

Running the gamut from A to B: Federal Trademark and False Advertising Law

The Lanham Act, enacted in 1947 and significantly amended several times since, establishes federal trademark law as well as a private cause of action for false advertising more generally. Along with prohibiting infringement of registered trademarks, the Lanham Act protects unregistered trademarks and indications of source against conduct likely to cause confusion as to source or sponsorship, in a provision commonly known as §43(a)(1)(A). In 1988, Congress confirmed by amendment that the Lanham Act's false advertising provision, known as §43(a)(1)(B), bars both false statements about an advertiser's own goods or services and false statements about another's goods or services – both false boasting and false attacks.

These provisions, as their designations indicate, are next to one another in the U.S. Code. And for certain issues – mainly preliminary relief, remedies, and survey evidence – courts have drawn freely on false advertising precedents to decide trademark cases, and vice versa. But in other important areas of the law, doctrine has proceeded as if there were two entirely separate bodies of law, despite their common heritage.

This article challenges that separation, arguing in particular that false advertising law, which is vastly undertheorized compared to trademark law, has several important lessons for trademark about the importance of implications and of materiality. Likewise, false advertising doctrines could benefit from the insights of trademark law, which has developed much clearer ideas of what values might counterbalance a plaintiff's claim to be acting in the interests of deceived consumers.