

WITTLIFF | CUTTER  
TECHNOLOGY LAWYERS

## Apples to Apples: Getting Comparative Advertising Right

38th Annual Corporate Counsel Institute

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## Vintage Comparative Ad

Video Clip

## FTC's Position on Comparative Advertising

“Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions.”

## Legal Framework

- Section 43(a) of the Lanham Act
- Federal Trade Commission Act (FTCA)
- Unfair and Deceptive Trade Practices Acts
- National Advertising Division (NAD)

## Section 43(a) of the Lanham Act

- Competitor need not be named in order to have standing to sue.
- A false or misleading statement of fact about a product or service offered in interstate commerce.
- Such statement either deceived, or had the capacity to deceive, a substantial segment of purchasing customers.
- The deception is material to a consumer's purchasing decision.
- The plaintiff has been or is likely to be injured as a result of the statement at issue.

## "Falsity" under Section 43(a) of the Lanham Act

- Literal Falsity
  - False on its face
  - False by necessary implication
  - Courts will presume that consumers were deceived and harmed
- Literally true but ambiguous
  - Plaintiff has the burden of showing deception and harm
  - Usually done through the use of consumer survey data

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