a right to relief "in addition to any other provision of law," it is important to note that a complainant

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115 Id. § 1337(j)(2).
116 Id. § 1337(c).
117 Id. § 1337(d).
118 Id.
119 Id.
121 Id. at 514-17.
124 19 U.S.C. § 1337(f)(1). Cease and desist orders have rarely been used by the ITC. See Saxon & Newhouse, supra note 123, at 61.
126 Id. § 1337(a). The courts have been reluctant to enjoin parties from also participating in a section 337 proceeding. David I. Wilson & George E. Hovanec, Jr., The Growing
may file for relief from false advertising concurrently with the ITC and a district court. This raises the issue of whether ITC determinations will be given res judicata effect in other proceedings. Patent-based 337 proceedings are not given res judicata effect because district courts have exclusive jurisdiction over patent validity. On the other hand, the Second Circuit recently decided to give res judicata effect to ITC determinations in trademark infringement cases. Although this issue has yet to be addressed in the context of a false advertising case, it appears likely that district courts would follow the Second Circuit’s reasoning in the trademark situation.

B. Proving a Section 337 Violation

A complainant in a section 337 proceeding must prove (1) an unfair method of competition or unfair act in the importation into or sale of imported articles in the United States, and (2) that the threat or effect of the act is to (a) “destroy or substantially injure an industry in the United States,” (b) prevent its establishment, or (c) “restrain or monopolize trade and commerce in the United States.”

All sorts of practices have been found unfair under the first criterion including false advertising, as detailed below. The proof of injury merits discussion.

The first step in proving injury is defining the domestic industry. If the U.S. manufacturing is significant and distinct from any overseas manufacturing, then a domestic industry exists. Even without domestic manufacturing, a domestic industry may exist if domestic services such as quality control, packaging, installation, and warranty service substantially add to the value of the product.

Once the domestic industry is defined, the ITC considers several factors in making its determination of injury to that industry: (1) lost sales or customers; (2) underpricing by imports; (3) significant market penetration by imports; (4) declining profits, employment, or production in the domestic industry; and (5) large foreign produc-

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Importance of Trademark Litigation Before the International Trade Commission Under Section 337, 76 Trademark Rep. 1, 2 n.8 (1986).

130 For a general discussion of types of practices, see Nance, supra note 120, at 496-506.
131 See Vakerics, supra note 8, at 498. “Absent a showing of domestic industry, the ITC has no jurisdiction to hear a 337 case, and the complaint will be dismissed.” Id.
tion capacity with intent to increase U.S. sales. Only a few cases have found no injury to domestic industry.

C. ITC Advertising Cases

The vast majority (sixteen) of section 337 complaints alleging false advertising have been withdrawn prior to adjudication so that the specific details of the advertising allegations have not been reported. In three additional cases, decisions published prior to the withdrawal or settlement of the advertising claims indicate the specific allegations. In Certain Insulated Security Chests, the complainant alleged it had documented tests that disproved advertising claims that the chest could withstand temperatures of "1550 degrees F" for "up to 30 minutes." In Certain Single Handle Faucets, the complainant initially challenged, but did not pursue, claims that the imported faucets had been "proven dependable in millions of installation [sic]." This claim was challenged as both false advertising and as evidence that the importer was attempting to pass off its faucets as being those of the complainant. Finally, in Certain Limited Charge Cell Culture Microcarriers, the complainants withdrew false advertising charges concerning price comparisons and the origin of the technol-

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134 See Nance, supra note 120, at 512; Vakerics, supra note 8, at 503-06; Wilson & Hovanec, supra note 128, at 6-7.
135 See Vakerics, supra note 8, at 505-06.
137 Inv. No. 337-TA-244, 1986 ITC LEXIS 155 (June 17, 1986)(ALJ decision to amend the complaint).
139 Id.
ogy in question. Thus, in nineteen cases, the false advertising allegations were settled or withdrawn.

The remaining ITC advertising cases fall into four categories. First, five cases pled false advertising, but really had no separate cause of action beyond passing off or false designation of origin. Similarly, three other cases alleged misappropriation of a picture of the complainant's product used in the respondent's advertisement, which is essentially passing off or false designation of origin. While false advertising, broadly defined, would certainly include such practices, these eight cases offer little precedential value for false advertising cases generally.

The second category of false advertising cases consists of only one early case where the ITC found infringement of a patent as a basis for an exclusion order but did not reach a determination on the false advertising count. In a separate opinion, Vice Chairman Albenger and Commissioner Stern suggested that the advertising claim "as seen on TV" had not clearly been proven false by the complainant.

The third category is comprised of cases where false advertising was found, but failed to meet the requirements of section 337. In two other cases, the ITC found that false claims of either actual or pending U.S. patent protection constituted false advertising, but found no section 337 violation because of insufficient proof of injury to the domestic industry. Similarly, in Certain Compound Action Metal Cutting Snips, the ITC found that a false claim that snips had molybdenum blades constituted false advertising, but also held that

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141 In one other case, the ITC Administrative Law Judge noted false advertising about a product's chemical content that was not challenged. See In re Certain Minoxidil Powder, Salts and Compositions For Use in Hair Treatment, Inv No. 337-TA-267, 1988 ITC LEXIS 19 (Feb. 16, 1988).
145 Id.
“there are no confusing similarities between these products and those of complainant which could give rise to injury or tendency to injure complainant, as required by section 337.” In one additional case, the ITC found that the use of a picture of the complainant’s product in the respondent’s advertisement and a false logo for Underwriters Labs constituted false advertising, but held that no proof existed of importation into the U.S. The complainant later sued and obtained an injunction against these and other practices in federal district court under the Lanham Act.

Lastly, the ITC found that false advertising did constitute a violation of section 337 in two cases involving claims that the imported product was equivalent to the domestic product. In both cases, the importers were attempting to compete with dominant firms in the product market. It is not unusual for small competitors to claim equivalency to the market leader under these circumstances (the marketing literature refers to this tactic as an associative claim). These cases also successfully challenged the importers for passing off.

The earlier of these two cases was the first in which the ITC discussed its authority over false advertising. In Certain Airtight Cast Iron Stoves, the complainant challenged stoves imported from Taiwan that copied non-functional features of Jotul brand stoves from Scandinavia as violating a common law trademark on those features. It also challenged these imports for falsely advertising their origin and their equivalency to Scandinavian stoves. The ITC cited both the Lanham and FTC acts as authorities for finding that these false advertising claims constituted unfair competition under section 337.

An interesting issue in this precedent-setting case was the Commission’s interpretation of the terms “domestic industry” and “proof of injury.” Although the complainant’s products were manufactured in Norway, the Commission found there to be a domestic industry in the sale, installation, and servicing of these stoves.

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151. See infra note 155.
154. 3 I.T.R.D. at 1159.
155. Id. at 1160.
156. Id. at 1159-60.
157. Id. at 1161-63.
by U.S. firms and workers.\textsuperscript{158} It also found this domestic industry to be injured by the challenged practices since imports were obtaining significant market penetration.\textsuperscript{159}

The copying of non-functional features in \textit{Cast Iron Stoves} also were challenged as a restraint of trade under the antitrust laws.\textsuperscript{160} Despite finding injury to the domestic industry, the ITC found no evidence of concerted action and no suppression of competition sufficient to constitute a restraint of trade.\textsuperscript{161} Thus, while the ITC's antitrust analysis appears sketchy, its finding of no antitrust liability is consistent with other antitrust cases that have only found liability when the advertising was "massive" or disparaging.\textsuperscript{162}

Two other points about this decision bear mentioning. First, the Commission failed to reconcile its findings that the Taiwanese stoves were both being passed off as Jotul stoves and being falsely advertised as equivalent to them.\textsuperscript{163} The former illegal practice tells consumers they are Jotul stoves; the latter says they are not, but are just as good.\textsuperscript{164} Whether both claims can be communicated to consumers simultaneously is not explained by the decision.

Second, while the decision cites to FTC precedent, it omits any reference to a famous FTC decision that appears analogous. In \textit{In re Heinz B. Kirchner},\textsuperscript{165} the Federal Trade Commission noted its responsibility to protect the gullible and credulous consumer, but stated that it would not hold advertisers liable for every conceivable interpretation of the advertising, such as those that might be made by the "foolish or feebleminded."\textsuperscript{166} The example that the FTC presented of an "outlandish" interpretation was the view that Denmark was the source of all Danish pastries.\textsuperscript{167} Perhaps Scandinavian stoves do not hold the same sort of generic meaning for consumers as do Danish pastries, but the ITC did not discuss this issue.

The second ITC case to find section 337 liability for false advertising is \textit{In re Certain Plastic Food Storage Containers}.\textsuperscript{168} The complain-

\begin{footnotes}
\item[158] Id. at 1162.
\item[159] Id. at 1163.
\item[160] Id. at 1160.
\item[161] Id. at 1161.
\item[162] See supra notes 98-101. In \textit{In re Certain Electrically Resistive Monocomponent Toner}, 10 I.T.R.D. (BNA) 1672 (Mar. 1988), the ALJ found the respondent liable under section 337 for the maintenance of monopoly power through disparagement—referring to its rivals as "pirates." The Commission reversed stating that the ALJ improperly reversed the burden of proof by forcing the respondent to disprove injury rather than requiring the complainant to prove it. The ITC found there was no proof that the disparagement was exclusionary and dismissed the case. Id. at 1676-77.
\item[163] Certain Aurtight Cast Iron Stoves, 3 I.T.R.D. at 1159-60.
\item[164] Id. at 1160.
\item[165] See \textit{In re Heinz B. Kirchner}, 63 F.T.C. 1282 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964).
\item[166] \textit{Heinz B. Kirchner}, 63 F.T.C. at 1290.
\item[167] Id.
\end{footnotes}
ant, who made Tupperware brand storage containers, based its false advertising cause of action solely on the Lanham Act. It alleged, and the Administrative Law Judge found (these findings were adopted by the Commission), that the advertising claims of "interchangeability" with Tupperware were false because even though the products fit together, Tupperware had conducted tests which proved that its products sealed better and were more resistant to impact and warpage.\(^{169}\) The decision follows Lanham Act precedent of not requiring proof of how consumers would interpret the advertising claims because they were found to be literally false.\(^{170}\) The decision adopts a dictionary definition of interchangeability, "mutual substitution without loss of function or suitability," without considering whether in this advertising context consumers would limit the advertising claim to fit rather than also including quality.\(^{171}\)

The remedy ordered by the ITC in both of these cases was the exclusion of products that violated complainants' trademarks. In *Cast Iron Stoves*, the order was a broad exclusion order since the copying of nonfunctional features violated common law trademarks.\(^{172}\) In *Tupperware*, the exclusion order was limited to those products in packaging that used the Tupperware name or trademark.\(^{173}\) In both cases, the ITC issued cease and desist orders against the false advertising as well.

In summary, while occasionally false advertising charges before the ITC involve advertising claims completely distinct from allegations of passing off or false designation or origin (e.g., "can withstand temperatures..." and "molybdenum blades,"), these cases are rare. Still rarer are cases where the ITC has actually ordered the cessation of false advertising. Therefore, the ITC has not yet become an agency for addressing general problems of false advertising for imports.

### IV. Unresolved Section 337 Issues

The ITC cases that analyze advertising issues suggest three areas of concern. First, in areas where FTC law differs from Lanham Act jurisprudence, which should the ITC follow?\(^{174}\) Second, how should the ITC approach section 337's requirement of injury to a domestic industry in an advertising case and should it also consider consumer interests in determining the injury?\(^{175}\) Third, what reme-

\(^{169}\) *Id.* at 2147.

\(^{170}\) *Id.*

\(^{171}\) *Id.*

\(^{172}\) 5 I.T.R.D. at 1164.

\(^{173}\) 6 I.T.R.D. at 2134-35.

\(^{174}\) *See infra* notes 183-94 and accompanying text.

\(^{175}\) *See infra* notes 195-213 and accompanying text.
dies are appropriate in ITC advertising cases?\textsuperscript{176} Each of these issues will be discussed in turn.

\textbf{A. Federal Trade Commission or Lanham Act Precedent}

While \textit{Cast Iron Stoves} approvingly adopts precedent under both the FTC and Lanham Acts,\textsuperscript{177} most ITC advertising cases only discuss precedent under the Lanham Act.\textsuperscript{178} This appears to be the more appropriate standard for the ITC because despite participation by the Commission Investigative Attorney,\textsuperscript{179} it primarily functions like a federal district court hearing a case litigated by private parties.\textsuperscript{180} Furthermore, also like a court, it is required to initiate, investigate, and hear every case that is properly filed before it.\textsuperscript{181} In contrast, the FTC staff acts as complaint counsel in its administrative proceedings. It only initiates cases where it has reason to believe the FTC Act has been violated and that are in the public interest.\textsuperscript{182}

Although the majority of ITC advertising cases appear to adopt Lanham Act precedent, in \textit{Certain Caulking Guns}, the ITC appears closer to adopting FTC precedent.\textsuperscript{183} The ITC stated that it did not need evidence of consumer advertising interpretation; it could decide for itself whether advertising was unfair or deceptive.\textsuperscript{184} This holding implies that the ITC has advertising expertise comparable to the FTC.\textsuperscript{185} Most courts in Lanham Act cases will only interpret express claims, not implied ones, without evidence of consumer interpretation.\textsuperscript{186} The ITC cited its earlier decision in \textit{Cast Iron Stoves} as precedent for its holding even though that decision contains no authority for such a holding beyond the explicit false use of pictures of Jotul stoves in the respondents’ advertising and the false description of the Taiwanese stoves as Scandinavian.\textsuperscript{187} The language in \textit{Caulking Guns} is not as troubling as it first appears when the entire decision is examined. The complainant alleged that respondents’ use of cutaway drawings of caulking guns would confuse consumers since the complainant first used this common advertising technique in the

\textsuperscript{176} See infra notes 214-25 and accompanying text.
\textsuperscript{177} See also \textit{In re Certain Nut Jewelry}, 9 I.T.R.D. 1595, 1598 (Nov. 1986)(citing both FTC and Lanham Act precedent).
\textsuperscript{179} See supra note 111 and accompanying text.
\textsuperscript{180} Vakerics, supra note 8, at 522.
\textsuperscript{184} Id. at 1453.
\textsuperscript{185} See supra note 37 and accompanying text.
\textsuperscript{186} See supra notes 75-78 and accompanying text.
\textsuperscript{187} 6 I.T.R.D. (BNA) at 1453.
caulking gun market. The ITC held that the complainant had not proven consumer confusion and held that false advertising therefore had not been proven. Liability was found only for patent infringement. Thus, while the ITC suggested it had expertise like the FTC to interpret advertising without evidence of consumer interpretation, it declined to find liability in the absence of such evidence.

As this Article makes clear, the ITC has reviewed so few advertising cases that its expertise level is more akin to that of a district court than the FTC.

This analysis also suggests that the ITC should not adopt the FTC doctrine of advertising substantiation. Under this doctrine the FTC requires advertisers to have a "reasonable basis" for their advertising claims. The FTC may stop any advertising that lacks such a basis without proving the claims are false. Rather it should require complainants to prove the falsity of the advertising just as most courts in Lanham Act cases have done when faced with this issue. Most Lanham Act courts have rejected this doctrine because it is contrary to the language of the statute and because the courts are skeptical of their own expertise and of the plaintiff’s private interest in stopping a rival’s advertising where the advertising is not proven false.

B. Proving Injury and Consumer Interest

Two troubling findings of this Article stand in stark contrast to each other and emphasize the ITC’s need to develop a consistent standard for proving industry injury. First, the only two cases where the ITC ordered advertising claims to cease, Cast Iron Stoves and Food Storage Containers, involved associative claims by small marketers offering consumers a lower priced alternative to the market leader. The ITC found industry injury and condemned these ads without extrinsic evidence of whether consumers were likely to be deceived by the ads (i.e., passing off had occurred) or whether consumers understood the ads to make comparability claims.

Second, in several other cases where the ITC found advertising claims to be false, it failed to order their cessation because it rejected industry injury arguments based on lost sales. Thus, it rejected the arguments that it had accepted in Cast Iron Stoves and Food Storage

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188 Id. at 1452.
189 Id.
190 Id.
191 See supra notes 47-50 and accompanying text.
192 See supra note 47 and accompanying text.
193 See supra note 53 and accompanying text.
194 See supra note 70 and accompanying text.
195 See supra notes 150-73.
196 See supra notes 163-64, 170.
197 See supra notes 149-50 and accompanying text.
Containers.\textsuperscript{198}

In \textit{Certain Vertical Milling Machines},\textsuperscript{199} for example, the ITC found a number of instances of false advertising, including the use of trade names that infringed on the complainant’s trademarks, the use of a photograph of complainant’s product in advertising that purported it was respondent’s product, and a false claim of patent protection.\textsuperscript{200} The ITC noted a decrease in complainant’s sales and an increase in sales of imported products, but attributed these market changes to complainant’s price increase and a general decrease in the price of imports.\textsuperscript{201} The vast majority of imported machines were marketed by companies that had not engaged in any unfair acts, and the Commission held that there was “no direct evidence that . . . the unfair acts [had] caused substantial injury to the domestic industry.”\textsuperscript{202} While this holding justifies not issuing a general exclusion order against all such vertical milling machines, it is a narrow interpretation of section 337’s requirement of proof that “the threat or effect of which [unfair act] is . . . to destroy or substantially injure an industry in the United States.”\textsuperscript{203} The holding does not explain the Commission’s reluctance to issue a cease and desist order against particular companies to cover the challenged practices.

In the past, the ITC has interpreted its authority more broadly to cover conceivable lost sales.\textsuperscript{204} Such an interpretation is more consistent with the Lanham Act,\textsuperscript{205} which requires that the plaintiff prove that the defendant’s advertisement “likely” has caused or will cause injury to the plaintiff.\textsuperscript{206} Likely injury is presumed in cases of comparative advertising.\textsuperscript{207} Proof of actual lost sales caused by the advertising is required to obtain an award of damages, but not required for injunctive relief.\textsuperscript{208}

A liberal interpretation of the proof of injury requirement is also consistent with recent congressional concerns. Prior to the passage

\textsuperscript{199} See also \textit{In re Certain Solder Removal Wicks}, 582 F.2d 628 (C.C.P.A. 1978)(false advertising claims of “patent pending” held not injurious).
\textsuperscript{200} Id. at 1276.
\textsuperscript{201} Id.
\textsuperscript{205} See supra note 66 and accompanying text.
\textsuperscript{206} See, e.g., \textit{Johnson & Johnson v. Carter-Wallace, Inc.}, 631 F.2d 186, 190 (2d Cir. 1980).
\textsuperscript{207} See, e.g., \textit{McNeilab, Inc. v. American Home Prods. Corp.}, 848 F.2d 34, 38 (2d Cir. 1988).
\textsuperscript{208} Id.
of the Omnibus Trade and Competitiveness Act of 1988, the House Ways and Means Committee suggested that this requirement might unduly discourage proper complainants from filing section 337 cases before the ITC and estimated that half of the litigation costs of a section 337 case are devoted to proving this element. For this reason, the 1988 Act eliminated the injury requirement for cases involving statutory intellectual property matters. This amendment, however, did not affect cases alleging false advertising.

To become an effective agency against false advertising, the ITC must develop consistent standards for proving injury. Since the Lanham Act does require some proof of likely injury, completely eliminating the requirement of injury is too extreme. The statute could be amended to be consistent with the Lanham Act case law or the ITC could simply decide to follow earlier precedent to be consistent with the Lanham Act. In either event, the ITC should strive to consistently consider the consumer benefits from competition in determining whether the industry is injured by the alleged false advertising.

C. Remedies

The Omnibus Trade and Competitiveness Act of 1988 made important clarifications to the ITC's remedial authority under section 337. First, it imposes deadlines of 90 days (or 150 days in complicated cases) for the granting of temporary relief, comparable to a district court preliminary injunction. These deadlines were added to prevent the ITC from unduly delaying temporary relief, but Congress anticipated that the ITC would still conduct a hearing before granting such relief (unlike a district court temporary restraining order). Second, the Act empowers the ITC to require the complainant to post a bond before ordering temporary relief. This step limits the harassment of respondents through temporary relief. Third, the Act raises the maximum penalty for violating cease and

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212 See supra notes 84-89.
213 For example, the FTC has extolled the virtues of comparative advertising including associative claims. See 16 C.F.R. § 14.15 (1989); Dee Pridgen & Ivan L. Preston, Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission, 14 Ga. L. Rev. 635, 673-79 (1980). The FTC rarely challenges comparative advertising claims, particularly those that explicitly name the competitor. See Ross D. Petty, The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?, 10 J. PUB. POL'Y & MARKETING (forthcoming 1991)(less than 20% of recent FTC cases challenge comparative claims, but over half of Lanham Act lawsuits challenge such claims).
desist orders and settles an internal ITC debate by clarifying that such orders may be imposed in addition to exclusion orders.218

Yet despite these amendments, remedial questions remain. It has not yet been decided, though it seems likely, that the ITC can use its cease and desist authority to order affirmative information disclosures or corrective advertising. Both the FTC and the Lanham Act courts have imposed such orders under similar remedial authority.219 In contrast, there is no authority for the ITC to order consumer refunds or competitor damages.

The ITC also needs to limit the role of exclusion orders in false advertising cases. It likely will not be in the public interest to completely exclude products, otherwise legally imported, merely because they are falsely advertised here.220 This remedy goes far beyond those under the FTC or Lanham Acts.221

A final issue involves false advertising in a domestic context. One could question whether the ITC should intervene at all in a purely domestic false advertising case, where the domestic importer, not a foreign firm, is responsible for false advertising. In cases like Cast Iron Stoves, the ITC had no difficulty exercising jurisdiction over domestic dealers who purchased the stoves from domestic distributors, but in that case the product itself violated a common law trademark.222 In Cardiac Pacemakers & Components Thereof, the ALJ dismissed a case involving imported components with significant other uses beyond the pacemaker that allegedly infringed upon a U.S. patent and held that no nexus existed between importation and the unfair act.223

It is not clear what the ITC would do in a case where the only unfair practice concerning an imported product was its false advertising by domestic dealers.224 In a carefully worded footnote, Vice Chairman Liebeler has recognized this question, but reserved judgement on it.225

V. Conclusion

Competitor challenges to advertisements today in many different forums are commonplace. While the FTC considers advertising

219 See supra notes 55, 56, 61, 91 and accompanying text.
220 Moreover, the exclusion order is often ineffective. See Saxon & Newhouse, supra note 123, at 59.
221 See supra notes 51-63, 82-89 and accompanying text.
222 See supra note 154 and accompanying text.
224 In re Certain Apparatus for Installing Electrical Lines, 7 I.T.R.D. (BNA) 1869, 1876.
225 See id. at 1876 n. 23.
as often benefiting consumers, the ITC, like most Lanham Act courts, fails to account for any such benefit. Given this similarity to the Lanham Act, it is somewhat surprising that section 337's condemnation of "unfair methods of competition and unfair acts" has not yet made the U.S. International Trade Commission anywhere near as popular a forum as district courts under the Lanham Act.226 The ITC has only considered false advertising as an adjunct to other allegations of unfair practices such as trademark infringement, passing off, and false designation of origin.227

There exist two possible explanations for the limited number of ITC advertising actions.228 First, in some cases, the Commission has found no proof of injury to the domestic industry.229 These decisions suggest a requirement that the complainant present a high level of proof to show that the false advertising caused it to lose sales.230 Such a difficult standard is more akin to common law requirements that discouraged such suits rather than the more modern Lanham Act standard for injunction cases.231

Second, when the majority of advertising for imported products is done by the domestic firm that imported them rather than the foreign firm that manufactured them, the ITC has not stated whether it will consider a suit only against the domestic importing firm. While issuing an exclusion order against such products clearly is inappropriate, the ITC's cease and desist authority is roughly comparable to remedies typically imposed by the FTC and Lanham Act district courts. In such cases the ITC offers the litigants the advantage of time limits to ensure that the case proceeds promptly. From the perspective of public policy, the ITC has the advantage of Presidential review and possible veto if foreign policy concerns merit such action.232

Perhaps the simplest explanation for the small number of ITC advertising cases is the lack of experience of advertising lawyers with this forum and the lack of experience of the ITC bar with advertising issues. Like the early years of the Lanham Act, time and gradual experience may correct these deficiencies. Indeed, perhaps with experience the ITC will develop a consistent treatment of industry injury in advertising cases that explicitly examines the consumer benefits from enhanced competition.

226 See supra notes 10-14 and accompanying text.
227 See supra notes 143-44, 150.
228 See supra notes 136-73 and accompanying text.
229 See supra notes 146-48 and accompanying text.
230 See supra notes 197-204.
231 See supra notes 94, 205-08 and accompanying text.
232 See supra note 115 and accompanying text.