

COMPETITION FOR STANDING: DEFINING THE
COMMERCIAL PLAINTIFF UNDER SECTION 43(a) OF
THE LANHAM ACT

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INTRODUCTION

Procter & Gamble Co., a manufacturer and distributor of various household products, invested heavily in research and development to create a breakthrough toothbrush for its consumers.¹ Clinical studies show that the toothbrush effectively removes plaque.² Ultreo, Inc., a manufacturer and distributor of “ultrasound toothbrushes,” also produces a toothbrush that it advertises as having plaque-removal capabilities.³ According to Ultreo, its toothbrush uses “magic” ultrasound waveguide technology to create bubbles that remove plaque in the mouth, including the plaque that ordinary bristle action leaves behind.⁴ But through clinical studies of its own, Procter & Gamble discovered that the Ultreo toothbrush actually removed more plaque through bristle action alone than through the use of its ultrasound waveguide technology.⁵ Consequently, on September 27, 2007, Procter & Gamble filed a lawsuit against Ultreo, claiming that the advertised benefits of Ultreo’s ultrasound technology were false and misleading.⁶

The situation between Procter & Gamble and Ultreo is not uncommon. In today’s ever improving, technologically-advanced consumer product market, companies are able to both flood the market with cheaper, more innovative goods and offer evidence as to why their products will better meet consumer needs. When such claims turn out to be false, the consumer is not the only wronged party. Competitors often claim harms caused by another company’s false advertisement and turn to the law for redress.

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¹ Press Release, Procter & Gamble Co., P&G Files Lawsuit Against Toothbrush Maker Ultreo, Inc. (Sept. 27, 2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=104574&p=irol-news-Article&ID=1056605&highlight=>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Section 43(a) of the Lanham Act, 15 U.S.C.A. § 1125, allows a plaintiff to bring a false advertising claim against a defendant who has undertaken deceptive activity.⁷ To bring the claim successfully, the plaintiff must prove that she is within the class of persons that Congress intended for the statute to protect.⁸ Most circuit courts addressing the issue agree that Congress designed the Lanham Act to protect competitors rather than consumers.⁹ Beyond this, however, the courts diverge as to the requirements that a plaintiff must satisfy in order to have prudential standing to bring a false advertising claim.

A circuit split currently exists on the issue of prudential standing. The courts have adopted three different approaches for determining whether or not a commercial party may bring an action under Section 43(a): (1) the categorical approach; (2) the reasonable interest approach; and (3) the balancing test approach. This Comment argues that the balancing test approach properly limits the category of “competitors” who may bring a false advertising claim under the Lanham Act: competitors with interests that clearly fall within the purview of the Act’s purpose. By contrast, the reasonable interest approach fails to limit standing to only these competitors, and the categorical approach excludes some of these competitors by unnecessarily drawing a bright-line rule. Part I of this Comment discusses the background of the Lanham Act and the standing requirement. Part II then explains the three approaches to prudential standing. Finally, Part III analyzes each of the three approaches, considering the Lanham Act’s statutory language and legislative history as well as the policy considerations that affect standing. This Comment concludes that the balancing test is the appropriate standard for standing in light of this analysis.

I. BACKGROUND

A. *Section 43(a) of the Lanham Act*

Congress enacted the Lanham Act (“the Act”) in 1946 pursuant to its power under the Commerce Clause¹⁰ to unify and modernize the law of trademarks, which it considered to be part of the broader law of unfair competition.¹¹ Policymakers designed the law of trademarks both to protect the trademark owner by preventing the misappropriation of his or her product and to strengthen public purchasing confidence by protecting consumers

⁷ 15 U.S.C. § 1125 (2000).

⁸ See 5 THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:39 (4th ed. 1996).

⁹ *Id.*

¹⁰ U.S. CONST. art. I, § 8.

¹¹ S. REP. NO. 79-1333, at 4 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274.

from such deceptive practices.¹² Thus, with the passage of the Act, Congress intended to secure to the trademark owner “the good will of his business and to protect[] the public against spurious and falsely marked goods.”¹³ Viewed as the “essence of competition,” trademarks enabled purchasers to distinguish and choose among competing products.¹⁴ Consequently, protecting and encouraging the use of trademarks through the Act “foster[ed] fair competition.”¹⁵ Trademark infringement, however, is just one of many forms of unfair competition that may harm a business or consumer.¹⁶

The law of unfair competition is a broad “commercial tort that has . . . roots in the common law of deceit.”¹⁷ Although definitions of unfair competition are unclear and often circular,¹⁸ courts sometimes define unfair competition as conduct dealing with fair play and the principles of honesty and fair dealing.¹⁹ Thus, “misrepresentations about the nature, source, or quality of either the plaintiff’s or defendant’s goods or services may be viewed as ‘unfair competition’”²⁰ insofar as they mislead the consumer into choosing one party’s product over the other. By the time Congress amended the Lanham Act in 1988, case law had expanded the cause of action to cover new types of unfair competition not envisioned at the time of its first enactment, including false advertising.²¹ In Section 43(a) of the revised Act, Congress codified courts’ interpretations and expressly included a right to bring suit for false advertising.²² The section currently states:

(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLAL REV. 671, 673 (1984).

¹⁷ David R. McKinney, *Telephone Mnemonics and Complementary Numbers: A Review of Trademark and Unfair Competition Law and Policy*, 1999 BYU L. REV. 435, 456.

¹⁸ *Id.* at 456 (“[I]t is competitive conduct that seems unfair.”).

¹⁹ *Id.*

²⁰ Bauer, *supra* note 16, at 673.

²¹ Bruce P. Keller, “*It Keeps Going and Going*”: *The Expansion of False Advertising Litigation Under the Lanham Act*, LAW & CONTEMP. PROBS., Winter 1996, at 131, 132-33.

²² Trademark Law Revision Act of 1988, 102 Stat. 3935, 3946 (1988) (current version at 15 U.S.C. § 1125(a) (2000)); S. REP. NO. 100-515, at 40 (1988), *as reprinted in* 1998 U.S.C.C.A.N. 5577.

person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.²³

The plain meaning of the words “any person” in the last sentence of the section seemingly confers a statutory right to anyone who suffers harms caused by false advertising. But Section 45 of the Act unequivocally states that the purpose of the Act is to “protect persons engaged in such commerce against unfair competition.”²⁴ As a result, most courts have excluded consumer actions under Section 43(a) and have only allowed commercial parties to bring false advertising claims.²⁵ Proponents of this reading argue that most states have enacted their own consumer protection laws providing remedies for false advertising and thus courts “should be careful in extending federal laws in a manner that may infringe on the states’ interests without clear congressional intent to do so.”²⁶ Because Section 45 explicitly states that the Act intends to cover competitors,²⁷ the issue left for the courts to decide is who may bring a false advertising claim under the Act as a commercial plaintiff. The ramifications of this decision are significant, as they ultimately affect how businesses will choose to advertise in the market, the extent of consumer protection from false advertising, and the amount and complexity of litigation on false advertising claims.²⁸

B. *Standing*

Standing is the right of a party to bring a particular legal claim before the court and have the court decide the substantive merits of that claim.²⁹ Even though a legal claim may be valid, a court may refuse to hear the mer-

²³ 15 U.S.C. § 1125 (a)(1).

²⁴ 15 U.S.C. § 1127 (2000); James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1104 (1995).

²⁵ *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 691-92 (2d Cir. 1971) (holding that students lacked standing to bring a Section 43(a) claim against a ski tour service because as consumers they were not as covered under the Act); 5 MCCARTHY, *supra* note 8; Elizabeth Williams, Annotation, *Standing to Bring False Advertising Claim or Unfair Competition Claim Under § 43(a)(1) of Lanham Act (15 U.S.C.A. § 1125(a)(1))*, 124 A.L.R. FED. 189 (1995). *But see* *Thorn v. Reliance Van Co.*, 736 F.2d 929, 933 (3d Cir. 1984) (finding that the stockholder of a corporation had standing to sue a competing corporation and its officers and shareholders for false advertising).

²⁶ Wrona, *supra* note 24, at 1149, 1152. *But see* Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 249-50 (1994) (arguing that consumers should have standing to sue under Section 43(a)).

²⁷ 15 U.S.C. § 1127.

²⁸ *See infra* Part III.B.

²⁹ *Warth v. Seldin*, 422 U.S. 490, 498 (1975); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984).

its of the claim when the party advancing it is not in the proper position to obtain judicial relief.³⁰ The two sources of the federal standing requirement are the U.S. Constitution and prudential principals developed by federal courts.³¹ A commercial plaintiff must meet both constitutional and prudential standing requirements to bring a false advertising claim under the Act.³²

Constitutional standing derives from the Article III case or controversy requirement.³³ In every federal case, this determines “the power of the court to entertain the suit” and is thus the minimum threshold.³⁴ To establish constitutional standing, a plaintiff must show: (1) injury in fact (2) that is “fairly traceable to the defendant’s allegedly unlawful conduct and (3) likely to be redressed by the requested relief.”³⁵ Essentially, this requires the plaintiff to have suffered a threatened or actual injury resulting from the action of the defendant.³⁶ In addition to the Article III requirement, federal courts may impose prudential limits on a plaintiff’s ability to bring a claim.³⁷

Prudential standing considerations are judge-made rules that limit the role of federal courts in resolving a dispute.³⁸ Because they are not constitutionally imposed restraints on a court’s power to adjudicate a claim, Congress can abrogate or modify prudential standing rules.³⁹ Unless a statute expressly states otherwise, courts presume that Congress intended to incorporate prudential standing principles when enacting legislation.⁴⁰

The issue of prudential standing is whether the “statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”⁴¹ Generally, this requires that (1) a litigant assert his or her own legal interests rather than those of third parties; (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances; and (3) a litigant demonstrate that his or her asserted interest is arguably within the zone of interests that were *intended to be protected* by the statute on which the claim is based.⁴² Determining the appropriate test for prudential standing under the Act with regard to the third factor is the issue in dispute among the circuits.

³⁰ 13 WRIGHT ET AL., *supra* note 29.

³¹ *Id.*

³² *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225, 227 (3d Cir. 1998).

³³ *Id.* at 225.

³⁴ *Seldin*, 422 U.S. at 498.

³⁵ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

³⁶ *Seldin*, 422 U.S. at 499.

³⁷ *See Allen*, 468 U.S. at 751.

³⁸ *Id.*

³⁹ *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 227 (3d Cir. 1998); 35A C.J.S. *Federal Civil Procedure* § 63 (2003).

⁴⁰ *Conte Bros.*, 165 F.3d at 227.

⁴¹ *Seldin*, 422 U.S. at 500.

⁴² *Allen*, 468 U.S. at 751.

II. THREE APPROACHES TO THE PRUDENTIAL STANDING REQUIREMENT

As previously stated, there are three approaches that the federal courts have developed to address the issue of prudential standing: (1) the categorical approach; (2) the reasonable interest approach; and (3) the balancing test approach.⁴³

A. *The Categorical Approach*

The Seventh, Ninth, and Tenth Circuits have adopted a categorical approach to prudential standing, which holds that a plaintiff must be in direct competition with the defendant in order to assert a competitive injury for a false advertising claim under the Act.⁴⁴

In *Halicki v. United Artists Communications, Inc.*,⁴⁵ a film producer brought a false advertising claim against several movie theaters that misrepresented the rating on his film to moviegoers.⁴⁶ The Motion Picture Association of America had given the producer's adventure film a "PG" rating, which indicated to viewers that the film was "not unsuitable for children."⁴⁷ Accordingly, the theaters agreed that all advertising of the film would reflect the "PG" rating, but each theater advertised the movie as rated "R."⁴⁸ The "R" rating indicated that the movie was unsuitable for children and young adults, and that no person under the age of 18 should be admitted to watch it.⁴⁹ Alleging injury in the form of disastrous box office sales, the producer filed a false advertising claim against the movie theaters under Section 43(a) of the Act.⁵⁰ The court of appeals held that to prove standing it was not enough for the producer to show that the defendants made a false representation about his film and that he suffered injury by it.⁵¹ Rather, the theaters' conduct "must in some discernible way be competitive."⁵² The court found that because the producer was not a direct competitor of the

⁴³ To date, the Fourth, Sixth, and Eighth Circuits have yet to decide the issue of prudential standing under Section 43(a) with respect to commercial plaintiffs.

⁴⁴ *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993); *Halicki v. United Artists Commc'ns, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987).

⁴⁵ 812 F.2d 1213 (9th Cir. 1987).

⁴⁶ *Id.* at 1213.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Halicki*, 812 F.2d at 1214.

⁵² *Id.*

movie theaters, he did not assert a competitive injury and thus did not have standing to bring the false advertising claim.⁵³

By the same reasoning, the Seventh Circuit denied standing to a commercial party who asserted a false advertising claim against another commercial party because the two conducted different lines of business. In *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*,⁵⁴ a manufacturer of chocolate products hired a computer company to build and install a new communications system for its business.⁵⁵ The system ran smoothly at first, and the computer company ran various media advertisements that highlighted the benefits of the system that it was providing to the manufacturer.⁵⁶ The project began experiencing difficulties, however, and the company failed to respond to the manufacturer's demands for improvement.⁵⁷ The manufacturer filed suit shortly thereafter, alleging among other things that the company's advertisements misrepresented the communications system and portrayed the manufacturer in a false light, thereby violating Section 43(a) of the Act.⁵⁸ Citing a Ninth Circuit case, the Seventh Circuit held that the plaintiff must assert a discernible competitive injury to gain standing.⁵⁹ The court found that the manufacturer was not the defendant's competitor because it was not in the computer business. Thus, the manufacturer did not have standing to bring the false advertising claim.⁶⁰

Any injury arising out of the false advertising claim asserted in *AT&T* would have been tenuous, and any damages would have been speculative. As the district court intimated, "candy consumers do not buy their candy based upon the computer system endorsed by the manufacturer."⁶¹ It is likely that the chocolate manufacturer would have found it difficult to prove that consumers (1) purchased a computer system from the defendant based on the computer system advertisement, (2) became dissatisfied with the defendant upon learning that its computer system did not meet expectations, and then (3) chose not to purchase the manufacturer's chocolate products all because of its appearance in the defendant's advertisement. In this situation, where there is a clear lack of direct competition, denying standing to the plaintiff is a practically sound decision because of the difficulty of proving harm to the plaintiff's commercial interest.

The use of the "direct competition" standard in *Halicki*, however, produced a more troubling result. Although *Halicki* also involved a dispute between parties engaged in different lines of business, it differed from

⁵³ *Id.* at 1213.

⁵⁴ 9 F.3d 561 (7th Cir. 1993).

⁵⁵ *Id.* at 564-65.

⁵⁶ *Id.* at 565.

⁵⁷ *Id.*

⁵⁸ *Id.* at 566, 575.

⁵⁹ *L.S. Heath*, 9 F.3d at 575.

⁶⁰ *Id.*

⁶¹ *Id.*

AT&T in an important respect—the defendants’ false advertisements in *Halicki* were likely to have had a direct impact on the plaintiff’s ability to profit from his product. In fact, the Ninth Circuit admitted that the plaintiff “made out a plausible case” and had been “injured by a misdescription of [his] movie.”⁶² Although the court did not discuss the injury in detail, one can logically conclude that the false “R” rating placed on the plaintiff’s movie effectively deterred certain moviegoers from seeing the movie, resulting in a loss of profits to the plaintiff.⁶³ Thus, the alleged injury in *Halicki* was clear and easily discerned. This case illustrates that a party may not be a direct competitor of another party but may nevertheless suffer a direct commercial injury as a result of the latter’s false advertising. The categorical approach leaves such an injured party with no claim for redress under the Act.

In contrast to the categorical approach, the reasonable interest approach does not preclude standing for a plaintiff who fails to assert a direct competitive injury arising out of another’s false advertisement.

B. *The Reasonable Interest Approach*

In a flexible approach to standing, the First and Second Circuits focus on whether the plaintiff has a “reasonable interest” in being protected against false advertising, rather than on the degree of competition between the plaintiff and the defendant.⁶⁴ This requires the plaintiff to show a link or “nexus” between itself and the alleged falsehood in the advertisement of the defendant.⁶⁵

*Ortho Pharmaceutical Corp. v. Cosprophar, Inc.*⁶⁶ involved a plaintiff who manufactured a prescription acne treatment containing tretinoin, a transretinoic acid.⁶⁷ Following an article in the Journal of the American Medical Association recommending tretinoin for the treatment of photoaged skin, prescriptions for the plaintiff’s drug increased dramatically.⁶⁸ Later that same year, the defendant began to distribute a line of cosmetics advertised as having an “anti-aging effect” and containing a chemical that belonged to the same family as transretinoic acid.⁶⁹ The plaintiff subsequently brought suit under Section 43(a), claiming that consumers who purchased the defendant’s product based on its advertisements would feel

⁶² *Halicki v. United Artists Commc’ns, Inc.*, 812 F.2d. 1213, 1214 (9th Cir. 1987).

⁶³ *See id.* at 1213.

⁶⁴ *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986).

⁶⁵ *Camel Hair*, 799 F.2d at 11-12.

⁶⁶ 32 F.3d 690 (2d Cir. 1994).

⁶⁷ *Id.* at 692.

⁶⁸ *Id.*

⁶⁹ *Id.* at 693.

no need to purchase the plaintiff's product because it purportedly contained the same type of active chemical.⁷⁰ Similarly, the plaintiff worried that consumers who became dissatisfied with the defendant's product would decide not to purchase the plaintiff's product for fear that it would perform just as poorly as the defendant's.⁷¹ The court of appeals held that in order to establish standing, the plaintiff must demonstrate a "reasonable interest to be protected against the advertiser's false or misleading claims" and a reasonable basis for believing that the interest is likely to be damaged by the claims.⁷² But the plaintiff "need not demonstrate that it is in direct competition with the defendant."⁷³ Because the plaintiff's product was a prescription drug and the defendant's product was a cosmetic, the plaintiff had to show that consumers viewed the parties' products as comparable substitutes.⁷⁴ The court found that the plaintiff failed to provide any evidence of consumer surveys, witnesses, or other proof that the two products were comparable substitutes.⁷⁵ Therefore, the plaintiff did not have standing under the Lanham Act.⁷⁶

Conversely, in *Camel Hair & Cashmere Institute, Inc. v. Associated Dry Goods Corp.*,⁷⁷ the plaintiff was a nonprofit corporation whose purpose was to safeguard the interests of the cashmere and camel hair industry, and all of its members manufactured or marketed camel hair and cashmere or products.⁷⁸ After purchasing coats from the defendants' department stores, the plaintiff discovered that the coats consisted of significantly less cashmere than their labels represented.⁷⁹ The plaintiff then filed action under Section 43(a) of the Act, claiming that the defendants' sale of mislabeled coats would cause injury to the plaintiff by harming its reputation and its members.⁸⁰ In order to establish standing, the court held that a plaintiff must have a reasonable interest to be protected against the false advertising alleged, which requires showing a sufficient nexus between itself and the alleged falsehood.⁸¹ The court found that while none of the members of the nonprofit corporation competed with the department stores in selling coats, the members had a strong interest in preserving the reputation of cashmere, as they were in the business of manufacturing cashmere clothing and fab-

⁷⁰ *Id.*

⁷¹ *Id.* at 694-95.

⁷² *Ortho Pharm.*, 32 F.3d at 694.

⁷³ *Id.* at 694.

⁷⁴ *Id.* at 692.

⁷⁵ *Id.* at 695.

⁷⁶ *Id.* at 695.

⁷⁷ 799 F.2d 6 (1st Cir. 1986).

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 10.

⁸¹ *Id.* at 11-12.

ric.⁸² Thus, the members had a sufficient nexus to the alleged wrong and had standing to bring the false advertising claim.⁸³

In both *Ortho Pharmaceutical Corp.* and *Camel Hair*, the courts looked at the particular circumstances surrounding the plaintiff's false advertising claim to determine whether Section 43(a) conferred standing to the plaintiff. This allowed the courts to examine the likelihood that the defendant's misrepresentation would cause de facto harm to the plaintiff, regardless of whether the plaintiff was a formal "competitor" of the defendant. However, in neither case did the courts articulate a clear standard as to what constitutes a "reasonable interest," or what establishes a sufficient "nexus" between the plaintiff and the alleged misrepresentation. In *Ortho Pharmaceutical Corp.*, the plaintiff had a clear interest in protecting the reputation of its anti-aging product. The court denied standing, however, because the plaintiff did not provide market research to indicate that the defendant's representation of its anti-aging product would affect consumer preference for the plaintiff's product.⁸⁴ By contrast, in *Camel Hair*, the court granted standing based on the plaintiffs' interest in protecting the general reputation of cashmere as a fabric, even though the plaintiffs did not produce market research to show that the defendants' representation of its cashmere products would affect the overall representation of cashmere among consumers.⁸⁵ As these cases together illustrate, the lack of a clear standard leads to unpredictable outcomes.

Like the reasonable interest approach, the balancing test does not preclude standing based on a lack of direct competition alone. But the balancing test goes further by establishing specific factors for determining whether or not the plaintiff has a statutory right to seek relief under the Act.

C. *The Five-Factor Balancing Test*

The Third, Fifth, and Eleventh Circuits have established a middle-ground approach to standing by adopting a five-factor balancing test that considers: (1) the type of injury alleged; (2) the directness of the alleged injury; (3) the proximity of the plaintiff to the alleged injurious conduct; (4) the degree of speculation in the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages.⁸⁶

⁸² *Id.* at 12.

⁸³ *Camel Hair*, 799 F.2d at 12.

⁸⁴ *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 695 (2d Cir. 1994).

⁸⁵ *Camel Hair*, 799 F.2d at 12.

⁸⁶ *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1163-64 (11th Cir. 2007); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562-63 (5th Cir. 2001); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234 (3d Cir. 1998).

First, under “the type of injury alleged” factor, a court must determine whether a plaintiff has a commercial interest that suffered harm.⁸⁷ If the alleged false advertising hinders the plaintiff’s ability to compete or erodes the plaintiff’s goodwill or reputation, then the plaintiff has an injury within the type of harm that the Act seeks to redress.⁸⁸ This often occurs when the defendant’s false or misleading representations about its product or services causes the plaintiff to lose sales and/or market share.⁸⁹ Second, the court turns to “the directness or indirectness of the asserted injury,” focusing on whether the defendant’s conduct had a direct impact on the plaintiff’s commercial interest.⁹⁰ Third, under “the proximity of the plaintiff to the allegedly harmful conduct” factor, a court must decide whether another commercial entity can bring a more appropriate action under Section 43(a) to address the harms caused by the defendant’s false advertising.⁹¹ Fourth, the court considers “the speculation involved in the damages claim” and determines whether the nature of the alleged damage is merely conjectural.⁹² Finally, looking to “the risk of duplicative damages or complexity in apportioning damages,” a court decides whether there is a risk that multiple parties will bring actions against the defendant for the same conduct or whether apportioning damages will be administratively difficult.⁹³ None of these factors, in and of themselves, is determinative. Instead, the courts consider each of these questions to decide whether the balance of interests weighs in favor of conferring standing on a particular plaintiff to bring suit for false advertising.

In *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.*,⁹⁴ retailers of engine additives brought a false advertising claim against several manufacturers of engine additives.⁹⁵ The retailers claimed that the false advertisements increased sales of the manufacturers’ product, thereby decreasing sales of competitor products that were sold in the retailers’ stores.⁹⁶ The court of appeals stated that Section 43(a) of the Act confers standing even when parties are not in direct competition with each other so long as they “are doing business on different economic levels,” as with a retailer and a manufacturer of a certain type of product.⁹⁷ Perhaps most importantly, the court affirmed the five-factor balancing test as the appropriate

⁸⁷ *Phoenix of Broward*, 489 F.3d at 1167-68.

⁸⁸ *Id.* at 1168.

⁸⁹ *Id.* at 1169.

⁹⁰ *Id.*

⁹¹ *Id.* at 1170.

⁹² *Id.* at 1171.

⁹³ *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233, 235 (3d Cir. 1998).

⁹⁴ 165 F.3d 221 (3d Cir. 1998).

⁹⁵ *Id.* at 223-24.

⁹⁶ *Id.* at 224.

⁹⁷ *Id.* at 231.

standard for standing.⁹⁸ Applying this test to the facts, it found that (1) a loss of retail sales due to the defendants' alleged false advertising did not impair the plaintiffs' ability to compete; (2) no evidence indicated that the plaintiffs' goodwill or reputation suffered harm caused directly or indirectly by the defendants' conduct; (3) manufacturers of competing products were the most appropriate party to bring suit because the alleged falsehoods would directly harm them; (4) the plaintiffs only had a theoretical economic interest in preserving the reputation of the defendants' competitors; and (5) the defendant would be subject to multiple liability if every potentially injured party in the distribution chain had the right to bring an action and administratively complex damages proceedings would result.⁹⁹ On balance, the court held that the plaintiffs lacked standing to bring a false advertising claim in this case.¹⁰⁰

Whereas the Third Circuit used the balancing test to deny standing to an *indirect* competitor in *Conte Brothers*, the Fifth Circuit considered those same factors to deny standing to a *direct* competitor in *Procter & Gamble Co. v. Amway Corp.*¹⁰¹ This Fifth Circuit case involved two companies that manufactured and distributed competing household products.¹⁰² The defendant allegedly spread rumors amongst its distributors that connected the plaintiff with Satanism.¹⁰³ Claiming violation of Section 43(a) of the Lanham Act, the plaintiff asserted that the defendant's false representations fraudulently induced employees to work for the defendant and caused the plaintiff to lose customers.¹⁰⁴ Under the five-factor balancing test, the court of appeals found that (1) false representations made to convince potential employees to work for and buy from the defendant are not within the type of injury that falls under the Lanham Act; (2) the alleged harm was too attenuated from the defendant's conduct where there was no indication that workers would otherwise have worked for the plaintiff or would have bought its products; (3) the distributors were more immediate to the injury than the plaintiff and could have brought suit for fraud; (4) damages based on the plaintiff's market share were highly speculative; and (5) allowing standing for the plaintiff would give all of the defendant's competitors, as well as non-competitors, the right to sue the defendant.¹⁰⁵ Considering these factors, the court denied the plaintiff standing to bring suit for false advertising.¹⁰⁶

⁹⁸ *Id.* at 236.

⁹⁹ *Id.* at 234-35.

¹⁰⁰ *Conte Bros.*, 165 F.3d at 236.

¹⁰¹ 242 F.3d 539, 561 (5th Cir. 2001).

¹⁰² *Id.* at 542.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 544.

¹⁰⁵ *Id.* at 563-64.

¹⁰⁶ *Id.* at 564.

The Eleventh Circuit similarly denied standing to a direct competitor in *Phoenix of Broward, Inc. v. McDonald's Corp.*¹⁰⁷ In that case, the defendant corporation, which owned and operated fast food restaurant franchises, gave customers the opportunity to participate in promotional games to win various prizes.¹⁰⁸ In its advertisements, the defendant represented specific odds of winning certain prizes and stated that customers had a fair and equal opportunity to win them.¹⁰⁹ During the defendant's sixth year of conducting the promotional games, the FBI announced that the games were part of a fraud scheme that denied customers a fair and equal chance of winning the prizes.¹¹⁰ The plaintiff, a licensed fast-food franchisee, filed suit under Section 43(a) of the Lanham Act, alleging that the defendant lured customers away from the plaintiff through false advertisement of the promotional games.¹¹¹ The court of appeals adopted the five-factor balancing test to determine whether the plaintiff had prudential standing.¹¹² It found that (1) the plaintiff alleged the type of injury that the Lanham Act was intended to redress; (2) the causal chain linking the defendant's misrepresentations about an aspect of its promotional games to a decrease in the plaintiff's sales was highly tenuous; (3) fast food franchisees such as the plaintiff constituted a class of identifiable persons that were sufficiently proximate to the claimed injury; (4) calculating damages would require much speculation regarding the percentage loss of the plaintiff's sales which were attributable to the misrepresentations; and (5) allowing the plaintiff to bring its claim would give every fast food competitor of the defendant standing to bring such a claim, which would impact the federal courts substantially by subjecting them to tremendous amounts of litigation.¹¹³ Although the first and third factors weighed in favor of the plaintiff, the remaining three factors weighed against the plaintiff. Thus, the court held that the totality of the factors weighed against prudential standing.¹¹⁴

In contrast to *Conte Brothers* and *Procter & Gamble*, the Fifth Circuit conferred standing to an indirect competitor in *Logan v. Burgers Ozark Country Cured Hams, Inc.*¹¹⁵ The plaintiff in *Logan* held patents on a method of spirally slicing boneless meat products and sold some meats that were cut by this method.¹¹⁶ The defendant company violated the plaintiff's patents and used pictures of meat products that were cut using the patented method in its advertising, even after it stopped selling such meat prod-

¹⁰⁷ 489 F.3d 1156, 1173 (11th Cir. 2007).

¹⁰⁸ *Id.* at 1159.

¹⁰⁹ *Id.* at 1159-60.

¹¹⁰ *Id.* at 1160.

¹¹¹ *Id.*

¹¹² *Id.* at 1163.

¹¹³ *Phoenix of Broward*, 489 F.3d at 1168-72.

¹¹⁴ *Id.* at 1173.

¹¹⁵ 263 F.3d 447, 461 (5th Cir. 2001).

¹¹⁶ *Id.* at 449.

ucts.¹¹⁷ In deciding whether the plaintiff had standing to bring a false advertising claim against the defendant, the court applied the five-factor balancing test. It found that (1) the defendant's literally false advertising clearly fell under Section 43(a); (2) the false advertisement may have directly affected the plaintiff's ability to license his patent; (3) the plaintiff was the only one who would bring the claim because he held patents to the slicing method; (4) the court could use evidence presented by the plaintiff on profits that the defendant received as a result of the false advertising to calculate damages; and (5) there was no risk of duplicative or complex damages.¹¹⁸ Therefore, in this case, the balancing test clearly weighed in favor of standing.¹¹⁹

As shown by these cases, the balancing test approach focuses primarily on the type of injury that the defendant's false advertising is likely to cause to the plaintiff and the directness of that injury. While the categorical approach requires a "competitive injury" between direct competitors,¹²⁰ the balancing test requires plaintiffs to assert a commercial interest that has been harmed and defines such harm as either a hindrance on the plaintiff's ability to compete or erosion of the plaintiff's goodwill or reputation.¹²¹ As a result, indirect competitors can acquire standing if they can show the requisite harm or likelihood of such harm, as illustrated in *Logan*.¹²² Conversely, even a direct competitor may not have standing to bring a Section 43(a) claim under the balancing test if the defendant's alleged false advertising did not interfere with the competitor's ability to compete or cause damage to the competitor's goodwill or reputation, as in the case of *Procter & Gamble*.¹²³ The reasonable interest approach similarly excludes the direct competition requirement, but it is more inclusive than the balancing test because it does not specifically define the type of commercial interest that a plaintiff must allege to establish standing.¹²⁴

Unlike the reasonable interest and categorical approaches, the balancing test also requires courts to examine the proximity of the plaintiff to the alleged injury, whether another commercial party is better situated to bring the false advertising claim against the defendant, and whether the damages alleged are highly speculative and complex. As illustrated in *Phoenix of Broward*, these factors may prevent a plaintiff from acquiring standing even when the plaintiff has sufficiently alleged a Section 43(a) injury.¹²⁵

¹¹⁷ *Id.* at 450.

¹¹⁸ *Id.* at 461.

¹¹⁹ *Id.*

¹²⁰ *See supra* Part II.A.

¹²¹ *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1167 (11th Cir. 2007).

¹²² *Logan*, 263 F.3d at 461.

¹²³ *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 563-64 (5th Cir. 2001).

¹²⁴ *See supra* Part II.B.

¹²⁵ *Phoenix of Broward*, 489 F.3d at 1173.

In order to determine which approach to Section 43(a) standing is the most appropriate standard for courts to employ, we must consider the three approaches in light of the Act's statutory and legislative history and being mindful of some important policy considerations.

III. ANALYZING THE THREE APPROACHES TO PRUDENTIAL STANDING

The statutory language and legislative history of Section 43(a) provide minimal guidance to courts regarding the standard to determine whether a plaintiff may bring a false advertising claim. There is no doubt, however, that the policy implications associated with the adoption of a given standard are significant. Given the lack of statutory guidance and the significant policy implications associated with selecting a standard for prudential standing, the Supreme Court must address the current circuit split on this issue. This section discusses first the statutory language and legislative history of Section 43(a) and then turns to the policy issues involved in the regulation of false advertising.

A. *Statutory Language and Legislative History*

Confusion as to who may bring suit under Section 43(a) of the Lanham Act undoubtedly stems in large part from the imprecise language of the Act as a whole. Section 43(a) broadly states that "any person who believes that he or she is or is likely to be damaged" by conduct proscribed in the Act can commence suit.¹²⁶ While this appears to give limitless standing to anyone subjected to harm by another's false advertisements, Section 45 of the Act provides that the focus of the statute is anticompetitive conduct among the commercial class:¹²⁷ "The intent of this Act is to regulate commerce within the control of Congress . . . to protect persons engaged in such commerce against unfair competition . . ."¹²⁸

Most courts have used Section 45 to exclude consumers from bringing false advertising claims under the Act.¹²⁹ When interpreting a statute, courts "have some scope for adopting a restricted rather than literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, or would thwart the obvious purpose of the statute."¹³⁰ Thus, courts have determined that Section 45 evidences a congressional intent to allow

¹²⁶ 15 U.S.C. § 1125(a)(1)(B) (2000).

¹²⁷ *Conte Bros. Auto., Inc., v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 229 (3d Cir. 1998).

¹²⁸ 15 U.S.C. § 1127 (2000) (emphasis added).

¹²⁹ See 5 MCCARTHY, *supra* note 8.

¹³⁰ *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941) (internal citations omitted).

standing only for commercial plaintiffs who possess interests that fall within the Act's protection, rather than "any person" in the literal sense.¹³¹

But determining what constitutes harm that stems from "unfair competition" under the Act is a point where courts diverge in their interpretation of the statutory language. Courts following the categorical approach conclude that a "competitive harm" must be alleged, which in turn requires direct competition between the parties involved.¹³² By contrast, courts that utilize the balancing test or reasonable interest approach do not insist that direct competition is a necessary requirement to bring a Section 43(a) claim. The balancing test concludes that false advertising, which interferes with the plaintiff's ability to compete in its commercial activity or causes damage to the plaintiff's goodwill or reputation, is the type of harm that results from unfair competition.¹³³ The reasonable interest approach, on the other hand, does not consider the specific element of "competition" between the litigating parties despite the statute's language concerning its purpose of protecting commercial plaintiffs from unfair competition.¹³⁴ Instead, the plaintiff must only show that it possesses an interest in protection against the defendant's conduct and establish a connection between itself and the misrepresentation.¹³⁵

Because no language in the statute expressly limits claims under the Act to those between direct competitors, but the statute does evidence clear congressional intent to protect commercial actors from the harms resulting from unfair competition, the balancing test approach to standing most closely fulfills the purpose of the statute as written. The test does not preclude standing based on a single determination of the parties' formal relationship. It does, however, limit actions to those that arise from the anti-competitive conduct of the defendant and directly affect a plaintiff's ability to compete against other commercial actors.

By contrast, the categorical approach excludes false advertising claims that arise between commercial parties who are competing on different levels of business. For example, patent holders and merchants in a particular industry would fail the categorical test, even though cases have shown that such parties can use false advertising to directly harm the other's ability to fairly compete for sales or profits.¹³⁶ The Act's language makes no distinction between commercial parties that would support this limitation on standing. In stark contrast to the categorical approach, the reasonable interest approach does not restrict standing to situations where the defendant's conduct interferes with either the plaintiff's ability to compete with the de-

¹³¹ *Conte Bros.*, 165 F.3d at 229.

¹³² *See supra* Part II.A.

¹³³ *See supra* Part II.C.

¹³⁴ *See supra* Part II.B.

¹³⁵ *Id.*

¹³⁶ *See supra* text accompanying notes 115-21.

defendant or the plaintiff's ability to compete with other commercial actors. At a minimum, however, the Act's desire to protect parties engaged in commercial activity from unfair competition supports a requirement that the defendant's misrepresentation hinder the plaintiff's ability to compete.

An examination of the Act's legislative history sheds little additional insight on the intent of Congress with regard to prudential standing. When the Act was first set forth in 1946 to provide for the registration and protection of trademarks, the accompanying Senate Report stated that "there is no essential difference between trade-mark infringement and what is loosely called unfair competition."¹³⁷ The Senate Report further explained that the protection of a trademark was meant to safeguard the goodwill that a trademark owner holds in his business.¹³⁸ This proposition supports the balancing test's first factor, requiring a court to consider whether the defendant's false advertising harmed the plaintiff's ability to compete and whether the advertising harmed the plaintiff's goodwill or reputation.¹³⁹

The statute was eventually interpreted by the courts as "creating, in essence, a federal law of unfair competition" which extends to cases involving infringement of unregistered trademarks, violations of trade dress, and false advertising.¹⁴⁰ In a 1988 revision of Section 43(a), Congress codified the courts' interpretations and expanded the section to cover different types of unfair competition, making false advertising claims expressly actionable.¹⁴¹ Congress also stated in its Senate Report accompanying the revision that Section 43(a) standing "should continue to be decided on a case-by-case basis."¹⁴² Clearly, Congress wished to retain the prudential standing requirement and entrusted its development to the courts.¹⁴³ But Congress did not provide any guidance for the courts to establish a uniform rule that would fulfill the purpose of the Act.¹⁴⁴

Recall *Halicki*, where the Ninth Circuit used the categorical approach to deny standing to a film producer who sued theaters for falsely advertising his film as rated "R" instead of "PG."¹⁴⁵ Clearly, the theaters' false advertisements could have deterred adult moviegoers with children and moviegoers under the age of eighteen from watching the producer's movie as a result of the incorrect rating, resulting in a loss of profits to the producer.

¹³⁷ S. REP. NO. 79-1333, at 4 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274.

¹³⁸ *Id.* See also Keller, *supra* note 21, at 132.

¹³⁹ Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1169 (11th Cir. 2007).

¹⁴⁰ S. REP. NO. 100-515, at 40 (1988), as reprinted in 1988 U.S.C.C.A.N. 5577.

¹⁴¹ Trademark Law Revision Act of 1988, 102 Stat. 3935, 3946 (1988) (current version at 15 U.S.C. § 1125(a)(1) (2000)).

¹⁴² S. REP. NO. 100-515, at 41.

¹⁴³ Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 299 (2007).

¹⁴⁴ *Id.*

¹⁴⁵ *Halicki v. United Artists Commc'ns, Inc.*, 812 F.2d 1213, 1213 (9th Cir. 1987).

By misrepresenting the plaintiff's film rating, the movie theaters gave competing producers of "PG" rated movies an advantage over the plaintiff in obtaining consumer sales. So although the plaintiff was not a direct competitor of the defendants, the defendants' anticompetitive conduct directly harmed the plaintiff's ability to fairly compete with other movie producers. In light of the Act's purpose of protecting commercial parties from the harms of unfair competition, the producer should have standing to bring a Section 43(a) claim under these circumstances. This case illustrates that the categorical approach is unnecessarily restrictive. It fails to extend protection to commercial parties that face actual harm as a result of false advertising based on a formal classification that is unsupported by the Act's language or legislative history.

Unlike the categorical approach, the reasonable interest approach recognizes that actual and direct competition is not a prerequisite for standing, and under this standard, the movie producer in *Halicki* would likely gain standing. But the categorical approach also allows a commercial plaintiff to bring a claim without asserting an injury of an anticompetitive nature. For example, in *Thorn v. Reliance Van Co.*,¹⁴⁶ the Third Circuit held that a stockholder of Corporation A had standing to sue Corporation B for false advertising that caused injury to Corporation A.¹⁴⁷ The court found that the shareholder's investment in Corporation A constituted a reasonable interest to be protected against false advertising, which gave him the right to sue under the Act.¹⁴⁸ But the shareholder was neither a direct nor indirect competitor of the defendant corporation. Any injury incurred by him was merely an indirect consequence of the alleged misrepresentation—the direct consequence was the injury caused to Corporation A itself.¹⁴⁹ In this type of situation, Corporation A is the appropriate party to bring a Section 43(a) claim because it is the party that has been directly harmed by a competitor's false advertisement.

Under *Thorn*, persons remote from the anticompetitive injury and the commercial activity giving rise to the injury may nevertheless have standing to sue for false advertising based on a derivative claim of harm. This illustrates that the reasonable interest test may be construed far too broadly so as to confer standing beyond the purpose of the Act.¹⁵⁰ Moreover, commercial parties who do not have standing to bring a false advertising claim under the Act may have traditional causes of action based on state law, such as tortious interference of contract, business expectancy, or other business

¹⁴⁶ 736 F.2d 929 (3d Cir. 1984). This case was decided prior to the Third Circuit's adoption of the balancing test approach to standing.

¹⁴⁷ *Id.* at 933.

¹⁴⁸ *Id.*

¹⁴⁹ See Wrona, *supra* note 24, at 1111-13.

¹⁵⁰ See *Thorn*, 736 F.2d at 993 (relying on the reasonable interest test to grant standing to an investor).

torts.¹⁵¹ The Act was not meant to preempt these causes of action.¹⁵² Consequently, over-enforcement of Section 43(a) through an overbroad approach to standing would defeat the purpose of the Act, which Congress intended to supplement and not replace existing state laws.¹⁵³

The five-factor balancing test also permits standing in the absence of direct competition between the plaintiff and defendant. Unlike the reasonable interest approach, however, the balancing test places proper emphasis on the importance of protecting commercial parties against competitive injuries resulting from unfair competition. If the court had decided *Thorn* using the balancing test approach, the stockholder would have been precluded from bringing a Section 43(a) claim because he was not engaged in any commercial enterprise for which either his ability to compete for profits or his reputational interests were harmed. In contrast to *Thorn*, recall *Logan*, where the court conferred standing on a plaintiff who patented a spiral meat-slicing method and used that method to cut its meat for sale under the balancing test approach, allowing him to sue a company that falsely advertised its meat products as cut using the same method.¹⁵⁴ Although not a direct competitor of the defendant, the plaintiff undoubtedly had a direct interest both in the sales of meat products that were sliced using his spiral method and in protecting the integrity of his patent.¹⁵⁵ As previously mentioned, Congress specifically intended to protect both of these interests when it first passed the Act.¹⁵⁶

By focusing on the injury alleged rather than on the party, and requiring that the injury be of a competitive nature in the sense that it impacts the plaintiff's ability to compete or erodes the plaintiff's goodwill or reputation, the balancing test sufficiently provides redress for those whom the Act is intended to protect. The categorical approach, on the other hand, places unwarranted focus on the party rather than the injury by requiring that the plaintiff be a direct competitor of the defendant. While it does not focus on the party, the reasonable interest approach fails to define the required injury as one that impacts the ability of the plaintiff to compete in its commercial niche. As a result of these deficiencies, the latter two approaches do not sufficiently carry out the Act's statutory and legislative purpose of protecting commerce from unfair competition.

The Act's competition-centric purpose and its progression from a narrow law designed to unify trademark statutes to a law that provides widespread commercial protection against unfair competition support use of the standards that have been articulated in the balancing test. In addition to

¹⁵¹ Lemley, *supra* note 143, at 312.

¹⁵² *Id.* at 312-13.

¹⁵³ *Id.*

¹⁵⁴ *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 450 (5th Cir. 2001).

¹⁵⁵ *Id.* at 461.

¹⁵⁶ *See supra* note 138 and accompanying text.

conclusions derived from the Act's statutory language and legislative history, policy considerations also support the balancing test approach to prudential standing.

B. *Policy Considerations*

1. Consumer Welfare

To the extent that courts "look upon the competitor as the preferred plaintiff who will protect not only his own interest but society's interest as well in his challenges to deceptive advertising,"¹⁵⁷ a test for prudential standing will necessarily impact the degree of consumer welfare that will be promoted by applications of Section 43(a). Holding that the Act's protection extends to parties who have unfairly been placed at a commercial disadvantage as a result of a direct or indirect competitor's false advertisement will generally confer greater benefit upon both consumers and commercial parties as participants in commerce.

False advertising harms the consumer when he or she makes a purchase in reliance on a company's misrepresentation.¹⁵⁸ Truthful advertising provides a buyer with accurate information about products that are being offered on the market so that she may purchase the product or brand that will give her the best perceived value for her money.¹⁵⁹ Such informed purchasing decisions contribute to overall market efficiency and the optimal allocation of societal resources.¹⁶⁰ In contrast, deceptive advertising obstructs a buyer's ability to make informed product purchasing decisions, thereby decreasing market efficiency and leading to the misallocation of resources.¹⁶¹

Furthermore, commercial parties are in a better position than consumers to detect the falsity of an advertisement because they tend to know about the qualities of their competitors' products or services.¹⁶² Recall Procter & Gamble's use of clinical studies to determine that Ultreo's ultrasound waveguide technology did not effectively remove plaque as Ultreo claimed it did.¹⁶³ Like Procter & Gamble, other businesses are also likely to have

¹⁵⁷ Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 48 (1994).

¹⁵⁸ Bauer, *supra* note 16, at 745.

¹⁵⁹ Burns, *supra* note 157, at 52-53.

¹⁶⁰ *Id.* at 53.

¹⁶¹ *Id.* at 54; Robert S. Saunders, Note, *Replacing Skepticism: An Economic Justification for Competitors' Actions for False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 563, 581-83 (1991).

¹⁶² Saunders, *supra* note 161, at 595.

¹⁶³ See *supra* notes 1-6 and accompanying text.

invested in research that would allow them to identify a competitor's false claim because they have an interest in knowing about a competitor's product for purposes of identifying consumer preferences.¹⁶⁴ Consumers, on the other hand, often detect falsity only after they have purchased and used a particular product and thus suffer deception and forgo a gain of optimal utility with regard to that product.¹⁶⁵ Although a commercial party sues a competitor to protect itself from suffering a loss of profits, rather than to protect consumers, consumers stand to benefit derivatively from reductions in false advertising that result from competitor actions under Section 43(a) because the commercial party will likely institute suit when the consumer is incurring or will incur deception and harm.¹⁶⁶

Direct and indirect competitors considering the use of either borderline claims or blatantly false representations in their advertisements will be less inclined to do so if the risk of litigation under Section 43(a) is high,¹⁶⁷ as this will encourage the dissemination of only truthful information. On the other hand, over-enforcement of Section 43(a) may stifle the use of advertising and thereby prevent accurate and beneficial information from being conveyed to consumers.¹⁶⁸ Particularly, newer and smaller market entrants may be discouraged from using advertising to attract and distribute information about their products out of fear that competitors will "scrutinize their ads for a reason to bring a lawsuit."¹⁶⁹ This hurts consumers by not only decreasing their ability to make informed purchasing decisions, but by decreasing market competition as well.¹⁷⁰ Thus, unnecessary restrictions on the use of Section 43(a) "limit[] its ability to enhance the vigor of competition as well as the level of marketing ethics and conduct,"¹⁷¹ but some restriction is necessary to avoid adverse market consequences for both competitors and consumers.

In theory, a party will only pursue private litigation if the litigant has a positive expected return from commencing the suit.¹⁷² In the context of false advertising, the threat of litigation by a commercial party will depend on whether the party is likely to suffer injury to the extent that recovery will exceed the high costs of going to court. The extent of injury that a business

¹⁶⁴ Saunders, *supra* note 161, at 595.

¹⁶⁵ *Id.* at 582.

¹⁶⁶ Burns, *supra* note 157, at 73 ("False advertising harms the rival, who suffers losses in sales, by deceiving consumers into buying the advertiser's product. Thus, the harm to the rival is a necessary part of the larger societal harm."); Saunders, *supra* note 161, at 585-86.

¹⁶⁷ Saunders, *supra* note 161, at 588.

¹⁶⁸ *See id.* at 588-89.

¹⁶⁹ Ashley N. Calhoun, Comment, *Winking in the Dark: An Analysis of Corrective-Advertising Damages Under the Lanham Act and the Effect on the American Economy*, 32 STETSON L. REV. 821, 843-44 (2003).

¹⁷⁰ Saunders, *supra* note 161, at 588.

¹⁷¹ Bauer, *supra* note 16, at 736.

¹⁷² Saunders, *supra* note 161, at 585.

will suffer necessarily turns on whether consumers are likely to actually believe the false or misrepresented information in an advertisement and trust the information to the consumers' disadvantage.¹⁷³ Businesses are therefore likely to sue "only in circumstances where their assessments of marketplace reality indicate that consumers are influenced by the challenged advertising."¹⁷⁴ Although firms that market goods or services in direct competition with a false advertiser's product are the most obvious potential litigators under Section 43(a),¹⁷⁵ cases such as *Halicki* and *Logan* demonstrate that firms may also be extensively harmed by the misrepresentations of indirect competitors that cause consumers to make sub-optimal purchasing decisions.¹⁷⁶ Thus, by excluding indirect competitors from Section 43(a) standing, the categorical approach prevents the Act from being efficiently utilized to protect both commercial parties and consumers.

Although under-enforcement of Section 43(a) will reduce the effectiveness of the Act in promoting market efficiency, over-enforcement also poses harm. As previously noted, an attempt to completely eliminate all incorrect beliefs on the market will result in the end of advertisements.¹⁷⁷ If standing is construed too expansively, "firms can stifle their competitors' ability to supply information to the market" and thereby cause the net information available to consumers to fall below optimal levels.¹⁷⁸ While the primary goal of Section 43(a) is to chill false or deceptive advertising, considerable amounts of non-deceptive advertising may also suffer where companies are uncertain as to how the courts might view a particular advertisement claim.¹⁷⁹ The lack of clear standards for determining standing under the reasonable interest approach will contribute to such uncertainty. Furthermore, excessive false advertising claims will force advertisers to incur high litigation expenses to defend truthful claims.¹⁸⁰ These expenses will likely be passed on to consumers in the form of increased costs of products and services. Because the reasonable interest approach does not limit the type of injuries to only those directly associated with competition, the approach is more likely to result in the over-enforcement of Section 43(a).

To avoid construing the prudential standing requirement too broadly, courts should adopt a rule which excludes parties based on whether their commercial interests are de minimus or exceedingly indirect.¹⁸¹ This is es-

¹⁷³ *Id.* at 586.

¹⁷⁴ Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 55 (1985).

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* notes 29-46, 111-25, and accompanying text.

¹⁷⁷ See Lemley, *supra* note 143, at 318.

¹⁷⁸ *Id.* at 289.

¹⁷⁹ Saunders, *supra* note 161, at 588.

¹⁸⁰ *Id.* at 587-88; Best, *supra* note 174, at 50.

¹⁸¹ Wrona, *supra* note 24, at 1138.

essentially what the balancing test provides by requiring the plaintiff to assert injury to either its ability to compete or to its goodwill or reputation. In contrast to the vagueness of the reasonable interest approach, this requirement sets much clearer guidelines for establishing standing. As a result, there will be increased certainty with regard to court determinations over who may properly bring a Section 43(a) claim, and firms will consequently be less inclined to engage in the unnecessary chilling of advertisements. Moreover, unlike the categorical approach, the balancing test's focus on the type of injury that must be alleged will provide standing to both direct and indirect competitors when consumers are likely to suffer harm by relying on a misrepresentation. By contrast, the reasonable interest test fails to set a sufficient boundary for standing and the categorical approach sets an overly constrictive one. The balancing test strikes a proper balance between promoting consumer welfare and discouraging the dissemination of truthful information through advertising. In addition to these competitor and consumer benefit considerations, the balancing test approach also ensures that Section 43(a) actions will be prudently enforced by the courts.

2. Judicial Enforcement

Important factors that must be considered with regard to any approach for standing are the costs of judicial enforcement and the ability of courts to apply the approach fairly. Both the number of cases litigated and the complexity of determining standing contribute to the costs of judicial enforcement.

Under the categorical approach, prudential standing for a false advertising claim is strictly precluded for a plaintiff who is not in direct competition with a defendant. This approach invites less litigation under Section 43(a) than its broader counterparts and reduces the potential for frivolous actions by commercial plaintiffs who allege tenuous harms. In *Heath*, for example, standing was properly denied to a plaintiff who asserted a speculative commercial interest that was allegedly harmed by the defendant's advertisement.¹⁸² In addition to lowering the number of cases that will be litigated, the categorical approach is easy to implement because it is clear and does not require much analysis. Thus, the costs associated with judicial enforcement under this approach are minimal. However, as previously mentioned, under the categorical approach a commercial plaintiff will often be excluded from obtaining redress when a defendant, through false advertising, has directly harmed the plaintiff's ability to sell its product, merely because the two parties are formally classified as indirect competitors in the marketplace.¹⁸³ Such a plaintiff has clearly suffered harm as a result of un-

¹⁸² L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc., 9 F.3d 561, 575 (7th Cir. 1993).

¹⁸³ See *supra* Part II.A.

fair competition—harm that the Lanham Act is designed to protect against. The categorical denial of standing to all indirect competitors is also contrary to the notion of prudential standing as a means of assuring that the court will hear the claims of plaintiffs whose interests fall “within the ‘zone of interests’ intended to be protected by the statute.”¹⁸⁴ As a result, application of the categorical approach’s bright-line rule, while promoting low enforcement costs and “fairness” in terms of judicial predictability, ignores the very purpose of both the prudential standing doctrine and the Lanham Act.

In stark contrast to the categorical approach, the reasonable interest approach provides broad flexibility and allows courts to resolve issues of prudential standing on a case-by-case basis. Because the approach takes into consideration all circumstances surrounding a false advertising claim, it will in theory afford every plaintiff a fair chance of acquiring prudential standing. But this is ultimately the test’s downfall. It is far too general and does not provide courts with “a proper framework for evaluating reasonable interest.”¹⁸⁵ As such, court decisions will rely heavily on the particular facts of a case and become less predictable. Furthermore, the approach will tend to invite a larger amount of litigation under Section 43(a) by parties who do not assert interests that fall within the Lanham Act’s anticompetitive purpose but nonetheless have standing because a “sufficient nexus” exists between themselves and the defendant’s false advertising.

Recall *Camel Hair*, where various manufacturers of cashmere clothing and fabrics had standing to bring a false advertising claim against department stores that sold cashmere coats that bore labels misrepresenting the amounts of cashmere contained in them.¹⁸⁶ Although the manufacturers undoubtedly had an interest in preserving the reputation of cashmere, they did not provide any evidence that the department stores’ misrepresentations caused damage to that reputation, or that the misrepresentations affected the manufacturers’ reputation or ability to sell their products.¹⁸⁷ Virtually any manufacturer of a cashmere product has standing to sue the department stores under this decision, inviting an enormous amount of litigation and administratively complex damages. Thus, while it may provide a greater degree of fairness in judicial application than the categorical approach, the reasonable interest test may result in tremendously high judicial costs.

Like the reasonable interest approach, the five-factor balancing test offers greater flexibility in determining the issue of standing than the categorical approach. But unlike the reasonable interest approach, the balancing

¹⁸⁴ *Conte Bros. Auto. Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 226 (3d Cir. 1998) (quoting *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994)).

¹⁸⁵ Lemley, *supra* note 143, at 302.

¹⁸⁶ *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986).

¹⁸⁷ *Id.* at 10.

test places some important limits on this flexibility to ensure that the test will be fairly applied among varying cases and to safeguard against the potentially high costs of judicial enforcement.

The first, second, and third factors of the balancing test (type of injury alleged, directness of injury, and proximity of the plaintiff to the alleged conduct) limit standing to those who can assert competitive interests that fall within the Act's scope and allow courts to analyze factually distinct scenarios without categorically excluding a particular commercial plaintiff.¹⁸⁸ For instance, both *Logan* and *Conte Brothers* involved parties who were indirect competitors. In *Logan*, these three factors weighed in favor of the patent holder because the merchant's misrepresentation of the patented product directly interfered with the patent holder's ability to market it.¹⁸⁹ Conversely, in *Conte Brothers*, these factors weighed against the retailers because the manufacturer's false advertising of its own product hindered neither the retailers' ability to sell their products nor their goodwill or reputation.¹⁹⁰ Under the categorical approach, standing would have been denied in both cases simply because the parties were indirect competitors. But by requiring a court to examine the nature of the injury and its directness to the party, rather than just the party itself, the first three factors of the balancing test consider the particular circumstances of a given claim in light of the anticompetitive purpose of the Act. These factors thereby promote fairness in the application of the standing requirement.

Furthermore, by inquiring into whether the defendant's conduct directly impacted the plaintiff and whether another commercial party was closer to the harm and therefore the more appropriate party to seek relief under Section 43(a),¹⁹¹ the second and third factors of the balancing test decrease the likelihood that standing will be conferred to parties who assert tenuous claims. This was precisely the case in *Procter & Gamble*, where the alleged harm was too attenuated from the defendant's conduct and other parties existed who were more immediate to the injury than the plaintiff.¹⁹² Such considerations will ultimately reduce the amount of potential false advertising litigation faced by the courts. The remaining factors of the balancing test address the administrative court costs that are associated with false advertising claims.

The fourth factor of the balancing test requires a court to consider whether the nature of the alleged damage is speculative and therefore prohibitively difficult for the court to determine damages.¹⁹³ For example, in *Phoenix of Broward*, the court found that although the plaintiff alleged the

¹⁸⁸ See *supra* Part II.C.

¹⁸⁹ *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 461 (5th Cir. 2001).

¹⁹⁰ *Conte Bros. Auto. Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234 (3d Cir. 1998).

¹⁹¹ See *supra* Part II.C.

¹⁹² *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 563 (5th Cir. 2001).

¹⁹³ *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1171 (11th Cir. 2007).

type of injury for which Section 43(a) provided relief, “it requires too much speculation to conclude that an ascertainable percentage of both the increase in [the defendant]’s sales and the concomitant decrease in [the plaintiff]’s sales . . . is directly attributable to [the defendant]’s misrepresentations” in light of the many competitors in the fast food market.¹⁹⁴ Damages that require a large degree of speculation not only hinder a court’s ability to provide appropriate judicial relief in such a situation but also increase the complexity of calculation. Consideration of the fourth factor thus reduces the potential of high administrative costs resulting from speculative damages.

The fifth factor of the balancing test, risk of duplicative damages or complexity of apportioning damages, also addresses the problem of speculative damages with regard to enforcement costs. In denying standing in *Conte Brothers*, the court reasoned that if it were to give Section 43(a) standing to the plaintiffs under their theory for recovery, then “every corner grocer in America alleging that his sales of one brand of chocolate bars have fallen could bring a federal action against the manufacturer of another brand for falsely representing the chocolate content of its product.”¹⁹⁵ As a result, apportioning damages among the suing parties would be highly complex, and the federal courts would face burdensome amounts of litigation.¹⁹⁶

The use of the balancing test’s five factors thus enables a court to prudently limit the false advertising claims which may be brought before it to those that can be effectively and efficiently adjudicated.

CONCLUSION

The current circuit split regarding prudential standing generates great confusion regarding who, as a commercial party, may bring a false advertising claim under Section 43(a) of the Lanham Act. A uniform approach needs to be adopted in order to allow those who engage in commercial activity to determine whether or not they can seek relief for injury resulting from the anticompetitive conduct of another.

In light of the Act’s focus on protecting commerce from the harms of unfair competition, as well as the general law of unfair competition and its emphasis on deceptive activity, the Act’s statutory language and legislative history indicate that a lack of direct competition alone should not preclude standing. Rather, the standing question should primarily turn on whether or not a plaintiff can assert an injury of a competitive nature, such as injury to the plaintiff’s ability to compete or to the plaintiff’s goodwill or reputation.

¹⁹⁴ *Id.*

¹⁹⁵ *Conte Bros.*, 165 F.3d at 235.

¹⁹⁶ *Id.*

The balancing test is the proper approach for prudential standing. It limits standing to situations where the type of injury alleged falls within the anticompetitive purpose of the Act but also provides sufficient flexibility so that it may be applied fairly to diverse situations. Furthermore, the balancing test tends to reduce the potential burden of litigation on the courts with regard to false advertising and furthers society's interest in the promotion of fair competition. Recognizing these advantages of the balancing test, the Supreme Court ought to adopt this standard for prudential standing in cases of unfair competition brought under Section 43(a) of the Lanham Act.