

its duties to enforce an order or that the federal court is the only reasonable method of enforcing such an order.¹⁸⁰

The enactment of such legislation is an indication that Congress is not pleased with the status of child support enforcement today. How well the federal measure will interact with state legislation, and the effectiveness of the Act in today's dismal child support collection atmosphere,¹⁸¹ remains to be seen.

V. CONCLUSION

Laws relating to the enforcement of familial duties of support have progressed tremendously since 1949. Despite this, the welfare rolls are swollen, at great expense to the taxpayers, with persons who must turn to this means of support after having failed to receive court-ordered support from absent obligors. Fortunately the support collection situation is no longer as intolerable as it once was, and the future looks bright for obligees. The newly enacted federal child support legislation will be instrumental in the creation of state child support recovery units. Iowa has already created such a unit within the Iowa Department of Social Services. In order to facilitate the effectiveness of these recovery units, adoption of the RURESA by all states is essential. It is anticipated that enactment of the RURESA and the creation of child support recovery units by all states will be forthcoming; and when that time comes, dependent obligees will no longer need to look to public assistance for support, but will receive court-ordered support from their legal obligors.

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180. 42 U.S.C.A. § 660 (Supp. Feb. 1975).

181. See Conlin, *Equal Protection Versus Equal Rights Amendment—Where Are We Now?*, 24 *DRAKE L. REV.* 259, 288 (1975).

SECTION 43(a) OF THE LANHAM ACT— A FEDERAL UNFAIR COMPETITION REMEDY

The post-World War II business expansion brought an increased need for protection of both business and consumers from unfair competitive practices. Detecting this need, Congress responded in the Lanham Act with section 43(a).¹ Hidden amongst the trademark provisions of the Lanham Act, section 43(a) may seem at first an oddity, for the purpose of section 43(a) is not to protect registered trademarks. Section 43(a) is a federal statutory prohibition of unfair competition, designed to prevent the use of false designations of origin and false descriptions and representations of goods and services in interstate commerce.

The purpose of this Note is to examine the scope of section 43(a) and the interpretations given that section by the courts. Procedural and substantive requirements of section 43(a) will be considered, as will remedies made available to the suitor under the section.

I. EARLY DEVELOPMENT

The present section 43(a) had its origins in section 3 of the Trademark Act of 1920.² That section, dealing with unfair competition, had been passed to implement the provisions of certain treaties signed by the United States.³ Section 3 required a showing that the allegedly unfair practice was done willfully and with intent to deceive.⁴ Because of the requirement that the unfair practices be shown to have been done with an intent to deceive, the section was of little use.⁵

Like section 3 of the Trademark Act of 1920, section 43(a) remained largely unrecognized and unused from the date of its passage in 1946 until the

1. 15 U.S.C. § 1125(a) (1970):

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

2. Act of March 19, 1920, ch. 104, § 3, 41 Stat. 534.

3. See, e.g., Buenos Aires Convention of 1910, 39 Stat. 1675 (1926), T.S. No. 626.

4. "[A]ny person who shall willfully and with intent to deceive . . . [falsely indicate the origin of marked goods in interstate commerce] . . . shall be liable to an action at law for damages and to an action in equity for an injunction" Act of March 19, 1920, ch. 104, § 3, 41 Stat. 534 (emphasis supplied).

5. For a discussion of the history of 43(a) see Derenberg, *Federal Unfair Competition Law at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U. L. Rev. 1029, 1032 (1957).

mid-1950's.⁶ The obscure fate of section 43(a) began to change when the Court of Appeals for the Third Circuit decided in 1954 the now famous case of *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*⁷ In *L'Aiglon* the defendants had used a photograph of the plaintiff's more expensive dress in the advertisement of their lower quality dresses.⁸ Judge Hastie, writing for the majority, broke section 43(a) away from the narrow common law tort of false advertising and seemed to breathe life into the section when he wrote:

We find nothing in the legislative history of the Lanham Act to justify the view that this section is merely declarative of existing law. . . . It seems to us that Congress has defined a statutory civil wrong of false representation of goods in commerce and has given a broad class of suitors injured or likely to be injured by such wrong the right to relief in the federal courts. This statutory tort is defined in language which differentiates it in some particulars from similar wrongs which have developed and have become defined in the judge made law of unfair competition.⁹

However, the reluctance of the courts to recognize the potential of section 43(a) remained for many years following this first recognition. Even today section 43(a) remains tied to the vestiges of the common law concepts of unfair competition.¹⁰

Since 1954 the courts have uniformly stated that section 43(a) creates a new and distinct federal tort, *sui generis*.¹¹ One district court has characterized section 43(a) as a "civil fraud" provision.¹² Section 43(a) is a civil provision and remedial in nature. As a result of this remedial nature the provisions of section 43(a) are given a broad, but often inconsistent interpretation.¹³ One caveat to the otherwise broad reading must be remembered: 43(a) is only directed at certain kinds of activity relating to goods and services in interstate commerce.¹⁴

II. PROCEDURAL ASPECTS

A. Jurisdiction

The district courts of the United States have jurisdiction over causes

6. *Id.* at 1039-40.

7. 214 F.2d 649 (3d Cir. 1954).

8. *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 650 (3d Cir. 1954).

9. *Id.* at 651.

10. *See, e.g., Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974) (to be actionable the practice must be "unfair advertising").

11. *See, e.g., Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137, 141 (5th Cir. 1972); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 10 (E.D. Pa. 1974); *Franklin Mint, Inc. v. Franklin Mint, Ltd.*, 331 F. Supp. 827, 831 (E.D. Pa. 1971); *Gold Seal Co. v. Weeks*, 129 F. Supp. 928, 940 (D.D.C. 1955), *aff'd sub nom. S.C. Johnson & Son, Inc. v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956).

12. *Midwest Packaging Materials Co. v. Midwest Packaging Corp.*, 312 F. Supp. 134 (S.D. Iowa 1970).

13. *Geisel v. Poynter Products, Inc.*, 283 F. Supp. 261, 267 (S.D.N.Y. 1968). *See* discussion at Part III *infra*. The inconsistent interpretation arises out of the courts' concern with restoring the injured party rather than with developing a standard for future conduct.

14. 1 R. CALLMANN, *UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES* § 18.2(b) (3d ed. 1967) [hereinafter cited as CALLMANN]. *See* text accompanying notes 18-27 *infra*.

arising under section 43(a).¹⁵ This jurisdiction is conferred under the general grant of jurisdiction for all causes arising under the Lanham Act,¹⁶ and is present without regard to the citizenship of the parties or the amount in controversy.¹⁷ As section 43(a) arises under the "trademark laws," the pendent jurisdiction provisions of 28 U.S.C. § 1338(b) are available to the claimant.¹⁸ Section 1338(b) allows a state claim of unfair competition to be joined to a related and substantial claim arising under 43(a). The defendant in a state court action for trademark infringement or unfair competition which could have been brought originally in federal district court under section 43(a) has available the option of removal to federal court.¹⁹ To make use of the removal provisions it is clear the state court action need not sound under 43(a) so long as it could have been brought under 43(a) in federal court.²⁰

The most important limitation to federal court jurisdiction under section 43(a) is the requirement that "interstate commerce" be involved.²¹ Failure either to plead interstate commerce or to prove the interstate commerce requirement would warrant a dismissal of those counts brought under 43(a).²² An allegation of interstate commerce not made in good faith may warrant a court finding that the action brought under section 43(a) is not "substantial" and so permit dismissal of the pendent state unfair competition claims.²³ However, the definition of interstate commerce has received an expanding interpretation in recent years.²⁴ For example, causing one good containing a false designation, description or representation to enter interstate commerce is sufficient to meet the jurisdictional requirement.²⁵ The interstate commerce requirement may alternatively be met by showing a false designation, description or representation in connection with services which enter interstate commerce.²⁶ The district courts have treated advertisements by business competitors under differing theories with respect to interstate commerce. In *National Dynamics Corp. v. John Surrey, Ltd.*,²⁷ use of a photograph of the plaintiff's

15. *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1 (E.D. Pa. 1974).

16. *Catalina, Inc. v. Gem Swimwear, Inc.*, 162 F. Supp. 911 (S.D.N.Y. 1958).

17. *Id.* See also *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 650 (3d Cir. 1954).

18. 28 U.S.C. § 1338(b) (1970) states: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the . . . trade-mark laws."

19. 28 U.S.C. § 1400 (1970).

20. *Beech-Nut, Inc. v. Warner-Lambert Co.*, 480 F.2d 801 (2d Cir. 1973).

21. This restriction arises as a necessity from the use of the interstate commerce clause of the Constitution as the jurisdictional base for the legislation concerning trademarks. See *Trade-Mark Cases*, 100 U.S. 82 (1879).

22. *Iding v. Anaston*, 266 F. Supp. 1015 (N.D. Ill. 1967). Failure to allege interstate commerce would render action vulnerable to a motion to dismiss for lack of jurisdiction over the subject matter. See *FED. R. Civ. P. 12(b)(6)*.

23. *Iding v. Anaston*, 266 F. Supp. 1015 (N.D. Ill. 1967).

24. One reflection of the broadening scope of interstate commerce can be found in the civil rights cases of the last two decades. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

25. *Blazon, Inc. v. Deluxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965).

26. *National Dynamics Corp. v. John Surrey, Ltd.*, 238 F. Supp. 423 (S.D.N.Y. 1964).

27. 238 F. Supp. 423 (S.D.N.Y. 1964).

product—an automobile defroster gun—in a mail order advertisement for the defendant's similar product was found to be "use of services" in interstate commerce. In contrast, at least one district court has held that an advertising publication would qualify as "goods" in interstate commerce,²⁸ and the multi-state solicitation of manufacturers for inclusion in an advertisement has been held to meet the "goods or services in interstate commerce" requirement.²⁹ Business which is purely intrastate in nature is held to be interstate commerce if it has a substantial effect on interstate commerce.³⁰

B. *Standing*

The language of section 43(a) on standing to maintain an action is very broad and inclusive. Any person who uses such a false designation, description or representation

. . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.³¹

Since few cases have involved false designations of geographic origin, the most often used standing provision is the "likely to be damaged" section. Professor Callmann proposes the test for standing to be "whether plaintiff has a reasonable interest to be protected against false advertising."³² A commercial competitor maintaining an action need not be in the same line of business as, nor a direct competitor of, the defendant to have sufficient likelihood of damage to meet the standing requirement.³³ An exclusive selling agent likely to be damaged by defendant's action has been found to have standing.³⁴

The federal courts have found that section 43(a) was devised to protect two distinct interests: (1) the interest of business in business "property rights," and (2) the interest of the consuming public.³⁵ Despite this tacit admission that the consuming public is likely to be damaged, most courts have found that consumers have no standing to bring an action under section 43(a).³⁶ The courts that have found consumer standing have looked to the

28. *Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889 (S.D.N.Y. 1966).

29. *Harrison Serv., Inc. v. Margino*, 291 F. Supp. 319 (S.D.N.Y. 1968).

30. *See Crossbow, Inc. v. Glovemakers, Inc.*, 265 F. Supp. 202 (N.D. Ill. 1967); *Burger King, Inc. v. Brewer*, 244 F. Supp. 293 (W.D. Tenn. 1965).

31. 15 U.S.C. § 1125(a) (1970).

32. CALLMANN, *supra* note 14, at § 18.2(b).

33. *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom. S.C. Johnson & Son, Inc. v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956). *See also Marshall v. Proctor & Gamble Mfg. Co.*, 170 F. Supp. 828, 835 n.8 (D. Md. 1959).

34. *Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137 (5th Cir. 1972).

35. *Matador Motor Inns, Inc. v. Matador Motel, Inc.*, 376 F. Supp. 385 (D.N.J. 1974).

36. *Colligan v. Activities Club, Ltd.*, 442 F.2d 686 (2d Cir. 1971); *Florida ex rel. Broward County v. Eli Lilly & Co.*, 329 F. Supp. 364 (S.D. Fla. 1971). *See also Marshall v. Proctor & Gamble Mfg. Co.*, 170 F. Supp. 828, 835 n.8 (D. Md. 1959).

intent of the statute to protect all persons from these practices.³⁷ On the other hand, the courts that have found consumers have no standing seem to be content with allowing the Federal Trade Commission to protect the consumer interest.³⁸ Following the majority view the Court of Appeals for the Second Circuit in *Colligan v. Activities Club, Ltd.*³⁹ rejected the consumer plaintiffs' contention that "any person" as used in section 43(a) to define that class of litigants with standing includes consumers as well as commercial competitors. The court concluded that "any person" was not meant to include that individual consumer, but referred only to that class of plaintiffs whose claims partook of the nature of the injury sought to be prevented; namely, commercial competitors.⁴⁰ Aside from the long expressed fear that the expansion of section 43(a) to grant consumers standing would lead to a flood of litigation,⁴¹ justification seems to be lacking for this narrow reading of the standing requirement. This hesitance of the federal courts to expand standing to consumers presents one of the largest stumbling blocks to the development of an enlarged section 43(a).⁴²

III. SUBSTANTIVE REQUIREMENTS

When section 43(a) was drafted no mention was made of the need of a federally registered trademark, and courts have uniformly found that the ownership of a registered trademark is indeed not a prerequisite to action under 43(a).⁴³ One district court has noted that "43(a) is not dependent upon an allegation that the plaintiffs own a federally registered trademark nor does it require that a case arising under this section be substantially related to a claim regarding any federally registered trademark."⁴⁴

Unlike section 3 of the Trademark Act of 1920, the "falsification" in an action under section 43(a) need not be done willfully or with an intent to deceive.⁴⁵ Proof by the defendant that the use of a false designation, description or representation was undertaken innocently will not constitute an affirmative defense to the action if as a result of the designation, description or representation the consuming public may be deceived.⁴⁶ The designation, description or representation need not be literally false, but the representation must have a tendency to create a false impression in consumers.⁴⁷ As will be

37. *Arnesen v. Raymond Lee Organization, Inc.*, 333 F. Supp. 116 (C.D. Cal. 1971).

38. See Federal Trade Commission Act, 15 U.S.C. § 45 (1970). The FTC Act does not provide a remedy to the private suitor.

39. 442 F.2d 686 (2d Cir. 1971).

40. *Colligan v. Activities Club, Ltd.*, 442 F.2d 686, 689 n.8 (2d Cir. 1971).

41. *Id.* at 693.

42. Note, *Section 43(a) of the Lanham Act: Its Development and Potential*, 3 LOYOLA U.L.J. 327, 339-42 (1972).

43. *National Lampoon, Inc. v. American Broadcasting Companies, Inc.*, 376 F. Supp. 733 (S.D.N.Y. 1974); *McTavish Bob Oil Co. v. Disco Oil Co.*, 345 F. Supp. 1379 (N.D. Ill. 1972); *Iding v. Anaston*, 266 F. Supp. 1015 (N.D. Ill. 1967).

44. *Potato Chip Institute v. General Mills, Inc.*, 333 F. Supp. 173, 179 (D. Neb. 1971).

45. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958); *Apollo Distrib. Co. v. Apollo Imports, Inc.*, 341 F. Supp. 455 (S.D.N.Y. 1972).

46. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958).

47. *Geisel v. Poynter Products, Inc.*, 283 F. Supp. 261 (S.D.N.Y. 1968). See also

noted in a later section,⁴⁸ a plaintiff, to obtain injunctive relief, need only show that the falsity has a tendency to deceive. In *National Lampoon, Inc. v. American Broadcasting Companies, Inc.*⁴⁹ the court found that a showing of a willful intent to deceive would raise a presumption that the designation, description or representation would be deceptive and result in consumer confusion.⁵⁰ Although section 43(a) does not protect against all kinds of unfair competition, the section departs from the common law in that the plaintiff need not show actual "palming off" by the defendants as long as the confusion arises.⁵¹ The Third Circuit in *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*⁵² expressly refused to follow the view that the "palming off" requirement which had existed at least since the case of *American Washboard Co. v. Saginaw Manufacturing Co.*⁵³ should be read into section 43(a)—a view some early decisions under the section had indicated.⁵⁴

"Origin" as it relates to "false designation of origin of goods" does not refer only to geographic origin of the goods. The origin may also refer to the origin of the manufacture of the goods.⁵⁵ The "single source" rule which prevailed in the common law unfair competition has not been included in the requirements of an action under this section.⁵⁶ The court in *Mutation Mink Breeders Association v. Lou Nierenberg Corp.*⁵⁷ stated that "the 'single source' rule is inapplicable to suits under § 43(a) of the Lanham Act and that the 'likely to be damaged' provision of § 43(a) obviates the necessity of proving actual diversion of trade."⁵⁸ The removal of the single source requirement does not obviate the requirement that the competitor who seeks relief have some protectable interest, for he must be "likely to be damaged." In *Geisel v. Poynter Products, Inc.*,⁵⁹ the court noted that the unfair competition must

Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582 (S.D.N.Y.), *rev'd on other grounds*, 393 F.2d 91 (2d Cir. 1968).

48. See discussion at Part IV, § A *infra*.

49. 376 F. Supp. 733 (S.D.N.Y. 1974).

50. *National Lampoon, Inc. v. American Broadcasting Companies, Inc.*, 376 F. Supp. 733, 747 (S.D.N.Y. 1974).

51. *Geisel v. Poynter Products, Inc.*, 283 F. Supp. 261 (S.D.N.Y. 1968); *General Pool Corp. v. Hallmark Pool Corp.*, 259 F. Supp. 383 (N.D. Ill. 1966); *Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889 (S.D.N.Y. 1966). "Palming off" is the actual passing off of the goods of one competitor as being those of another business competitor.

52. 214 F.2d 649, 651 (3d Cir. 1954).

53. 103 F. 281 (6th Cir. 1900) (defendants' false allegation that their product was made of aluminum was not actionable, and the fact that the defendants deceive the public as to their goods by fraudulent or false means does not give a cause of action unless it results in sale of defendants' goods as those of the plaintiff).

54. See, e.g., *Chamberlin v. Columbia Pictures Corp.*, 186 F.2d 923 (9th Cir. 1951); *Sampson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949), *aff'd mem.*, 180 F.2d 896 (1st Cir. 1950).

55. *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405, 408 (6th Cir. 1963).

56. *Zandelin v. Maxwell Bentley Mfg. Co.*, 197 F. Supp. 608, 611 (S.D.N.Y. 1961); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155, 160 (S.D.N.Y. 1959). Under the "single source" rule there must be imitation by one competitor of another competitor's product, and it must appear that the consuming public associates the infringing and the infringing products with a single source.

57. 23 F.R.D. 155 (S.D.N.Y. 1959).

58. *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155, 161 (S.D.N.Y. 1959).

59. 283 F. Supp. 261 (S.D.N.Y. 1968).

involve misuse of a distinguishing characteristic of the competitor's product or of the competitor himself. Often the competitor has an interest in his trade-name or trademark sufficient that damage to him is likely if confusion were to arise as a result of the defendant's activity.⁶⁰

If the defendant's false designation, description or representation involves some related mark or symbol of the complainant, such as design or trade dress, the complainant may be required to show a secondary meaning. The secondary meaning requirement is imposed when the falsity would not cause confusion which would be likely to damage the complainant were it not for the secondary meaning which results in consumer identification.⁶¹ Two examples may be the best method of illustrating the concept. In *Homemakers Home and Health Care Services, Inc. v. Chicago Home for the Friendless*,⁶² the court found the defendant had no action under section 43(a) in its counterclaim against the plaintiff for plaintiff's use of the descriptive term "homemakers" unless defendant could show a secondary meaning or origin which associated the term with the defendant as regarded homemaking services.⁶³ On the other hand, in *Eastman Kodak Co. v. Royal-Pioneer Paper Box Manufacturing Co.*,⁶⁴ the plaintiff's distinctive yellow and black trade boxes used for photographic film were held to have acquired such a secondary meaning that the manufacture of deceptively similar boxes by the defendant constituted an actionable wrong.

One problem that arises in connection with names and marks is the innocent adoption by another business competitor of a similar or identical name or mark in an area where the complainant is unknown. The courts have seldom allowed plaintiffs to extend their common law trademark protection by use of section 43(a) in cases where the defendant had the right to adopt the name or mark chosen.⁶⁵ In *Steak & Brew, Inc. v. Beef & Brew Restaurant, Inc.*,⁶⁶ the district court concluded that the defendant restaurant had not violated section 43(a) because they "innocently adopted the name for use in a market area in which the plaintiff was then unknown. They are entitled to the continued use thereof."⁶⁷ The results reached by the courts in these cases of multiple use could be based either on the theory that the complainant is not likely to be damaged in an area in which he is not doing business, or on the theory that the other competitor's activity involves no falsity within the meaning of the statute.

60. See, e.g., *Midwest Packaging Materials Co. v. Midwest Packaging Corp.*, 312 F. Supp. 134 (S.D. Iowa 1970) (claim that defendant's failure to adequately differentiate its stock shares from those of the plaintiff has resulted in confusion which has been harmful to plaintiff).

61. *Sterling Prod. Co. v. Crest Mfg. Co.*, 314 F. Supp. 204, 212 (E.D. Mich. 1970).

62. 484 F.2d 625 (7th Cir. 1973).

63. *Homemakers Home & Health Care Serv., Inc. v. Chicago Home for the Friendless*, 484 F.2d 625, 629 (7th Cir. 1973).

64. 197 F. Supp. 132 (E.D. Pa. 1961).

65. See, e.g., *Matador Motor Inns, Inc. v. Matador Motel, Inc.*, 376 F. Supp. 385 (D.N.J. 1974).

66. 370 F. Supp. 1030 (S.D. Ill. 1974).

67. *Steak & Brew, Inc. v. Beef & Brew Restaurant, Inc.*, 370 F. Supp. 1030, 1037 (S.D. Ill. 1974).

The theory that plaintiff suffers no damage would seem preferable, as the "falsity" should not be dependent upon the geographical location of the parties.

Due to the wide variety of activities which constitute unfair competition it is not possible to identify all activities which violate section 43(a). The following are only a few examples of what kinds of activity have been found to constitute false designations, descriptions or representations under section 43(a): (1) the defendant's use of a photograph of the plaintiff's product to advertise and sell its product;⁶⁸ (2) the false representation by the defendant that its product was expressly or impliedly endorsed by a particular person or group;⁶⁹ and (3) the defendant's selling of its goods as those of the plaintiff-competitor.⁷⁰ In *Bogene, Inc. v. Whit-Mor Manufacturing Co.*⁷¹ the court found that defendant's copying of plaintiff's uncopyrighted label in order to make its garment bags identical was actionable. The court found that the use of the words and symbols in the copied label amounted to a false designation of origin. The false designation of origin constituted a wrong distinct from the mere copying of the uncopyrighted label.⁷²

One area of activity which the courts have found not to be actionable under section 43(a) is the disparagement of the plaintiff's product,⁷³ unless such disparagement actually constitutes a false designation of origin.⁷⁴ These non-actionable activities include false representations about the plaintiff's products,⁷⁵ and resale under the defendant's name after removal of the plaintiff's name.⁷⁶ The typical "puffing" present in much advertising is also not actionable under section 43(a).⁷⁷ Unless the plaintiff can show an exclusive right to the use of its name,⁷⁸ the defendant's use of the plaintiff's name does not violate section 43(a) if no deceptive impression with respect to the origin of the goods is created and the defendant makes a full and truthful disclosure with respect to the name.⁷⁹ The defendant's use of the same design for its product as that used by the plaintiff does not violate section 43(a) if the defendant uses its own name on the product.⁸⁰ Courts find that the use of the name eliminates

68. *Crossbow, Inc. v. Dan-Dee Imports, Inc.*, 266 F. Supp. 335 (S.D.N.Y. 1967); *National Dynamics Corp. v. John Surrey, Ltd.*, 238 F. Supp. 423 (S.D.N.Y. 1964).

69. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641 (3d Cir. 1958); *Geisel v. Poynter Products, Inc.*, 383 F. Supp. 261 (S.D.N.Y. 1968).

70. *Sutton Cosmetics (P.R.), Inc. v. Lander Co.*, 455 F.2d 285 (2d Cir. 1972).

71. 253 F. Supp. 126 (S.D.N.Y. 1966).

72. *Bogene, Inc. v. Whit-Mor Mfg. Co.*, 253 F. Supp. 126, 128 (S.D.N.Y. 1966).

73. See, e.g., *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), cert. denied, 397 U.S. 912 (1970).

74. See, e.g., *Para-Tone, Inc. v. Pantone, Inc.*, 171 U.S.P.Q. 393 (N.D. Ill. 1971) (false designation of origin arose from false and deceptive comparison with competitor's system).

75. See *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), cert. denied, 397 U.S. 912 (1970).

76. See *PIC Design Corp. v. Sterling Precision Corp.*, 231 F. Supp. 106 (S.D.N.Y. 1964).

77. See *Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889 (S.D.N.Y. 1966).

78. *Sterling Prod. Co. v. Crest Mfg. Co.*, 314 F. Supp. 204 (E.D. Mich. 1970).

79. *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331, 351-53 (S.D.N.Y. 1968).

80. *American Rolex Watch Corp. v. Ricoh Time Corp.*, 491 F.2d 877 (2d Cir. 1974) (name on face of watch); *Bose Corp. v. Linear Design Labs, Inc.*, 467 F.2d 304 (2d Cir. 1972) (name on stereo system speakers).

confusion with respect to the origin of the goods.⁸¹

IV. REMEDIES

A. Injunctive Relief

In a suit brought under section 43(a) the plaintiff has two remedies available: injunctive relief and damages. Although section 43(a) makes no specific reference to injunctive relief,⁸² it is within the general equity power of the federal court to grant appropriate equitable injunctive relief. In actions seeking injunctive relief there is no requirement that the plaintiff suffer damages by an actual diversion of business.⁸³ The plaintiff need only show that the false designations, descriptions or representations "have a tendency to deceive."⁸⁴ In *Parkway Baking Co. v. Freihofer Baking Co.*⁸⁵ the Court of Appeals for the Third Circuit stated:

This seems to be the result desired by Congress in that Section 43(a) confers a right of action upon any person who "believes that he is or is likely to be damaged" by defendant's practices. While it would be going too far to read the requirement of customer reliance out of this section so far as damages are concerned, we believe that this is a recognition that, as with most equitable relief by way of injunction, Section 43(a) may be asserted upon a showing of likelihood of damage without awaiting the actuality.⁸⁶

The showing of the tendency to deceive in most cases would meet the general requisite of irreparable harm for the granting of injunctive relief.⁸⁷ For the entry of a preliminary injunction the additional factor of plaintiff showing a clear likelihood of success on the merits is required.⁸⁸ Injunctive relief under section 43(a) may be granted even where the pecuniary injury to the plaintiff may be slight and the possibility of the recovery of damages in the future speculative.⁸⁹ In most actions the injunctive relief would prevent continuation of the deceptive practice by the defendant. However, if such a broad prohibition is not required, more narrowly drawn injunctions have been used. In *Sutton Cosmetics (P. R.), Inc. v. Lander Co.*,⁹⁰ the Second Circuit enjoined the defendant's use of a cosmetics package similar to plaintiff's in only those areas where the plaintiff was doing business. The court reasoned that the plaintiff

81. *Bose Corp. v. Linear Design Labs, Inc.*, 467 F.2d 304, 309 (2d Cir. 1972).

82. The predecessor to section 43(a) made specific reference to injunctive relief. See Act of March 19, 1920, ch. 104, § 3, 41 Stat. 534.

83. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958).

84. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 12 (E.D. Pa. 1974); *Geisel v. Poynter Products, Inc.*, 283 F. Supp. 261, 268 (S.D.N.Y. 1968).

85. 255 F.2d 641 (3d Cir. 1958).

86. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958).

87. See, e.g., *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 13 (E.D. Pa. 1974).

88. *Sutton Cosmetics (P. R.), Inc. v. Lander Co.*, 455 F.2d 285, 287 (2d Cir. 1972).

89. *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 13 (E.D. Pa. 1974).

90. 455 F.2d 285 (2d Cir. 1972).

could not have suffered any irreparable harm from the defendant's activity in areas where the plaintiff did not sell its product.⁹¹

The equitable defense of laches has not as yet been applied to bar an action for injunctive relief brought under section 43(a). The courts that have considered the question have all found some showing of due diligence in the bringing of the suit such as to preclude the denial of relief for this reason.⁹²

The equitable doctrine of clean hands has been applied to the plaintiff in actions under this section.⁹³ In *Ames Publishing Co. v. Walker-Davis Publications, Inc.*⁹⁴ the district court stated:

The provision, however, was not designed to provide a windfall for an overly eager competitor. . . . [I]t appears in the light of the clear purpose of Section 43(a) that to permit a suitor with unclean hands to obtain injunctive relief would run afoul of the legislative goals. Accordingly, we conclude that the equitable maxim of clean hands is clearly applicable and may be raised in actions seeking injunctive relief under Section 43(a).⁹⁵

Even though most courts find consumers lack standing, the consumer interest has been injected in suits brought by injured business competitors. The court in *Ames Publishing* injected the interest of the consumer in the determination of whether injunctive relief was proper. In deciding whether the doctrine of clean hands would prevent injunctive relief the court stated:

While unarticulated in the Act itself, an underlying purpose of Section 43(a) appears to be protection of the consuming public from false representations and descriptions in connection with the advertising of goods and services. . . . Thus, in balancing the equity between the parties, it is appropriate that the Court also weigh the interest of the consuming public.⁹⁶

This inclusion of consumer interest seems to comport with the spirit of section 43(a), but its effect is very limited. The consumer interest input only arises after a competitor has shown he is likely to be damaged and may have come into the action with less than clean hands.

B. Monetary Damages

The second remedy available to a claimant under section 43(a) is monetary damages. To make out a cause of action for damages under 43(a) the

91. *Sutton Cosmetics (P. R.), Inc. v. Lander Co.*, 455 F.2d 285, 289 (2d Cir. 1972).

92. *E.g.*, *Eastman Kodak Co. v. Fotomat Corp.*, 317 F. Supp. 304 (N.D. Ga. 1970), *appeal dismissed*, 441 F.2d 1079 (5th Cir. 1971); *American Optical Co. v. Rayex Corp.*, 266 F. Supp. 342 (S.D.N.Y. 1966), *aff'd*, 394 F.2d 155 (2d Cir.), *cert. denied*, 393 U.S. 835 (1968).

93. *E.g.*, *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1 (E.D. Pa. 1974); *Eastman Kodak Co. v. Fotomat Corp.*, 317 F. Supp. 304 (N.D. Ga. 1970), *appeal dismissed*, 441 F.2d 1079 (5th Cir. 1971).

94. 372 F. Supp. 1 (E.D. Pa. 1974).

95. *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 13 (E.D. Pa. 1974).

96. *Id.* at 13, 14.

plaintiff must show not only that the defendant's designation, description or representation is false, but also that the falsification actually deceived a portion of the consuming public.⁹⁷ In order to prevail in the action, the plaintiff need not show individualized loss of sales, but the plaintiff must show some customer reliance on the falsity. The proof of individualized loss of sales goes to the quantum of the monetary damages, not to the maintenance of the action for damages.⁹⁸ With the plaintiff only having to meet the standard of "likely to be damaged" for injunctive relief, the use of the monetary damage remedy seems to be reserved for those cases where the large loss to the plaintiff makes the additional burden of showing actual reliance worthwhile. In most cases, the only remedy sought by the plaintiff is the enjoining of the defendant's activity.

V. CONCLUSION

In the thirty years which have elapsed since the passage of section 43(a) the courts have interpreted the section in varying ways. The general trend of the cases points to a continuing expansion of the section to cover more kinds of conduct and to permit standing to a wider range of plaintiffs. Section 43(a) has already been interpreted not to require "palming off" as long as deception of the consuming public results, and the future may reveal further expansion of the section to find disparagement of another competitor's product to be actionable. Additionally, some courts have extended standing to consumers, and this appears to follow the general move toward increased consumer protection. The ultimate extent of competitor's activity which will be found to be covered by section 43(a) is unknown. The limits of section 43(a) will await the pronouncements of the Supreme Court should it choose to consider the section in the future.

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97. *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958).

98. *Id.*