



## Circuit Sorts Out 'Truth' From 'Puffery' in Advertising Dispute

BY BETH BAR

THE U.S. COURT of Appeals for the Second Circuit yesterday upheld a decision preliminarily enjoining satellite television provider DIRECTV from airing TV commercials comparing the quality of its high-definition service in markets where Time Warner Cable operates.

Second Circuit Judge Chester J. Straub, writing for the panel in *Time Warner Cable v. DIRECTV*, 07-0468-cv, said Southern District Judge Laura Taylor Swain did not "exceed [her] allowable discretion" when she ordered DIRECTV to pull ads featuring Jessica Simpson and William Shatner.

But Judge Straub, in a decision joined by Judges Amalya L. Kearse and Rosemary S. Pooler, said Judge Swain "clearly erred" in preventing DIRECTV from running some of its Internet ads.

Though the parties have since settled their dispute, the decision nevertheless provides what Judge Straub described as "clarifications" to the Second Circuit's "false advertising doctrine."

Jade L. Ekstedt, DIRECTV's public relations manager, and Alexander Dudley, senior director for corporate communications at Time Warner Cable, confirmed that the parties have reached a settlement. Both, however, declined to elaborate on its terms.

Judge Straub found that an ad can be "literally false even though it does not explicitly make a false assertion, if the words or images, considered in context, necessarily and unambiguously imply a false message."

Second, Judge Straub held that ads with "visual depictions that, while factually inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them" can be aired.

Finally, he said that if a plaintiff demonstrates that a defendant's ad is "literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even though the plaintiff is not identified by name," irreparable harm to the plaintiff may be presumed.

According to Judge Straub, DIRECTV began running the disputed TV commercials in October 2006. Ms. Simpson portrayed Daisy Duke from the movie "The Dukes of Hazzard," and Mr. Shatner was featured as Captain James T. Kirk from "Star Trek."

In her commercial, Ms. Simpson told viewers that they cannot "get the best picture out of some big fancy screen TV without DIRECTV." In his commercial, Mr. Shatner said that "settling for cable would be illogical," and praised the "amazing picture quality of DIRECTV HD."

The original version of both commercials also

concluded with a narrator saying "for picture quality that beats cable, you've got to get DIRECTV." A revised version of both ads instead ended with the line "for HD picture that can't be beat, get DIRECTV."

DIRECTV also placed banner ads on various Web sites to promote the message that, when it comes to picture quality, "source matters." The ads showed a pixilated and distorted image of New York Giants quarterback Eli Manning, and equates the blurriness with the picture quality of cable.

On its own Web site, the satellite company also showed similar blurry and distorted images, and equated those images with cable's picture quality. And they included a statement that said "if you're hooking up your high-definition TV to basic cable, you're not getting the best picture on every channel. For unparalleled clarity, you need DIRECTV HD."

### Injunction Sought

On Dec. 7, 2006, Time Warner filed suit accusing DIRECTV of false advertising in violation of the Lanham Act. The cable company filed a motion for a preliminary injunction against the revised Simpson commercial and the banner and Web site ads on Dec. 18, 2006. And on Jan. 4, 2007 it filed supplemental papers requesting that the revised Shatner commercial also be preliminarily enjoined.

"TWC claimed that each of these advertisements was literally false, obviating the need for extrinsic evidence of consumer confusion," Judge Straub said. "TWC further argued that as DIRECTV's direct competitor, it was entitled to presumption of irreparable injury."

In response, DIRECTV argued that the revised TV commercials were not literally false because no single statement in the commercials explicitly claimed that DIRECTV HD is superior to cable HD in terms of picture quality. As to the Internet ads, the satellite company said the images and messages constituted non-actionable puffery. And they argued that irreparable harm could not be presumed because none of the contested ads identified Time Warner Cable by name.

In granting Time Warner's preliminary injunction request, Judge Swain said in a Feb. 5, 2007, opinion that the cable company had met its burden of showing that each of the challenged ads was likely to be proven literally false. She said that Ms. Simpson and Mr. Shatner's statements could only be understood as making the literally false claim that DIRECTV HD is literally superior to HD in picture quality (NYLJ, Feb. 16).

As for the Internet ads, she found that the

facially false depictions of cable's picture quality could not be discounted as mere puffery because it was possible that consumers unfamiliar with HD technology would rely on the images in deciding whether to hook up their HD TVs to DIRECTV or analog cable.

### Reality and Puffery

In upholding Judge Swain's decision in connection with the revised Simpson commercial, Judge Straub said Ms. Simpson's statement that "you're just not going to get the best picture out of some fancy big screen TV without DIRECTV" was "flatly untrue."

"The uncontroverted factual record establishes that viewers can, in fact, get the same 'best picture' by ordering HD programming from their cable service provider," he said.

Judge Straub also said Judge Swain's findings in connection with the revised Shatner commercial were not "clearly erroneous."

"The District Court found that Shatner's assertion that 'settling for cable would be illogical,' considered in light of the advertisement as a whole, unambiguously made the false claim that cable's HD picture quality is inferior to that of DIRECTV's," Judge Straub said. "We cannot say that this is clearly erroneous, especially given that in the immediately preceding line, Shatner praises the 'amazing picture quality of DIRECTV HD.'"

Judge Straub, however, said Judge Swain should have agreed with DIRECTV that its claims were permissible puffery.

"The Internet Advertisements' depictions of cable are not just inaccurate; they are not even remotely realistic," Judge Straub said. "It is difficult to imagine that any consumer, whatever the level of sophistication, would actually be fooled by the Internet Advertisements."

Time Warner Cable was represented by Saul B. Shapiro, Sarah E. Zgliniec and Catherine A. Williams of Patterson Belknap Webb & Tyler.

DIRECTV was represented by Daniel H. Bromberg, Marc L. Greenwald, Sanford I. Weisburst, Michael E. Williams, Justin C. Griffin, A.J. Bedel and Margaret Caruso of Quinn Emanuel Urquhart Oliver & Hedges.

Attorneys for both parties directed calls for comment to company representatives.

— Beth Bar can be reached at [bbar@alm.com](mailto:bbar@alm.com).

