

THE *LEXMARK* TEST FOR FALSE ADVERTISING STANDING: WHEN TWO PRONGS DON'T MAKE A RIGHT

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The Lanham Act, best known for providing a federal cause of action for trademark infringement, includes provisions that aim to curtail unfair competition.¹ One of those provisions, § 43(a), creates a federal cause of action for false advertising, which occurs when a seller falsely advertises that her product has qualities that in fact it does not have.² Over the past several decades, the number of cases brought under the Lanham Act, especially false advertising cases, has increased.³ This increase underscores the importance of a consistent application of false advertising law, but until recently, courts and litigants were forced to wade through a quagmire of confusing jurisprudence to find a test for standing under § 43(a) of the Lanham Act. In early 2014, there was a three-way circuit split regarding the proper test for § 43(a) standing. *Lexmark International, Inc. v. Static Control Components, Inc.* resolved the split over the correct test for federal

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1. Unfair competition is an umbrella term for commercial torts stemming from a number of unfair, deceptive, and misleading business practices. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 1:8–9 (4th ed. 2009). Unfair competition is notoriously difficult to define, with many judges relying on “principles of old-fashioned honesty” to guide their interpretation of what qualifies as “unfair” in business. *Radio Shack Corp. v. Radio Shack*, 180 F.2d 200, 201 (7th Cir. 1950); *see also* *G. Leblanc Corp. v. H & A Selmer, Inc.*, 310 F.2d 499, 460 (7th Cir. 1962); *Spangler Candy Co. v. Crystal Pure Candy Co.*, 353 F.2d 641, 645 (7th Cir. 1965). Unfair competition is best understood through examples of what courts have found to be unfair competition: infringement of trademarks and service marks; dilution of good will in trademarks; use of confusingly similar corporate, business, and professional names; misappropriation of business values; “bait and switch” selling tactics; below-cost selling; false representations and false advertising; filing a groundless lawsuit; and harassing customers or preventing customers from accessing a competitor’s place of business. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:10 (4th ed. 2009).

2. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:1 (4th ed. 2009).

3. *See generally* J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 44 (1996).

false advertising standing. In *Lexmark*, the Supreme Court examined the three major tests circuit courts previously used to analyze standing to maintain an action for false advertising under the Lanham Act.⁴ Rather than adopt one of those tests, the Court announced a new two-pronged test based solely on the application of the zone-of-interests and proximate-cause requirements.⁵ This new test promises to bring needed consistency and stability to false advertising standing law.⁶ Legal scholars predicted that the *Lexmark* test would broaden standing in most circuits as it removed considerations—potential barriers to standing—integral to the pre-*Lexmark* tests.⁷ However, a standard that facilitates false advertising claims does not necessarily serve the purpose of the Lanham Act: to deter unfair competition.⁸

The *Lexmark* test serves the Lanham Act's goal of protecting persons engaged in commerce against unfair competition better than the previous tests, but it is not perfect. The zone-of-interests prong, which requires that § 43(a) plaintiffs "allege an injury to a commercial interest in reputation or sales,"⁹ appropriately identifies parties within the class of plaintiffs the Lanham Act was intended to protect. But the proximate cause prong may unduly burden plaintiffs by requiring detailed pleadings establishing that the defendant's false advertising proximately caused its injury. For example, a plaintiff suing a defendant with a low market share may face an uphill battle convincing a court that the defendant's false advertising proximately caused its injury. Also, commercial injuries inflicted through network effects—notably in the software industry, where

4. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1392–93 (2014).

5. *Id.* at 1391.

6. See, e.g., Julia Rezvin, *Lawyers Weigh in on Supreme Court's Lexmark Ruling*, LAW360 (Sept. 9, 2014, 10:20 AM), <http://www.law360.com/articles/521983/print?section=appellate>; Bill Donahue, *High Court Clears Up False Ad Standing in Lexmark Ruling*, LAW360 (Sept. 16, 2014, 10:17 AM), <http://www.law360.com/articles/521844/print?section=appellate>; Peter Brody, *A New Test for False Ad Standing Under Lanham Act*, LAW360 (Sept. 16, 2014, 10:15 AM), <http://www.law360.com/articles/526163/print?section=appellate>; Harold P. Weinberger, *2nd Cir. Ruling May Spark More Lanham Act Cases*, LAW360 (Sept. 16, 2014, 10:01 AM), <http://www.law360.com/articles/574964/print?section=appellate>.

7. See *id.*

8. Elizabeth Williams, *Standing to Bring False Advertising Claim or Unfair Competition Claim under § 43(a)(1) of Lanham Act (15 U.S.C. §1125(a)(1))*, 124 A.L.R. FED. 189 (1995).

9. *Lexmark*, 134 S. Ct. at 1390.

indirect network effects¹⁰ drive commercial success—may fail to come within the definition of proximate cause set out by the Court in *Lexmark*. By demanding that plaintiffs plead proximate cause in addition to the causation required for Article III standing in any federal court case, the proximate cause prong may bar plaintiffs that the Lanham Act intended to protect. The proximate cause prong could thus undermine the purpose of the Lanham Act by narrowing the cause of action to plaintiffs whose circumstances of commercial injury allow them to plead proximate cause. Plaintiffs that suffered a commercial injury as a result of false advertising but are unable to show proximate cause could be left without a remedy. If the proximate cause prong bars plaintiffs who should have a cause of action under § 43(a), it may lead to under-enforcement of federal false advertising law. This may in turn lead to an increase in false advertising, particularly in software industries, which would harm both competitors and consumers.

Part I of this Note tracks the development of standing under § 43(a) of the Lanham Act and analyzes the three-way circuit split on false advertising standing that existed before the *Lexmark* decision. Part II describes the Supreme Court's decision in *Lexmark*, focusing on the Court's reasoning for formulating the new two-pronged test and the Court's interpretation of the Lanham Act's purpose. Part III assesses the extent to which both the zone-of-interests prong and the proximate cause prong serve the purposes of the Lanham Act. First, Part III shows how the zone-of-interests prong gives a right of action to plaintiffs with an injury the Lanham Act was intended to protect, focusing on the issue of consumer standing under § 43(a). Next, Part III explains two situations where the proximate cause prong may fail to serve the purpose of the Lanham Act: when the defendant has a low market share, and when the plaintiff's injury was inflicted through network effects. Finally, Part III analyzes courts' application of the proximate cause prong in false advertising cases and concludes that the relaxed application of the proximate cause requirement will likely prevent this prong from barring plaintiffs who otherwise fall within the class of plaintiffs the Lanham Act

10. In industries with indirect network effects, the addition of users on one side of a network benefit users on the other side of the network. See David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-sided Platforms*, 2005 COLUM. BUS. L. REV. 667, 686–87 (2005). For example, in the smartphone industry, as more developers make apps for a platform, users will have more choice of apps to use on their smartphone. As more users buy a type of smartphone, app developers for that smartphone have more customers. Indirect network effects are common in any industry with a two-sided platform, especially the software industry.

was intended to protect. Overall, the *Lexmark* test for federal false advertising standing serves the purpose of the Lanham Act because it grants a cause of action to plaintiffs with a commercial injury, thus deterring unfair competition.

I. DEVELOPMENT OF STANDING JURISPRUDENCE UNDER § 43(A) OF THE LANHAM ACT

Section 43(a) of the Lanham Act establishes a federal civil right of action for false advertising:

Any person who . . . uses in commerce any . . . false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another 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.¹¹

Section 43(a) seems to grant an expansive range of plaintiffs the right to sue: "civil action by any person who believes that he or she is or is likely to be damaged by such an act." Since before § 43(a) was enacted,¹² this ostensibly expansive language has elicited confusion among judges, parties, and legal scholars about who can sue under § 43(a). Perhaps in response to this confusion, courts initially applied § 43(a) sparingly and restrictively.¹³ But over the past several decades, courts have seen an increase in litigation around § 43(a) and have interpreted its provisions more broadly,¹⁴ making a consistent standing inquiry increasingly important. The following Sections provide a foundation of legal standing law and explore courts' evolving interpretations of who has standing to sue under § 43(a).

A. REQUIREMENTS FOR STANDING IN FEDERAL COURT

Today, courts do not construe the Lanham Act's broad phrasing "any person who believes he or she is likely to be damaged by such an act" to

11. Lanham Act, 15 U.S.C. § 1125(a) (2012). See Appendix B for full text of the current version of the Lanham Act.

12. See LOUIS ALTMAN & MALLA POLLACK, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES §2:8 (4th ed. 2007) (noting that in 1925, when Congress was in early stages of drafting the Lanham Act, a representative of the U.S. Trademark Association expressed concerns that the broad language may confer a cause of action upon consumers as well as business entities).

13. See generally MCCARTHY, *supra* note 2, at §§ 27:7–8 (discussing the history and growth of § 43(a)).

14. See generally *id.*; MCCARTHY, *supra* note 3.

confer a cause of action on any possible plaintiff. To bring a case in federal court under § 43(a), plaintiffs must satisfy § 43(a) standing, which includes both Article III standing requirements and statutory standing requirements.

1. *Article III Standing*

First, like all federal plaintiffs, Lanham Act plaintiffs must satisfy Article III standing requirements.¹⁵ Article III, which outlines the powers of the judiciary, sets the ceiling for federal jurisdiction:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to controversies to which the United States shall be a party;—to controversies between . . . citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.¹⁶

Generally, Article III grants federal courts the power to adjudicate actual “cases” and “controversies.”¹⁷ The Supreme Court has established three Article III standing requirements that a plaintiff must meet to show she has a case or controversy: (1) the plaintiff must have suffered an injury-in-fact,¹⁸ (2) there must be a “causal connection between the injury and the conduct complained of,”¹⁹ and (3) a favorable decision must be able to redress the injury.²⁰

2. *Statutory Standing*

In addition to Article III standing, Lanham Act plaintiffs must also satisfy statutory standing requirements, meaning they must come within the class of plaintiffs the Lanham Act designates as having the right to sue.²¹ Courts often refer to this second standing requirement as prudential

15. MCCARTHY, *supra* note 2, at §27:28.

16. U.S. CONST. art. III, §2.

17. *See* Allen v. Wright, 468 U.S. 737, 750 (1984); Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

18. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (describing injury-in-fact as “an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical”) (citations omitted).

19. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

20. *See* Allen, 468 U.S. at 751.

21. MCCARTHY, *supra* note 2, at §27:28.

standing.²² Prudential standing limitations are not found in the text of the Constitution, but have been developed over time by the judiciary as limits to justiciability.²³ These “judicially self-imposed limits on the exercise of federal jurisdiction”²⁴ prevent courts from deciding “abstract questions of wide public significance”²⁵ and can be abrogated by an express statement from Congress.²⁶ The Court has explained that the prudential standing doctrine included “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”²⁷

But the Court recently refined its interpretation of standing doctrine to highlight the difference between prudential and statutory standing. The zone-of-interests requirement, while traditionally understood as a prudential limitation, rests on statutory concerns.²⁸ That is, satisfying the zone-of-interests requirement depends on the text of the statute rather than judicial concerns about limiting federal jurisdiction.²⁹ The Court pointed out that courts “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates,”³⁰ which separates the zone-of-interests requirement from the prudential category.³¹ The Court suggested that a better term for the zone-of-interests standing inquiry would be statutory standing.³² No matter the nomenclature, statutory standing in § 43(a) cases has caused confusion and division in the courts that can be traced back to the Lanham Act’s inception.³³

B. EVOLUTION OF FEDERAL FALSE ADVERTISING STANDING

Historical context helps explain the confusion over § 43(a) standing. The modern Lanham Act is the product of multiple revisions and changes

22. *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014).

23. *See* *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

24. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Allen*, 468 U.S. at 751).

25. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

26. *Bennett*, 520 U.S. at 161.

27. *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751).

28. *See Lexmark*, 134 S. Ct. at 1386–87.

29. *See id.*

30. *See id.* at 1388.

31. *See id.* at 1386–87.

32. *See id.* at 1387 n.4.

33. *See infra* Part I.B.

to prior Acts.³⁴ Today's version of the Lanham Act inherited some of its language from those prior Acts, which helps explain § 43(a)'s overly broad grant of standing.

1. *Legislative History of § 43(a)*

The Lanham Act's origins trace back to an American Bar Association ("ABA") meeting in 1920.³⁵ A special committee convened at the meeting to address the failings of the Trademark Act of 1905, which was the first federal trademark registration statute.³⁶ Even with major amendments that strengthened protections for registered trademarks (and changed its name to the Trademark Act of 1920),³⁷ this original federal trademark statute had proved inadequate to protect American businesses.³⁸ The ABA committee approved a draft of a new federal trademark statute, and while that draft eventually became the Vestal Bill,³⁹ Congress never passed it into law.⁴⁰ But about twenty years later, the ABA resurrected the Vestal Bill, and Congressman Fritz Garland Lanham introduced an altered version to Congress in 1938.⁴¹ The new bill passed and became the Trademark Act of 1946, better known by its common name: the Lanham Act.⁴² This was the first time Congress enacted comprehensive substantive and procedural protections for trademarks and unfair competition,⁴³ leading contemporary scholar Daphne Robert Leeds to state that "American business owes to Mr. Lanham a debt of gratitude it can never pay."⁴⁴

The modern standing language in § 43(a) evolved from § 3 of the Lanham Act's predecessor, the Trademark Act of 1920.⁴⁵ The Trademark Act of 1920 conferred a right of action upon "any person, firm, or corporation doing business in the locality falsely indicated as that of origin, or in the region in which said locality is situated, or at the suit of any

34. See MCCARTHY, *supra* note 2, at §5:4.

35. *Id.*

36. *Id.*

37. *Id.* at §5:3.

38. *Id.* at §5:4.

39. H.R. 7118, 72nd Cong. 1st Sess. (1931).

40. MCCARTHY, *supra* note 2, at §5:4.

41. *Id.*

42. *Id.*

43. *Id.*

44. DAPHNE ROBERT, THE NEW TRADEMARK MANUAL 225 (1947).

45. See ALTMAN & POLLACK, *supra* note 12.

association of such persons, firms, or corporations.”⁴⁶ That language was appropriately circumscribed to specify a class of plaintiffs harmed by trademark infringement. When Congress transitioned the Trademark Act of 1920 into the original 1946 version of the Lanham Act, it broadened the cause of action by removing the geographic limitations, with § 43(a) conferring a right of action upon “any person who believes that he is or is likely to be damaged by the use of any such false description or representation.”⁴⁷ The change reflected a new purpose of the Lanham Act as opposed to the Trademark Act of 1920: to protect persons engaged in commerce against unfair competition.⁴⁸

Section 43(a) has been amended many times since it was enacted, but its only major amendments took place through the Trademark Law Revision Act of 1988,⁴⁹ and the current version of § 43(a) is essentially the same as that 1988 amendment.⁵⁰ This amended version codified the two judicially constructed⁵¹ prongs of § 43(a): false association and false advertising.⁵² Cases involving infringement of unregistered trademarks and trade dress fall under the false association prong, while cases involving verifiably false statements made in advertising and promotion fall under the false advertising prong.⁵³ While this separation into two prongs helped clarify elements of each offense, confusion about who had standing to sue remained under both prongs, and this Note focuses on the false advertising prong.⁵⁴ Confusion over § 43(a) standing clustered around two topics: consumer standing and the direct competitor requirement.

2. *Consumer Standing Under § 43(a)*

From its passage until the late 1980s, the original § 43(a)’s broad standing provision lead to confusion over who had a right to bring suit.⁵⁵

46. Trademark Act of 1920, Pub. L. No. 163, ch. 104, (41 Stat. 533) (repealed 1946).

47. See Appendix for full text of 1946 version of the Lanham Act.

48. See Elizabeth Williams, *Standing to Bring False Advertising Claim or Unfair Competition Claim under § 43(a)(1) of Lanham Act (15 U.S.C. §1125(a)(1))*, 124 A.L.R. FED. 189 (1995).

49. See MCCARTHY, *supra* note 2, at §§ 5:5–11.

50. See JEROME GILSON, GILSON ON TRADEMARK PROTECTION & PRACTICE § 7.02, 7–1 (2000).

51. See MCCARTHY, *supra* note 2, at § 27:9.

52. See Lanham Act, 15 U.S.C. § 1125(a) (2012). See Appendix for full text of the amended version of the Lanham Act § 43(a).

53. See MCCARTHY, *supra* note 2, at § 27:9.

54. See *id.*

55. See ALTMAN & POLLACK, *supra* note 12, at §2:8.

Reading the stated purpose of the Lanham Act⁵⁶ as limiting standing to participants in commerce, most courts concluded that § 43(a) did not confer a right to sue upon consumers.⁵⁷ But at least one court did allow consumers to sue under § 43(a),⁵⁸ and some commentators argued that allowing consumers to sue under § 43(a) could provide a powerful consumer protection tool.⁵⁹

While amended versions of the Lanham Act after the 1980s clarified elements of trademark and unfair competition law, they did not provide any additional guidance on the requirements for standing.⁶⁰ On the contrary, Congress deleted language in the 1988 bill that would confer a cause of action upon consumers under § 43(a).⁶¹ Commentators speculate that this deletion may have reflected a congressional reluctance to alter the courts' momentum toward disallowing federal false advertising consumer standing.⁶² At least one member of Congress⁶³ feared that including such language "would have radically altered the nature of the Lanham Act and would have had the likely effect of turning the Federal courts into a [sic] small claims court."⁶⁴ Many courts have since echoed this fear and insisted that the Lanham Act did not intend to grant consumers a right of action.⁶⁵

56. The Lanham Act's purpose is to protect persons engaged in commerce against unfair competition. *See Williams, supra* note 48, at §1(a).

57. *See, e.g., Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir. 1971); *Thorn v. Reliance Van Co., Inc.*, 736 F.2d 929 (3d Cir. 1984); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981).

58. *See, e.g., Arnesen v. Raymond Lee Org., Inc.*, 333 F. Supp. 116 (C.D. Cal 1971).

59. *See Arthur Best, Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing and Private Litigation*, 20 GA. L. REV. 1, 66–68 (1985) (arguing in favor of consumer standing); 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, 1146–54 (1995) (discussing the benefits of allowing consumer standing in false advertising cases).

60. *See Lanham Act*, 15 U.S.C. § 1125(a) (2012).

61. *See ALTMAN & POLLACK, supra* note 12, at §2:8; *see also* George Russel Thill, *The 1988 Trademark Law Revision Act: Damage Awards for False Advertising and Consumer Standing Under Section 43(a)—Congress Drops the Ball Twice*, 6 DEPAUL BUS. L.J. 361 (1994).

62. *See id.*

63. Representative Hamilton Fish. ALTMAN & POLLACK, *supra* note 12, at §2:8.

64. 134 Cong. Rec. H. 10,419, 10,423 (daily ed. Oct. 19, 1988); *see also* ALTMAN & POLLACK, *supra* note 12, at §2:8.

65. *See, e.g., Serbin v. Ziebart Int'l. Corp., Inc.*, 11 F.3d 1163 (3d Cir. 1993); *Made in the U.S.A. Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 280 (4th Cir. 2009); *Havana Club Holding, S.A. v. Galleon, S.A.*, 62 F. Supp. 2d 1085, 1098 (S.D.N.Y. 1999), *aff'd*, 203 F.3d 116 (2d Cir. 2000).

Under the amended Lanham Act, most courts affirmed the prevailing view that the “any person” language did not include consumers.⁶⁶ One such court reasoned that to allow consumer standing in false advertising cases “would be to convert the Lanham Act from a regulation of commercial interests and unfair competition to a catchall consumer protection statute.”⁶⁷ Some courts allowed individual, non-competitor plaintiffs to sue under § 43(a) if they asserted a commercial interest,⁶⁸ but these cases tended to fall under the false association cause of action rather than the false advertising cause of action.⁶⁹ While enforcing § 43(a) would often protect consumers from false and misleading advertising, to allow a direct consumer cause of action under the Lanham Act would be inconsistent with its stated purpose to protect those engaged in commerce.⁷⁰ For at least false advertising suits under § 43(a), the jurisprudence settled on disallowing consumer standing.⁷¹

3. *The Direct Competitor Requirement Under § 43(a)*

However, barring consumers who had no commercial interest did not completely resolve the confusion surrounding who has standing to sue for false advertising under § 43(a). Courts were still in considerable disagreement over how the plaintiff’s status as a direct competitor of the defendant should affect the standing inquiry.⁷² Most courts did not require

66. See, e.g., *Serbin*, 11 F.3d at 1177 (“[C]onsumers fall outside the range of ‘reasonable interests’ contemplated as protected by the false advertising prong of Section 43(a) of the Lanham Act”).

67. *Guarino v. Sun Co., Inc.*, 819 F. Supp. 405, 409–10 (D.N.J. 1993), *aff’d*, 11 F.3d 1163 (3d Cir. 1993).

68. Plaintiffs have a commercial interest when their sales or reputation are damaged by the defendant’s conduct. Most businesses could assert some kind of commercial interest in § 43(a) cases, but plaintiffs who were merely consumers of the defendant’s product could not. See *ALTMAN & POLLACK*, *supra* note 12, at §2:8.

69. See, e.g., *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1250 (9th Cir. 1997) (noting that a famous actor who commercially exploits his image and identity had standing under § 43(a)); *Loy v. Armstrong World Indus., Inc.*, 838 F. Supp. 991, 997 (E.D. Pa. 1993) (holding that plaintiffs did not have standing under § 43(a) because they were “pure consumers” who lacked a commercial interest); *Condit v. Star Editorial, Inc.*, 259 F. Supp. 2d 1046, 1052 (E.D. Cal. 2003) (holding that a private plaintiff with no manifested intent to commercially exploit her identity has no standing under § 43(a)).

70. See *MCCARTHY*, *supra* note 2, at §27:7.

71. See Malla Pollack, *Suing for False Advertising under Federal Lanham Act* § 8, 111 AM. JUR. TRIALS 303 (database updated Sept. 2014).

72. See Gregory Apgar, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 *FORDHAM L. REV.* 2389, 2389 (2008).

false advertising plaintiffs to be in direct competition with the defendant,⁷³ while a significant minority required plaintiffs to compete directly with a prospective defendant in order to bring a false advertising suit.⁷⁴ Courts that required direct competition typically only applied this condition to false advertising suits, not to false association suits.⁷⁵ Many courts have found such a dichotomy in the inquiry for standing under § 43(a) unacceptable and consequently have rejected the direct competitor approach.⁷⁶ Commentators have also found that this dichotomy adds an undesirable complexity to the already complicated inquiry of § 43(a) standing.⁷⁷

While many courts abandoned a strict direct competitor analysis, most courts included some form of a competition requirement in their analyses. For example, some courts found a competitive injury sufficient to confer false advertising standing when the plaintiff and defendant were not in direct competition.⁷⁸ Such an inquiry into the plaintiff's participation in competition is fitting given the drafters and promoters of the Lanham Act intended it to provide a general federal law of unfair competition.⁷⁹ Of course, the Lanham Act is not so broad as to confer a federal cause of action on common law unfair competition claims,⁸⁰ but courts often explain how the Lanham Act “protects commercial interests against unfair

73. See, e.g., *Conte Bros. Auto., Inc. v. Quaker-State Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998); *Trump Plaza of Palm Beaches Condo. Ass'n, Inc. v. Rosenthal*, 2009 WL 1812743 (S.D. Fla. June 24, 2009).

74. See, e.g., *L.S. Health & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561 (7th Cir. 1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867 (10th Cir. 1995); *Heidelberg Harris, Inc. v. Loebach*, 1997 WL 363972 (D.N.H. 1997), *aff'd*, 145 F.3d 1454 (Fed. Cir. 1998).

75. See, e.g., *Am. Ventures, Inc. v. Post, Buckley, Schuh & Jernigan, Inc.*, 1993 WL 468643 (W.D. Wash. 1993) (finding a non-competitor had standing to sue in a § 43(a) action for unauthorized use of endorsement); *Mktg Unlimited, Inc. v. Munro*, 1993 WL 124694 (W.D.N.Y. 1993) (holding that non-competitor did not have standing in § 43(a) false advertising case).

76. See, e.g., *Conte Bros.*, 165 F.3d at 233; *Guarino v. Sun Co., Inc.*, 819 F. Supp. 405, 409–10 (D.N.J. 1993), *aff'd*, 11 F.3d 1163 (3d Cir. 1993); *Logan Farms v. HBH, Inc. DE*, 282 F. Supp. 2d 776 (S.D. Ohio 2003).

77. See, e.g., *Wrona*, *supra* note 59, at 1136–38 (arguing that courts should apply the same criteria when reviewing standing under both sections of 43(a)).

78. See, e.g., *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F. 2d 6 (1st Cir. 1986); *Logan v. Burgers Ozark County Cured Hams, Inc.*, 263 F. 3d 447 (5th Cir. 2001).

79. See MCCARTHY, *supra* note 2, at §27:7.

80. See *id.*; see also *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912 (9th Cir. 1980) (noting that there is no federal common law of unfair competition).

competition”⁸¹ to frame their discussion of standing in § 43(a) false advertising cases.⁸²

C. TESTS FOR § 43(A) STANDING BEFORE *LEXMARK*: A CIRCUIT SPLIT

Before the Supreme Court’s decision in *Lexmark*, circuit courts split on what test to apply for plaintiff standing in § 43(a) false advertising cases. Three sets of circuit courts applied three different tests: the balancing test, the direct competitor test, and the reasonable interest test.

1. *Balancing Test*

The balancing test, first established by the Third Circuit in *Conte Bros.*, weighs five factors in determining a § 43(a) plaintiff’s right to sue: (1) the nature of the plaintiff’s alleged injury, (2) the directness of the alleged injury, (3) the proximity of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages.⁸³ Subsequently, the Fifth,⁸⁴ Eighth,⁸⁵ and Eleventh⁸⁶ Circuits adopted this test. This test has also been called the antitrust test of standing because it derives its factors from a multifactor antitrust standing analysis found in *Associated General Contractors, Inc. v. California State Council of Carpenters*.⁸⁷ Circuit courts adopting this test saw it as a solution to the dichotomy in false advertising and false association standing inquiries; the balancing test is applied to both § 43(a) causes of action.⁸⁸

81. *POM Wonderful L.L.C v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

82. *See, e.g., id.*; *Nature’s Prods., Inc. v. Natrol, Inc.*, 990 F. Supp. 2d 1307, 1323 (S.D. Fla. 2013); *Natural Answers, Inc. v. SmithKline Beecham Corp.*, 529 F.3d 1325, 1331 (11th Cir. 2008); *Serbin v. Ziebart Int’l Corp.*, 11 F.3d 1163, 1164 (3d Cir. 1993).

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

84. *See, e.g., Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001).

85. *See, e.g., Gilbert/Robinson, Inc. v. Carrie Beverage-Mo., Inc.*, 989 F.2d 985 (8th Cir. 1993).

86. *See, e.g., Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156 (11th Cir. 2007).

87. *See MCCARTHY, supra* note 2, at §27:32; *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

88. *See, e.g., Conte Bros.*, 165 F.3d at 232–33 (declining to adopt the direct competitor test).

2. *Direct Competitor Test*

The Seventh,⁸⁹ Ninth,⁹⁰ and Tenth⁹¹ Circuits adopted the direct competitor test, which requires a § 43(a) false advertising plaintiff to be in direct competition with the defendant.⁹² In this line of reasoning, courts interpreted the Lanham Act's stated purpose to protect those engaged in competition as imposing a stringent requirement on the character of a plaintiff's injuries, which must be "competitive," i.e., harmful to the plaintiff's ability to compete with the defendant."⁹³

3. *Reasonable Interest Test*

In the reasonable interest test, a § 43(a) plaintiff has standing if she can demonstrate "(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising."⁹⁴ The First,⁹⁵ Second,⁹⁶ and, in the lower *Lexmark* decision, Sixth⁹⁷ Circuits adopted this test. By adopting a reasonableness standard, this test does not overburden plaintiffs with the task of proving injury in an area where doing so is difficult given the long causal chains possible in commercial injuries.⁹⁸ But the reasonable interest test grants broad discretion to courts, leading to divergent applications.⁹⁹

89. *See, e.g.,* L.S. Health & Son, Inc. v. AT&T Info. Sys., Inc., 9 F.3d 561, 562 (7th Cir. 1993).

90. *See, e.g.,* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1094 (9th Cir. 1992).

91. *See, e.g.,* Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 868 (10th Cir. 1995).

92. *See, e.g.,* Waits, 978 F.2d at 1094.

93. Barrus v. Sylvania, 55 F.3d 468, 470 (9th Cir. 1995).

94. Famous Horse, Inc. v. 5th Avenue Photo, Inc., 624 F.3d 106, 113 (2d Cir. 2010).

95. *See, e.g.,* Camel Hair, 799 F.2d at 11–12; Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F.2d 154, 160 (1st Cir. 1977).

96. *See, e.g., id.*; Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, L.P., 380 F.3d 126 (2d Cir. 2010).

97. *See* Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 410–11 (6th Cir. 2012); *see also* Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642 (6th Cir. 1982) (adopting an early version of the reasonable interests test).

98. *See* Vincent V. Palladino, *Lanham Act "False Advertising" Claims: What Is a Plaintiff to Do?* 101 TRADEMARK REP. 1601, 1639 (2011).

99. *See* Peter S. Massaro, III, *Filtering Through a Mess: A Proposal to Reduce the Confusion Surrounding the Requirements for Standing in False Advertising Claims Brought Under Section 43(A) of the Lanham Act*, 65 WASH. & LEE L. REV. 1673, 1700–01 (2008).

II. THE *LEXMARK* DECISION

In *Lexmark*, the Supreme Court examined the three major tests the circuit courts used to analyze a party's standing to maintain an action for false advertising under the Lanham Act.¹⁰⁰ The Court announced a new, two-pronged test in an attempt to provide consistency to false advertising law.¹⁰¹

A. FACTS AND PROCEDURAL HISTORY

Petitioner Lexmark manufactures and sells laser printers and toner cartridges.¹⁰² While Lexmark designs its printers to work only with its toner cartridges, other businesses, called "remanufacturers," refurbish used Lexmark toner cartridges and sell them in competition with Lexmark's cartridges.¹⁰³ To prevent empty cartridges from getting into the hands of a competitor, Lexmark introduced a "Prebate" program.¹⁰⁴ Under the Prebate program, customers could purchase Lexmark toner cartridges at a twenty percent discount if they agreed to return the cartridge to Lexmark once it was empty.¹⁰⁵ Lexmark notified customers of the terms of this agreement through text on the toner cartridge packaging.¹⁰⁶ The notice also informed consumers that opening the toner cartridge box would indicate assent to the terms listed on the packaging.¹⁰⁷ Lexmark placed microchips in its toner cartridges to implement the Prebate program.¹⁰⁸ Once a Prebate cartridge ran out of toner, the microchip inside would disable the cartridge, and Lexmark would have to replace the microchip for the cartridge to be used again.¹⁰⁹ The microchips would thus prevent customers from selling empty cartridges to remanufacturers, as remanufacturers would not be able to refill and resell this cartridge as a functional refurbished toner cartridge.¹¹⁰

Respondent Static Control supplies remanufacturers with the components necessary to remanufacture Lexmark cartridges.¹¹¹ In response

100. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1392 (2014).

101. *Id.* at 1395.

102. *Id.* at 1383.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1384.

to Lexmark's Prebate program microchips, Static Control developed a microchip that remanufacturers could use to replace Lexmark microchips, thus allowing remanufacturers to refurbish and resell used Prebate cartridges as well as used non-Prebate cartridges.¹¹²

Lexmark sued Static Control for copyright violations.¹¹³ Static Control counterclaimed, alleging Lexmark's misleading conduct violated § 43(a) of the Lanham Act.¹¹⁴ Static Control first alleged that Lexmark purposefully misled consumers to believe that they were legally required to return empty Prebate cartridges to Lexmark, when in fact they were not.¹¹⁵ Second, Static Control alleged that Lexmark falsely advised to cartridge remanufacturers that it was illegal to sell refurbished Prebate cartridges and to use Static Control's products to refurbish those cartridges.¹¹⁶

The District Court for the Eastern District of Kentucky granted Lexmark's motion to dismiss Static Control's Lanham Act claim, holding that Static Control lacked prudential standing to bring the claim under the balancing test.¹¹⁷ The court reasoned that Static Control's injury was remote because it was a "byproduct of the supposed manipulation of consumers' relationships with remanufacturers," and that there were "more direct plaintiffs in the form of remanufacturers of Lexmark's cartridges."¹¹⁸ On appeal, the Sixth Circuit identified the three competing approaches to standing in Lanham Act cases and applied the reasonable interest test.¹¹⁹ The Sixth Circuit reversed the dismissal of Static Control's Lanham Act claim, finding that Static Control alleged (a) a reasonable interest in its business reputation and sales to remanufacturers, and (b) that those interests were harmed by Lexmark's statements to the remanufacturers that Static Control was engaging in illegal conduct by manufacturing

112. *Id.*

113. *Id.* Lexmark alleged that Static Control's microchips violated both the Copyright Act and the Digital Millennium Copyright Act.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1385.

118. *Id.*

119. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 410–11 (6th Cir. 2012). The Sixth Circuit followed precedent from *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, where the Sixth Circuit applied the reasonable interests test to find the plaintiff has standing to bring a case for false association of trademark under § 43(a). 670 F.2d 642 (6th Cir. 1982). The Sixth Circuit noted that the reasonable interest test applied to both the false advertising and the false association prongs of § 43(a), so it was bound to follow *Frisch's Restaurants* even though that case dealt with false association instead of false advertising.

microchips that mimicked the Prebate microchips.¹²⁰ Lexmark appealed, and the Supreme Court granted certiorari.¹²¹

B. THE SUPREME COURT'S ANALYSIS

The Court, in a decision written by Justice Scalia, unanimously held that in order to “invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.”¹²² Applying this standard, the Court held that Static Control adequately pled both elements and affirmed the Sixth Circuit’s decision to deny Lexmark’s motion to dismiss.¹²³ In reaching its decision, the Court focused on three main discussions. First, the Court discussed the zone-of-interests requirement, which became the first prong of their new two-pronged test for § 43(a) standing.¹²⁴ Second, the Court discussed proximate cause, which became the second prong of the test.¹²⁵ Finally, the Court considered the merits of each of the three proposed tests for § 43(a) standing.¹²⁶

1. Zone-of-Interests Requirement

The Lanham Act allows “any person who believes that he or she is likely to be damaged” by a defendant’s false advertising to bring suit,¹²⁷ but the Court reasoned that Congress did not intend such an expansive reading.¹²⁸ The Court first applied the zone-of-interests test to a case brought under the Administrative Procedure Act in *Association of Data Processing Service Organizations v. Camp*.¹²⁹ Subsequently, the Court has applied the zone-of-interests test to other statutory causes of action.¹³⁰ A plaintiff’s interests must “fall within the zone of interests protected by the law invoked.”¹³¹ The flexibility of the zone-of-interests test depends on the

120. *Id.* at 411.

121. *See id.* at 1393.

122. *Lexmark*, 134 S. Ct. at 1395.

123. *Id.* at 1393–1395.

124. *Id.* at 1389.

125. *Id.* at 1390.

126. *Id.* at 1392–93.

127. Lanham Act, 15 U.S.C. § 1125(a) (2012).

128. *See Lexmark*, 134 S. Ct. at 1389.

129. *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (noting the zone of interests limited the cause of action for judicial review under the Administrative Procedure Act).

130. *See Lexmark*, 134 S. Ct. at 1389.

131. *Id.* at 1388 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

breadth of interests protected by the statute at issue.¹³² Helpfully, the Lanham Act includes a statement of its interests:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.¹³³

Noting that false advertising cases implicate only the protection against unfair competition section of the Lanham Act's purpose, the Court described unfair competition as "concerned with injuries to business reputation and present and future sales."¹³⁴ The Court held that "to come within the zone of interests in a false advertising suit under [§ 43(a)], a plaintiff must allege an injury to a commercial interest in reputation or sales."¹³⁵

2. *Proximate Cause*

With the zone-of-interests prong settled, the Court moved on to a second general requirement for a suit: proximate cause. After a brief survey of precedent,¹³⁶ the Court concluded that it was bound to limit causes of action under § 43(a) to "plaintiffs whose injuries are proximately caused by

132. *See Lexmark*, 134 S. Ct. at 1389.

133. Lanham Act, 15 U.S.C. § 1127 (2006).

134. *Lexmark*, 134 S. Ct. at 1389–90 (citing Edward S. Rogers, *Book Review*, 39 YALE L. J. 297, 299 (1929) (reviewing HARRY D. NIMS, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* (1929)); RESTATEMENT OF TORTS, ch. 35, intro. note (1938)).

135. *Lexmark*, 134 S. Ct. at 1390.

136. *See id.* The Court reviewed several cases where statutory causes of action were limited by a proximate cause requirement: *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342–46 (2005) (requiring proximate cause for claims involving securities fraud); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (requiring proximate cause for a successful claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO")); *Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–36 (1983) (discussing proximate cause in relation to a claim under the Clayton Act).

violations of the statute.”¹³⁷ As such, the Court held that Lanham Act plaintiffs must show economic or reputational injury “flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.”¹³⁸ Having established that any satisfactory test for § 43(a) standing must contain both a zone-of-interests requirement and a proximate cause requirement, the Court moved on to evaluate the three tests used by the circuit courts.¹³⁹

3. *Proposed Tests for Standing*

With these two prongs established, the Court considered the three tests for plaintiff standing under § 43(a) currently in use by the lower courts: the balancing test, the direct competitor test, and the reasonable interest test.

First, the Court reviewed the balancing test, which weighs five factors in determining a § 43(a) plaintiff’s right to sue.¹⁴⁰ The first three factors, the Court reasoned, were essentially the zone-of-interests test and proximate cause requirement.¹⁴¹ As those factors must be met in every case, it was not appropriate to balance them. The last two factors, which may hint at a motivation for the proximate cause requirement, were insufficient bases to prevent an injured plaintiff from bringing suit under § 43(a).¹⁴² So, the Court dismissed this test.¹⁴³

Next, the Court found the direct competitor test, requiring a § 43(a) plaintiff to be in direct competition with the defendant,¹⁴⁴ to be an unduly restrictive bright-line rule.¹⁴⁵ When Congress passed the Lanham Act, the common law tort of unfair competition included actions between indirect competitors,¹⁴⁶ so limiting an unfair competition cause of action under the Lanham Act to plaintiffs who are direct competitors would frustrate Congress’s intent in passing the Lanham Act.¹⁴⁷

137. *Lexmark*, 134 S. Ct. at 1390.

138. *Id.* at 1391.

139. *Id.*

140. *See supra* Part I.C.1.

141. *Lexmark*, 134 S. Ct. at 1392.

142. *Id.*

143. *Id.*

144. *See supra* Part I.C.2.

145. *Lexmark*, 134 S. Ct. at 1392.

146. *Id.* (citing Edward S. Rogers, *Book Review*, 39 YALE L.J. 297, 299 (1929)).

147. *See Lexmark*, 134 S. Ct. at 1392.

Finally, the Court reviewed the reasonable interests test¹⁴⁸ applied by the Sixth Circuit on appeal. Because of its “widely divergent application” and because reasonableness was not the correct inquiry, the Court dismissed this test as well.¹⁴⁹

Having dismissed all three tests as inappropriate inquiries for § 43(a) plaintiffs, the Court concluded that “a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue.”¹⁵⁰

III. THE *LEXMARK* TEST SERVES THE LANHAM ACT’S PURPOSE

The *Lexmark* test remedied the three-way circuit split on false advertising standing by giving the lower courts a single, administrable test for § 43(a) standing. While consistency and applicability are admirable goals for a standing test, they are not the only goals a test for standing should achieve. Another appropriate metric of a test for statutory standing is how well it serves the statute’s purpose. Congress included a statement of purpose in the Lanham Act, which in relevant part states: “[t]he intent of this chapter is . . . to protect persons engaged in such commerce against unfair competition.”¹⁵¹ The Court in *Lexmark* noted this purpose at the outset of its analysis, setting the tone for creating a standing test that would help achieve the Lanham Act’s goals. The *Lexmark* test better serves the Lanham Act’s purpose than did the prior three tests. However, issues may emerge in the application of both the zone-of-interests prong and the proximate cause prong that would hinder fulfillment of the Lanham Act’s purpose.

A. THE *LEXMARK* TEST BETTER SERVES THE LANHAM ACT’S PURPOSE THAN THE THREE PREVIOUS TESTS

While the new standing test for false advertising under § 43(a) may not perfectly serve the Lanham Act’s purpose, it comes closer than did the three previous standing tests.

148. See *supra* Part I.C.3.

149. *Lexmark*, 134 S. Ct. at 1393 (“The relevant question is not whether the plaintiff’s interest is ‘reasonable,’ but whether it is one the Lanham Act protects; and not whether there is a ‘reasonable basis’ for the plaintiff’s claim of harm, but whether the harm alleged is proximately tied to the defendant’s conduct”).

150. *Id.* at 1391.

151. 15 U.S.C. §1127 (2006).

1. *The Lexmark Test Has Advantages over All Three Previous Tests*

In some aspects, the *Lexmark* test is an improvement over all three previous tests in the same way. First, *Lexmark* provides a single standing test for all jurisdictions. This improvement from the three-way circuit split brings consistency on standing appropriate for a federal false advertising statute. The Lanham Act was created to afford all commercially injured plaintiffs in the United States access to the same relief, and the different standing tests among the circuits was not conducive to this goal. Consider, for example, that in the year before the *Lexmark* decision was released, seven out of twelve false advertising plaintiffs (fifty-eight percent) were successful on a challenge to statutory standing in balancing test districts,¹⁵² as opposed to seven out of eleven false advertising plaintiffs (sixty-four percent) in reasonable interest districts,¹⁵³ and seven out of fourteen false advertising plaintiffs (fifty percent) in direct competitor districts.¹⁵⁴

152. This data was collected using WestlawNext, by searching for all false advertising cases under § 43(a) within the range 3/24/2013 to 3/24/2014 that dealt with standing. *See* Avaya Inc. v. Telecom Labs, Inc., 2014 WL 97335 (D.N.J. Jan. 7, 2014); Innovasystems, Inc. v. Proveris Scientific Corp., 2013 WL 5539288 (D.N.J. 2013); Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc., 2014 WL 702128 (D. Minn. 2014); York Group, Inc. v. Pontone, 2014 WL 896632 (W.D. Penn. 2014); FieldTurf USA, Inc. v. TenCate Thiolon Middle East, 945 F. Supp. 2d 1379 (N.D. Ga. 2013); Nature's Prods., Inc. v. Natrol, Inc., 990 F. Supp. 2d 1307 (S.D. Fla. 2013); Eastman Chem. Co. v. PlastiPure, Inc., 969 F. Supp. 2d 756 (W.D. Tex. 2013); Corizon, Inc. v. Wexford Health Sources, Inc., 2013 WL 3821268 (E.D. Mo. 2013); Cartier Int'l A.G. v. Daniel Markus, Inc., 2013 WL 5567150 (D.N.J., Oct. 3, 2013); Aceto Corp. v. TherapeuticsMD, Inc., 953 F. Supp. 2d 1269 (S.D. Fla. 2013); *In re* Gerber Probiotic Sales Practices Litig., 2013 WL 4517994 (D.N.J. 2013).

153. *See* Holdings B.V. v. Asiarim Corp., 992 F. Supp. 2d 223 (S.D.N.Y. 2013); Groeneveld Transp. Efficiency, Inc. v. Lubecore Intern., Inc., 730 F.3d 494 (6th Cir. 2013); R & L Merch., LLC v. Alex and Ani, LLC, 2013 WL 2434988 (M.D. Tenn., June 4, 2013); Sarah's Hat Boxes, LLC v. Patch Me Up, LLC, 2013 WL 1563557 (D.N.H., April 12, 2013); Klauber Bros., Inc. v. Russell-Newman, Inc., 2013 WL 1245456 (S.D.N.Y., March 26, 2013); Boston Cab Dispatch, Inc. v. Uber Techs., Inc., 2014 WL 1338148 (D. Mass., March 27, 2014); Savage v. Beiersdorf, Inc., 2013 WL 5532756 (Sept. 30, 2013); Sik Gaek, Inc. v. Yogi's II, Inc., 2013 WL 2408606 (E.D.N.Y., June 3, 2013); North Am. Olive Oil Ass'n v. Kangadis Food, Inc., 962 F. Supp. 2d 514 (S.D.N.Y. 2013); Migliore & Assocs., LLC v. Kentuckiana Reporters, LLC, 2013 WL 5323035 (W.D. Ky., Sept. 20, 2013); Global Fleet Sales, LLC v. Delunas, 2014 WL 634075 (E.D. Mich., Feb. 18, 2014).

154. *See* Sprint Nextel Corp. v. Welch, 2014 WL 68957 (E.D. Cal., Jan. 8, 2013); Gen. Steel Domestic Sales, LLC v. Chumley, 2013 WL 1900562 (D. Colo., May 7, 2013); E. Clampus Vitus v. Steiner, 2013 WL 4431992 (E.D. Cal., Aug. 16, 2013); A.F.L. Telecomms. LLC v. SurplusEQ.com, Inc., 946 F. Supp. 2d 928 (D. Ariz. 2013); Stahl Law Firm v. Judicate West, 2013 WL 6200245 (N.D. Cal., Nov., 27 2013); Animal Legal Def. Fund v. H.V.F.G. LLC, 2013 WL 3242244 (N.D. Cal., June 25, 2013); Stahl Law Firm v. Judicate West, 2013 WL 4873065 (N.D. Cal., Sept. 12, 2013);

Whether or not this difference represents an actual difference in likelihood of plaintiff success is debatable, but the three tests were different enough to provide substantially different standing standards for plaintiffs to meet. This difference in standards may have encouraged forum shopping and led to inconsistent jurisprudence in federal false advertising standing. The *Lexmark* test ends these problems and achieves the consistent access to remedies for commercial injuries intended by the Lanham Act.

Second, courts may draw upon a wealth of caselaw when applying the *Lexmark* test's two prongs: zone-of-interests and proximate cause. While neither prong has been explicitly applied in the federal false advertising context before, both are concepts used to evaluate standing under other statutes. For example, courts use the zone-of-interests inquiry to evaluate standing in cases brought under the Administrative Procedure Act ("APA"), federal agriculture statutes, federal election statutes, environmental statutes, financial and banking regulations, immigration statutes, tax statutes, and workers' compensation statutes.¹⁵⁵ Cases dealing with financial and banking regulations may be especially helpful analogies to § 43(a) false advertising cases because the zone-of-interests inquiries in both types of cases relate to commerce. In one such case, the Supreme Court reasoned that the plaintiffs, multiple data services companies, had standing to challenge a ruling by the Comptroller of the Currency under the APA because the ruling harmed the plaintiffs' business and economic interests, meaning they were "aggrieved persons" who fell within the zone of interests protected by the APA.¹⁵⁶

Proximate cause is originally a torts concept, and this common law principle is notoriously difficult to define, which may complicate its application to statutes.¹⁵⁷ Nevertheless, the Supreme Court has applied

Almblad v. Scotsman Inds., Inc., 2013 WL 4600209 (N.D. Ill., Aug. 28, 2013); *Think Computer Corp. v. Dwolla, Inc.*, 2014 WL 1266213 (N.D. Cal., March 24, 2014); *Shaker v. Nature's Path Foods, Inc.*, 2013 WL 6729802, n. 9 (C.D. Cal., Dec. 16, 2013); *Animal Legal Def. Fund v. H.V.F.G. LLC*, 939 F. Supp. 2d 992 (N.D. Cal. 2013); *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 967 F. Supp. 2d 1347 (N.D. Cal. 2013); *CrossFit, Inc. v. Alvies*, 2014 WL 251760 (N.D. Cal. Jan. 22, 2014); *Storm Mfg. Group Inc. v. Weather Tec Corp.*, 2013 WL 5352698 (C.D. Cal. Sept. 23, 2013).

155. See Donald T. Kramer, J.D., "Zone of interests" test in determining standing in litigation involving federal statutes—*Supreme Court cases*, 153 A.L.R. FED. 357, §§9–15 (originally published in 1999).

156. See *Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970).

157. See Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1201–05 (2013) (discussing how courts, legal scholars, and even legal dictionaries

proximate cause to several statutes, including securities fraud,¹⁵⁸ the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹⁵⁹ the Clayton Act,¹⁶⁰ and others.¹⁶¹ For example, RICO provides a private right to action to “[a]ny person injured in his business or property by reason of a violation’ of the RICO’s substantive restrictions,”¹⁶² a standing provision similarly broad to that in § 43(a).¹⁶³ When applying the proximate cause requirement in a RICO case, the Supreme Court found the plaintiff lacked standing when the “attenuated connection between [the plaintiff’s] injury and [the defendant’s] injurious conduct” implicates “fundamental concerns” embedded in the proximate cause requirement,¹⁶⁴ including the “demand for some direct relation between the injury asserted and the injurious conduct alleged”¹⁶⁵ and difficulty in “ascertain[ing] the damages caused by some remote action.”¹⁶⁶

Such a wealth of precedent for both the zone-of-interests prong and the proximate cause prong should allow for consistency in judicial application of the *Lexmark* test. This consistency will further the Lanham Act’s purpose of providing all plaintiffs participating in U.S. commerce a cause of action to remedy their commercial injuries. The *Lexmark* test also has advantages over the previous tests specific to each test.

use many different definitions for proximate cause because it embodies an attribution of moral blameworthiness that changes depending on the facts of the case).

158. *See, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342–46 (2005) (requiring proximate cause for claims involving securities fraud).

159. *See, e.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (requiring proximate cause for a successful claim under the Racketeer Influenced and Corrupt Organizations Act (RICO)); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006) (restating that proximate cause is required to sue under RICO).

160. *See, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535–36 (1983) (discussing proximate cause in relation to a claim under the Clayton Act).

161. *See, e.g.*, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) (applying proximate cause to the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”)); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703–04 (2004) (examining proximate causation with respect to the Federal Tort Claims Act); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (reasoning that the National Environmental Policy Act (“NEPA”) requires a causal standard similar to proximate cause).

162. *Anza*, 547 U.S. at 453 (quoting 18 U.S.C. § 1964(c) (2000)).

163. § 43(a) grants “any person who believes he or she is likely to be damaged by such an act [of false advertising or false association of trademark]” a cause of action. Lanham Act, 15 U.S.C. § 1125(a) (2012).

164. *Anza*, 547 U.S. at 459.

165. *Id.* at 457 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)).

166. *Id.* at 458.

2. *The Lexmark Test Has Advantages Specific to Each of the Three Previous Tests*

First, the balancing test¹⁶⁷ assessed a plaintiff's standing by considering five factors, several of which were unrelated to the Lanham Act's purpose of providing a cause of action to commercial plaintiffs in need of protection against unfair competition. When the Third Circuit first adopted the test, proponents cited the similarities in antitrust and unfair competition law as support for applying the *Associated General* factors, used as a standing test in antitrust law, to false advertising.¹⁶⁸ Critics point out that the balancing test brings to false advertising inappropriate goals from its origins in antitrust law.¹⁶⁹ Antitrust law protects "competition, not competitors," but the Lanham Act protects both.¹⁷⁰ The five factors thus place an inordinate emphasis on competition, undermining the test's attempt to stay true to the Lanham Act's goals by protecting those engaged in competition. By weighing factors intended only to protect competition, not competitors, the balancing test can curtail competitors' right to sue.¹⁷¹

In formulating the balancing test, the Third Circuit noted that "[t]he congressionally-stated purpose of the Lanham Act . . . evidences an intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers the purposes of the Lanham Act."¹⁷² Congress indeed intended § 43(a) of the Lanham Act to apply only to commercial harm brought about by another's false advertising, encompassing a narrow class of plaintiffs. But Congress did not intend to exclude plaintiffs who had suffered commercial harm based on such factors as uncertainty in damages. As the Court noted in *Lexmark*, a court "cannot limit a cause of action that Congress has created merely because 'prudence' dictates."¹⁷³ The balancing test thus considered factors irrelevant to the Lanham Act's purpose, which makes the *Lexmark* test a better approximation of the Lanham Act's interests.

167. See *supra* Part I.C.1.

168. See MCCARTHY, *supra* note 2, at §27:32, n. 1; Restatement (Third) Unfair Competition § 3, cmt. f (1995).

169. Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1376–79 (2011).

170. *Id.* at 1377.

171. *Id.*

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

173. *Lexmark*, 134 S. Ct. at 1388.

Second, the direct competitor test¹⁷⁴ offered a categorical test that was easier to apply than the other tests, but ultimately at odds with the Lanham Act's purpose. Nowhere does the Lanham Act require a plaintiff suffering commercial injury to be in direct competition with the party responsible for said injury.¹⁷⁵ And indeed, the Court in *Lexmark* recognized that the direct competitor test was too narrow to serve the Lanham Act's purpose.¹⁷⁶ The test's requirement of direct competition has been criticized as an overly simplistic and restrictive view of the Lanham Act's purpose and connection to unfair competition,¹⁷⁷ suggesting that the direct competitor test actually ran counter to the broad language granting standing under § 43(a).¹⁷⁸

In addition, the direct competitor test needlessly complicated § 43(a) standing analysis by requiring two different statutory standing tests for the two prongs of § 43(a) even though the text of the Lanham Act provides only one standing provision in § 43(a). While proponents of the direct competitor test argued its categorical standard lends itself to a more consistent application and clearer holdings,¹⁷⁹ this test often leads courts to apply a different standard to false association cases as opposed to false advertising cases because a false association defendant need not be in direct competition with a plaintiff to infringe her trademark.¹⁸⁰ Cases and commentators alike have criticized the direct competitor test for this dichotomy as it creates two separate § 43(a) standing tests absent any textual support from the Lanham Act.¹⁸¹ The Lanham Act merely states that "any person who believes he or she is likely to be damaged by such an act [of trademark infringement or unfair competition]" may bring suit under § 43(a).¹⁸² When Congress divided § 43(a) into two prongs (false advertising and false association) in the Trademark Revision Act of 1988, it did not suggest that the standing inquiries should be different for the

174. See *supra* Part I.C.2.

175. See MCCARTHY, *supra* note 2, at §27:32.

176. *Lexmark*, 134 S. Ct. at 1392.

177. See MCCARTHY, *supra* note 2, at §27:32.

178. See Gerald M. Meyer, *Standing Out: A Commonsense Approach to Standing for False Advertising Suits Under Lanham Act Section 43(A)*, 2009 U. ILL. L. REV. 295, 311–313 (2009).

179. See, e.g., *Halicki v. United Artists Commc'ns, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987).

180. See Meyer, *supra* note 178, at 315.

181. See, e.g., *Apgar*, *supra* note 72, at 2407–08; *Conte Bros. Auto., Inc. v. Quaker-State Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998).

182. Lanham Act, 15 U.S.C. § 1125(a) (2012). See Appendix B for full text of the current version of the Lanham Act.

two causes of action.¹⁸³ In fact, a draft of the Trademark Revision Act of 1988 would have narrowed standing to parties “damaged in [their] business or profession,” but Congress chose not to adopt this altered standing language into the Lanham Act.¹⁸⁴ The direct competitor test therefore subverts Congress’s intent to maintain the same standing test for both prongs of § 43(a). Instead of adhering to Congress’s instruction for standing in the Lanham Act, the direct competitor test created two different standing inquiries for the two prongs of § 43(a).

Finally, the reasonable interest test¹⁸⁵ failed to apply restrictions on standing inherent in the Lanham Act’s purpose. Because the reasonable interest test required only a reasonable interest in being protected against the alleged false advertising,¹⁸⁶ *Lexmark* is a comparatively narrower test.¹⁸⁷ Unlike the previous two tests, the reasonable interest test warranted narrowing. The “reasonable” inquiry likely cast an overly broad net, possibly leading to over-enforcement of § 43(a) by granting too many plaintiffs standing.¹⁸⁸ Moreover, the conspicuous absence of a discussion of commercial injury divorced the reasonable interest test’s inquiry from the purpose of the Lanham Act. As the Lanham Act expressly states that it intends to protect those engaged in commerce from unfair competition, some inquiry into commercial participation is a mandatory element of any standing test that serves the Lanham Act’s purpose. The zone-of-interests prong of the *Lexmark* test remedies this oversight in the reasonable interest test.

B. THE ZONE-OF-INTERESTS PRONG SERVES THE PURPOSE OF THE LANHAM ACT

The zone-of-interests prong of the *Lexmark* test serves the purpose of the Lanham Act because it gives a right of action to plaintiffs with a commercial injury. In general, the zone-of-interests inquiry asks whether

183. Brief of Law Professors as Amici Curiae in Support of Neither Side at 8, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

184. Brief of Law Professors as Amici Curiae in Support of Neither Side at 9, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

185. See *supra* Part I.C.3.

186. See *Famous Horse, Inc. v. 5th Avenue Photo, Inc.*, 624 F.3d 106, 113 (2d Cir. 2010).

187. See, e.g., Julia Rezvin, *Lawyers Weigh in on Supreme Court’s Lexmark Ruling*, LAW360 (Sept. 9, 2014, 10:20 AM), <http://www.law360.com/articles/521983/print?section=appellate>.

188. See Meyer, *supra* note 178, at 318.

“a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”¹⁸⁹ The zone-of-interests test originated as a limitation on the cause of action conferred by the APA.¹⁹⁰ Over time, the Court has refined the analysis and found the zone-of-interests test to be a “requirement of general application . . . which applies unless it is expressly negated [by Congress].”¹⁹¹

Section 43(a) false advertising cases fall under the Lanham Act’s goal to “protect persons engaged in [commerce within the control of Congress] against unfair competition,”¹⁹² and the zone-of-interests prong of the *Lexmark* test promotes that goal. In its amicus curiae brief, the American Intellectual Property Law Association (“AIPLA”) argued that only minimal prudential standing requirements were consistent with the language of the Lanham Act.¹⁹³ The law professors’ amicus brief similarly argued against a rigid standing doctrine for Lanham Act false advertising.¹⁹⁴ While the Court ultimately rejected the AIPLA’s contention that the reasonable interest test led to an evaluation of standing consistent with Congress’s intent, the Court echoed the amici briefs’ concerns that the test for standing should fulfill the Lanham Act’s purpose. Noting that unfair competition “was understood to be concerned with injuries to business reputation and present and future sales,” the Court in *Lexmark* held that to come within the zone of interests in a § 43(a) false advertising suit, “a plaintiff must allege an injury to a commercial interest in reputation or sales.”¹⁹⁵ The Court thus crafted the § 43(a) zone-of-interests test in light of Congress’s expressed intent for the Lanham Act. By requiring only an injury to a commercial interest in reputation or sales, the zone-of-interests test gives the lower courts an administrable standard that grants standing to plaintiffs that Congress intended to be included within the Lanham Act.

But even with a test specifically created to reflect the Lanham Act’s purpose, the zone-of-interests prong may incite new standing issues. The

189. *Lexmark*, 134 S. Ct. at 1387.

190. *See* Ass’n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

191. *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

192. *See Lexmark*, 134 S. Ct. at 1389.

193. Brief of American Intellectual Property Law Association as Amici Curiae in Support of Neither Party at 10, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

194. *See* Brief of Law Professors as Amici Curiae in Support of Neither Side at 2, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

195. *Lexmark*, 134 S. Ct. at 1387.

test may be broad enough to resurrect consumer standing under § 43(a). Commentators generally believed that the controversy over consumer standing in § 43(a) false advertising cases was put to rest by the early 1990s, when courts consistently held that the Lanham Act did not extend a right of action to consumers.¹⁹⁶ But Rebecca Tushnet suggested at the Supreme Court IP Review (“SCIPR”) conference that the zone-of-interests test may encompass consumers engaged in commerce, not just participants in commerce who sell products and services.¹⁹⁷ Congress intended the Lanham Act to protect persons engaged in commerce against unfair competition, and consumers are engaged in commerce.¹⁹⁸ One purpose of trademark law is to protect consumers from deception, and this purpose lends itself to an interpretation of consumers as persons engaged in commerce.¹⁹⁹

However, most experts believe that standing in § 43(a) false advertising cases will, and should, continue to elude consumers. In its amicus brief, the AIPLA argued that “the proper [§ 43(a) false advertising standing] test must be broad enough to allow commercial entities—but not consumers—to sue,” noting that the Lanham Act’s “persons engaged in . . . commerce” language actually supports such a restriction on consumer standing.²⁰⁰ Jameson Jones at the SCIPR conference cited fairly uniform pre-*Lexmark* circuit court precedent denying consumers standing under the Lanham Act in support of the same restriction.²⁰¹ Given the Lanham Act’s genesis as a response to the inadequate commercial protection provided by the federal Trademark Act of 1905 and the subsequent development of the Lanham Act as a statute protecting commercial interests, it seems more honest to the Lanham Act’s purpose to interpret “persons engaged in commerce” as excluding consumers.²⁰²

196. *See, e.g., Serbin v. Ziebart Int’l. Corp., Inc.*, 11 F.3d 1163 (3d Cir. 1993) (concluding that consumers fall outside the range of interests intended to be protected by § 43(a)).

197. Rebecca Tushnet, *Supreme Court IP Review: Lexmark Int’l v. Static Control Components*, IIT CHICAGO-KENT COLLEGE OF LAW (Friday, Sept. 12, 3:15 PM) <http://www.kentlaw.iit.edu/scipr>.

198. *See id.*

199. *See id.*

200. Brief of American Intellectual Property Law Association as Amici Curiae in Support of Neither Party at 13, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

201. Jameson Jones, *Supreme Court IP Review: Lexmark Int’l v. Static Control Components*, IIT CHICAGO-KENT COLLEGE OF LAW (Friday, Sept.12, 3:15 PM) <http://www.kentlaw.iit.edu/scipr>.

202. *See MCCARTHY, supra* note 2, at §5.4.

Finally, consumers can turn to state law to remedy injuries inflicted by false advertising.²⁰³ Practically, then, consumers injured by a company's false advertising may still find relief, although concerns about consistency of law and forum shopping remain, as a consumer could decide to sue a company for false advertising in the state with the most favorable unfair competition or consumer protections laws.

While the Court in *Lexmark* did not directly confront the issue of consumer standing, as neither *Lexmark* nor *Static Control* argued that consumers should have standing,²⁰⁴ the Court impliedly rejects consumer standing in its decision. The Court provides an example of how consumer injury falls outside the zone of interests of the Lanham Act: “[a] consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act.”²⁰⁵ While the Court did not directly bar consumers from the § 43(a) cause of action, courts are likely to interpret *Lexmark* as confirmation of the mostly settled jurisprudence that consumers do not have standing under § 43(a).

As the case was so recently decided and § 43(a) consumer standing is now rarely litigated, few federal false advertising cases dealing with consumer standing have occurred after *Lexmark*. But at least one court rejected standing because the plaintiff, a telecommunications company, purchased products from the defendant and was not in competition with the defendant.²⁰⁶ In that case, the court noted that the “injury . . . [at hand was] precisely the type of harm the *Lexmark* Court was careful to distinguish as falling outside the Lanham Act’s purview.”²⁰⁷ Given the district court’s quick dismissal of the suit of a commercial entity because it was a consumer of the defendant’s products, courts will likely not use

203. See, e.g., Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201–2(4)(ix), (x) (2007) (providing consumers a false advertising cause of action in Pennsylvania); Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. (providing consumers a false advertising cause of action in California).

204. See Respondent’s Brief on the Merits at 47–48, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873); Petitioner’s Brief on the Merits at 38–39, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

205. *Lexmark*, 134 S. Ct. at 1390.

206. See *Locus Telecomms., Inc. v. Talk Global LLC*, 2014 WL 4271635 at *2–3 (D.N.J., August 28, 2014) (dismissing the Lanham Act claim because the “allegations, taken as true, indicate that the complained-of conduct involves [Plaintiff] and [Defendant] as purchaser and seller, respectively, and not as competitors”).

207. *Id.* at *2.

Lexmark to support individual consumer standing in Lanham Act false advertising cases.

The potential to resurrect federal false advertising consumer standing may be an embodiment of a more fundamental concern with the Court's formulation of the zone-of-interests test. The Court's interpretation of the Lanham Act's purpose—to protect those engaged in commerce against unfair competition—as requiring “an injury to a commercial interest in reputation or sales”²⁰⁸ may not accurately reflect a modern understanding of “commerce.” As the digital age pushes commerce farther away from the face-to-face dealings on which classic conceptions of business and unfair competition were based,²⁰⁹ it becomes more difficult to draw a line between consumer and non-consumer. Modern conceptions of what constitutes unfair competition must stretch to fit changes modern technology has triggered in the economy, including sharing economy businesses like Uber and Airbnb²¹⁰ and multi-sided networks common in platform technologies such as computer operating systems.²¹¹ If the conception of commerce stretches enough, the Court's interpretation of the Lanham Act's purpose as requiring “an injury to a commercial interest in reputation or sales”²¹² may cease to fit modern conceptions of what constitutes commerce and unfair competition. While a resurgence of consumer standing in false advertising is unlikely as the Court seems to have rejected the idea, challenges to the Court's interpretation of the Lanham Act's express purpose may surface in § 43(a) litigation.

C. THE PROXIMATE CAUSE PRONG MAY FAIL TO SERVE THE LANHAM ACT'S PURPOSE IN SOME CIRCUMSTANCES

Unlike the zone-of-interests prong, the proximate cause prong may not serve the purpose of the Lanham Act. When formulating the proximate cause prong, the Court noted that it construed federal causes of action in several contexts, including securities fraud, RICO, and the

208. *Lexmark*, 134 S. Ct. at 1387.

209. For example, Justice Scalia in *Lexmark* based his contention that unfair competition is “understood to be concerned with injuries to business reputation and present and future sales” on a law review article from 1929 and a Restatement of Torts from 1938. See *Lexmark*, 134 S. Ct. at 1389–90 (citing Edward S. Rogers, *Book Review*, 39 YALE L. J. 297, 299 (1929); 3 Restatement of Torts, ch. 35, Introductory Note, pp. 536–537 (1938)).

210. For further discussion on the sharing economy, see Thomas A. Dickerson & Sylvia O. Hinds-Radix, *Taxing Internet Transactions: Airbnb and the Sharing Economy*, 86-AUG N.Y. ST. B.J. 49 (2014).

211. For further discussion on multi-sided networks, see *infra* Part III.C.2.

212. *Lexmark*, 134 S. Ct. at 1387.

Clayton Act, as having a proximate causation requirement.²¹³ Applying proximate cause in these contexts paved the way to include a proximate cause requirement in the test for standing under § 43(a) of the Lanham Act.²¹⁴ But the Court did not discuss the purpose of the Lanham Act and how the proximate cause requirement might affect that purpose, unlike in *Lexmark's* zone-of-interests section, where the Court discussed the purpose of the Lanham Act at length. Without considering how a proximate cause requirement would affect the Lanham Act's ability to protect those engaged in commerce against unfair competition, the Court may have unintentionally created a prong that bars plaintiffs the Lanham Act intended to admit, frustrating Congress's intent in passing the Lanham Act.

The proximate cause inquiry asks “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits,” and generally “bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.”²¹⁵ The proximate cause prong is another causation requirement in addition to the Article III causation requirement for standing in federal court. The Court recognized that all commercial injuries suffered by plaintiffs in false advertising suits “are derivative of those suffered by consumers who are deceived by the advertising,” so the intervening step of consumer injury does not bar the commercial plaintiff’s standing.²¹⁶ The Court held that a § 43(a) plaintiff must plead proximate cause by showing that its economic or reputational injury “flow[ed] directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.”²¹⁷ Situations where “deception produces injuries to a fellow commercial actor that in turn affect the plaintiff,” the Court noted, do not satisfy the proximate cause requirement.²¹⁸

Neither *Lexmark* nor *Static Control* disputed a proximate cause requirement. Rather, both parties structured their briefs assuming the standing test would include a proximate cause requirement: *Static Control* argued that it sufficiently pled that *Lexmark* proximately caused *Static Control's* injuries,²¹⁹ and *Lexmark* argued that *Static Control's* alleged

213. *See id.* at 1390.

214. *See id.*

215. *Id.*

216. *Id.* at 1391.

217. *Id.*

218. *Id.*

219. *See* Respondent’s Brief on the Merits at 47–48, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

injuries were only an indirect result of Lexmark's alleged violations of § 43(a).²²⁰ The parties likely assumed the standing test would include a proximate cause requirement because the Court had applied a proximate cause requirement to many statutory standing tests in the past.²²¹ So the existence of a proximate cause requirement in the § 43(a) false advertising standing test was not a contentious or thoroughly argued issue in *Lexmark*. But the proximate cause prong has the potential to create difficulties for courts applying the *Lexmark* test that could restrict commercially injured plaintiffs' access to relief under the Lanham Act. It may be especially difficult for a plaintiff to successfully plead proximate cause when the defendant has a low market share and when the plaintiff's injury was inflicted through network effects.

1. *The Proximate Cause Requirement May Unduly Burden Plaintiffs at the Pleading Stage When the Defendant Has a Low Market Share.*

By requiring a plaintiff to plead facts showing that the defendant's false advertising proximately caused her injury, the *Lexmark* test's proximate cause requirement may overburden plaintiffs at the pleading stage and bar plaintiffs that § 43(a) intended to protect. Because "[p]roximate cause is a mechanism for limiting liability for conduct that statutes otherwise arguably prohibit,"²²² the proximate cause requirement may deny standing to plaintiffs whose injury falls within the Lanham Act's protection. Such denial hinders the Lanham Act's purpose to protect those engaged in commerce from unfair competition. Under most circumstances, pleading facts to satisfy the zone-of-interests prong will also satisfy the proximate cause prong. When a plaintiff pleads facts to establish an injury to a commercial interest in reputation or sales, as required by the zone-of-interests prong, those facts will usually also establish that the defendant proximately caused that injury. But in today's complex commercial environment, the facts that establish a commercial injury will not always establish that injury's source with enough certainty to meet the proximate cause prong of the *Lexmark* test. Moreover, false advertising injuries stem from an injured consumer withholding trade from the plaintiff as a result of the defendant's false advertising, and it is

220. See Petitioner's Brief on the Merits at 38–39, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873).

221. See *Lexmark*, 134 S. Ct. at 1390.

222. Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1200 (2013).

difficult to plead proximate cause when false advertising injuries are by definition indirect.

Plaintiffs may be unable to successfully plead proximate cause when the defendant has a small market share of the product or service involved in the alleged false advertising. In *Lexmark*, defendant Lexmark had a majority of the market share for Lexmark-brand toner cartridges.²²³ So once the Supreme Court decided that plaintiff Static Control sufficiently alleged a commercial injury, it had little trouble concluding that Static Control also sufficiently pled that Lexmark's false advertising proximately caused that injury.²²⁴ But some commentators suggest that courts may have trouble concluding a defendant with low market share proximately caused a plaintiff's commercial injury.²²⁵

While none of the cases involving a challenge to standing under the *Lexmark* test's proximate cause prong noted that the defendant had a low market share,²²⁶ a few false advertising cases decided before *Lexmark* considered defendants with low market shares.²²⁷ In one such case, the court denied the plaintiff's motion for a preliminary injunction because the plaintiff failed to prove that it would suffer irreparable harm as a result of the defendant's allegedly false advertising claims regarding the ultrasound component of its electric toothbrush.²²⁸ In so deciding, the court relied on an absence of evidence that the defendant's allegedly false advertising had deceived consumers and emphasized that the defendant was a "new market entrant" whose electric toothbrush had "no market share."²²⁹ The

223. See *Lexmark*, 134 S. Ct. at 1383.

224. See *id.* at 1391.

225. See Rebecca Tushnet, *Supreme Court IP Review: Lexmark Int'l v. Static Control Components*, IIT CHICAGO-KENT COLLEGE OF LAW (Sept. 12, 2014, 3:15 PM) <http://www.kentlaw.iit.edu/scipr>; Thomas Saunders, *Supreme Court IP Review: Lexmark Int'l v. Static Control Components*, IIT CHICAGO-KENT COLLEGE OF LAW (Sept. 12, 2014, 3:15 PM) <http://www.kentlaw.iit.edu/scipr>.

226. See *infra* Part III.C.3.

227. See, e.g., *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 341–42 (S.D.N.Y. 2008). Also, several false advertising cases find evidence that the defendant had a large market share, and was therefore able to deceive a large portion of consumers, relevant to false advertising analysis. See, e.g., *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 129 F. Supp. 2d 351, 366–67 (D.N.J. 2000) (granting a preliminary injunction because 25% of consumers were deceived by defendant's false advertising); *Merck Eprova A.G. v. Gnosis S.P.A.*, 901 F. Supp. 2d 436, 458 (S.D.N.Y. 2012) (noting that the defendant willfully engaged in false advertising as a strategy designed to gain its high market share).

228. See *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 341–42 (S.D.N.Y. 2008).

229. See *id.* at 348–52, 342.

court stressed the fact that the defendant was a market newcomer with a low market share, even chiding the plaintiff by suggesting that its “litigation strategy in [the] case [was] simply an attempt to keep [the defendant] in the starting blocks.”²³⁰ While that case dealt with a preliminary injunction, not standing, it is relevant to the standing analysis under *Lexmark* because the defendant’s low market share affected the court’s reasoning. Courts have also found low market shares to be a hurdle to showing competitive injury in circumstances other than false advertising, including antitrust.²³¹

Since there is not yet caselaw directly on point, a hypothetical example will illustrate how a defendant with a low market share could be an obstacle to a plaintiff’s ability to satisfy the *Lexmark* test’s proximate cause prong. Consider a plaintiff who claims that a defendant with a ten percent market share of toothpaste falsely advertised that its toothpaste made teeth measurably four times whiter, whereas plaintiff’s toothpaste made teeth only two times whiter. The plaintiff also claims that the defendant’s false advertising proximately caused its drop in toothpaste sales and reputational damage. When it reaches the proximate cause prong of the *Lexmark* test, a court may conclude that defendant’s meager reach to only ten percent of the market is too low to show that the defendant’s advertising proximately caused the plaintiff’s commercial injuries.

Yet the plaintiff has suffered a commercial injury the Lanham Act intended to protect against. If the plaintiff cannot prove that the defendant’s false toothpaste advertising caused its injuries after discovery, then the case would (and should) be dismissed. And of course, if the plaintiff cannot plead Article III causation, she cannot have standing in federal court. But requiring the plaintiff to plead proximate cause to have standing to sue under § 43(a) may strip her of legal recourse against a false advertising defendant with low market share.

230. *Id.* at 356.

231. *See* *Viazis v. Am. Ass’n of Orthodontists*, 182 F. Supp. 2d 552, 569–70 (E.D. Tex. 2001); *see also* *Trade Regulation Reports Letter No. 767: Orthodontic Products Maker, Trade Association Did Not Conspire*, 2003 WL 26477901 (C.C.H.) (Jan. 2, 2003) (explaining that the defendant’s “low market share in orthodontic brackets” prevented a finding of competitive injury because the defendant “could not have significantly impeded the [plaintiff’s] ability to market the brackets.”).

2. *The Proximate Cause Requirement May Unduly Burden Plaintiffs at the Pleading Stage When the Plaintiff's Injury Was Inflicted Through Network Effects*

A plaintiff may also be unable to plead proximate cause when its commercial injury was inflicted through network effects. An economy is subject to network effects when the value of each product to its user increases as more users join the economy.²³² Network effects have come under legal scrutiny in the past decade in antitrust law.²³³ Most high-tech industries involve network effects. The telephone is an example of a product with direct network effects: as more people use telephones, telephones become more useful to each person because they are used to call more people.²³⁴

A more complex version of this scenario includes indirect network effects, which are common in the software industry: “most consumers prefer operating systems for which a large number of applications have already been written; and . . . most developers prefer to write for operating systems that already have a substantial consumer base.”²³⁵ Indirect network effects in the software industry involve three constituencies: the company providing the service (for example, Apple providing the iPhone), the developers (the companies that create the apps for the iPhone), and the users (the people buying the apps to use on their iPhone).

To see how network effects could be problematic for § 43(a) false advertising cases, consider a situation where Developer A designs apps for Company A and Developer B designs apps for Company B. Developer B falsely advertises to the developer community that Company A will soon go out of business, so Developer A stops designing apps for Company A. Company A's users notice a drop in app quality and switch to Company B. Under the zone-of-interests prong, Company A has suffered an injury to its commercial interest in reputation and sales. But under the Court's formulation of the proximate cause prong, Company A would likely struggle to plead that Developer B proximately caused its injury. Company A would need to plead that its economic or reputational injury “flow[ed]

232. See Michael L. Katz & Carl Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 J. POL. ECON. 822, 824 (1986).

233. See *U.S. v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001) (holding that indirect network effects can be barriers to market entry).

234. See MARIATERESA MAGGIOLINO, *INTELLECTUAL PROPERTY AND ANTITRUST: A COMPARATIVE ECONOMIC ANALYSIS OF U.S. AND E.U. LAW* 19 n.67 (2011).

235. See *Microsoft*, 253 F.3d at 55.

directly from the deception wrought by [Developer B's] advertising," but according to the Court, "that occurs when deception of consumers causes them to withhold trade from the plaintiff."²³⁶ Unless Developer A is considered a consumer, no consumers were deceived in this situation. So the proximate cause prong would likely leave Company A unable to sue for Developer B's misconduct under § 43(a).

But Company A did suffer a commercial injury because consumers decided to withhold trade as a result of Developer B's false advertising, or in other words consumers stopped buying Company A's products as a result of Developer B's false advertising. There were two intervening steps between Developer B's misconduct and Company A's injury: Developer A leaving Company A and consumers refusing to buy Company A's products. The Court in *Lexmark* conceded that "the intervening step of consumer deception is not fatal to the showing of proximate causation," but said nothing of multiple intervening steps.

In tort law, where proximate causation originated, intervening causes sometimes absolve the defendant of responsibility for the plaintiff's injuries, but sometimes they do not.²³⁷ The Court in *Lexmark* placed consumers in the category of intervening causes that do not break the causal chain, but other intervening causes, such as developers in this example, may well qualify as the type of intervening cause that does absolve the defendant of proximate causation. A court could therefore find under *Lexmark* that a software company injured as a result of false advertising lacked standing to sue because the false advertising did not proximately cause its commercial injury. Because a false advertising case where the injury was inflicted through network effects has not yet come in front of courts, it is difficult to predict how future false advertising plaintiffs in the software industry will fare under the proximate cause requirement. But the proximate cause requirement may become a substantial hurdle to software companies aiming to protect themselves against false advertising.

Despite these circumstances in which it may fail to serve the purpose of the Lanham Act, the proximate cause requirement has some redeeming features. First, courts can rely on a wealth of statutory proximate cause precedent to help apply proximate cause to § 43(a) complaints. This precedent should at least ensure a more consistent application of the

236. *Lexmark*, 134 S. Ct. at 1391.

237. *See, e.g., Berry v. Sugar Notch Borough*, 191 Pa. 345, 348–49 (1899); *see also* Restatement (Third) of Torts §§ 431, 443, 448 (2009).

proximate cause prong, which provides beneficial consistency and predictability to false advertising law. But this precedent may be less useful in preventing courts from using the proximate cause requirement to bar plaintiffs who come within the Lanham Act's purpose. One commentator has argued that RICO standing cases will provide useful analogies to the false advertising context,²³⁸ but it is difficult to tell whether those cases will help courts draw the line between plaintiffs that have pled commercial injuries proximately caused by the defendant's false advertising and those that have not.

Second, the proximate cause requirement as formulated by the Supreme Court in *Lexmark* bars consumer standing. According to the Court, a complaint satisfies the proximate cause requirement when it alleges that the defendant's "deception of consumers causes them to withhold trade from the plaintiff."²³⁹ It is difficult—if not impossible—to imagine a consumer as the defendant under this definition. As discussed earlier, the Lanham Act likely did not intend to extend its protection against false advertising to consumers whose only engagement in commerce was purchasing products or services. Because consumer standing under § 43(a) does not serve the Lanham Act's purpose, the proximate cause requirement's bar against consumer standing does serve the Lanham Act's purpose by reserving the cause of action for plaintiffs with injuries to a commercial interest in reputation or sales.

3. *Courts Will Likely Rarely Use the Proximate Cause Requirement to Bar § 43(a) Plaintiffs*

Courts' current treatment of the proximate cause requirement suggests that courts will rarely use the requirement to deny § 43(a) plaintiffs standing. While only a short period of time has passed since the Court decided *Lexmark*, defendants have already challenged a federal false advertising plaintiff's standing under *Lexmark* in at least fifteen cases.²⁴⁰

238. See Jameson Jones, *Supreme Court IP Review: Lexmark Int'l v. Static Control Components*, IIT CHICAGO-KENT COLLEGE OF LAW (Sept. 12, 2014, 3:15 PM) <http://www.kentlaw.iit.edu/scipr>.

239. *Lexmark*, 134 S. Ct. at 1391.

240. See *Toddy Gear, Inc. v. Navarre Corp.*, 2014 WL 4271631 (N.D. Ill. Aug. 26, 2014); *Synergy Real Estate of S.W. Fla., Inc. v. Premier Prop. Mgmt. of S.W. Fla., LLC*, 2014 WL 4233266 (11th Cir. Aug. 28, 2014); *Minitube of Am., Inc. v. Reprod. Provisions, LLC*, 2014 WL 1761317 (E.D. Wis. May 1, 2014); *Flu Shots of Tex., Ltd. v. Lopez*, 2014 WL 1327706 (N.D. Tex. Apr. 3, 2014); *Lundgren v. Ameristar Credit Solutions, Inc.*, 2014 WL 4079962 (W.D. Pa. Aug. 18, 2014); *Brother of the Leaf, LLC v. Plastic Prods. Co., Inc.*, 2014 WL 3824209 (W.D. Tex. Aug. 1, 2014); *Locus Telecomms., Inc. v. Talk Global LLC*, 2014 WL 4271635 (D.N.J. Aug. 28, 2014);

Courts in most of these cases focused on the zone-of-interests prong, sometimes finding that the plaintiff lacked standing because it failed to plead a commercial injury to reputation or sales.²⁴¹ Courts' focus on the zone-of-interests prong may be attributed to the comparative ease of disposing of a false advertising case under the zone-of-interests prong than under the proximate cause prong; it will likely be easier for courts to reason that the plaintiff's injury was not a commercial injury to reputation or sales than to reason that the plaintiff's injury was not proximately caused by the defendant's misconduct. Of the courts that considered whether the plaintiff successfully plead that the defendant proximately caused its injuries, only one court found that the plaintiff lacked standing to sue.²⁴² In that case, the court granted the defendant's motion to dismiss after finding that that plaintiff "could not possibly show that any alleged false statements caused its injuries,"²⁴³ a high bar for failing proximate cause.

But so far, courts have not generally used the proximate cause prong to bar plaintiff standing in federal false advertising cases. For several of these cases, a basic statement that the defendant proximately caused the plaintiff's commercial injury satisfied the proximate cause requirement.²⁴⁴ For example, the court in *Yellow Group LLC v. Uber Technologies Inc.*

Yellow Grp. LLC v. Uber Techs. Inc., 2014 WL 3396055 (N.D. Ill. July 10, 2014); *First Mariner Bank v. Resolution Law Grp., P.C.*, 2014 WL 1652550 (D. Md., Apr. 22, 2014); *Advanced Fluid Sys., Inc. v. Huber*, 2014 WL 2770231 (M.D. Pa. June 14, 2014); *Leason Ellis LLP v. Patent & Trademark Agency, LLP*, 2014 WL 3887194 (S.D.N.Y. July 2, 2014); *D.H. Pace Co., Inc. v. A.O.D. Grp., LLC*, 2014 WL 2574545 (N.D. Ga. June 9, 2014); *Underground Solutions, Inc. v. Palermo*, 2014 WL 4703925 (N.D. Ill. Sept. 22, 2014); *Bern Unlimited, Inc. v. Burton Corp.*, 2014 WL 2649006 (D. Mass. June 12, 2014); *Syngenta Seeds, Inc. v. Bunge North Am., Inc.*, 2014 WL 5315104 (8th Cir. Oct. 20, 2014).

241. See *Synergy Real Estate of S.W. Fla., Inc. v. Premier Prop. Mgmt. of S.W. Fla., LLC*, 2014 WL 4233266 (11th Cir. Aug. 28, 2014); *Flu Shots of Tex., Ltd. v. Lopez*, 2014 WL 1327706 (N.D. Tex. April 3, 2014); *Brother of the Leaf, LLC v. Plastic Prods. Co., Inc.*, 2014 WL 3824209 (W.D. Tex. Aug. 1, 2014); *Locus Telecomms., Inc. v. Talk Global LLC*, 2014 WL 4271635 (D.N.J. Aug. 28, 2014).

242. See *Minitube of Am., Inc. v. Reprod. Provisions, LLC*, 2014 WL 1761317 at *25 (E.D. Wis. May 1, 2014).

243. *Id.*

244. See *First Mariner Bank v. Resolution Law Grp., P.C.*, 2014 WL 1652550 (D. Md. Apr. 22, 2014) (denying a motion to dismiss for lack of standing because "Plaintiff has alleged that as a result of Defendants' false advertising, Plaintiff 'has incurred, and likely will continue to incur, substantial commercial injury in the form of lost sales, loss of market share, and damage to reputation and good will'"); *D.H. Pace Co., Inc. v. A.O.D. Grp., LLC*, 2014 WL 2574545 at *4-5 (N.D. Ga. June 9, 2014) (denying motion to dismiss for lack of standing because plaintiff sufficiently plead a commercial injury proximately caused by the defendant's false advertising).

found that the proximate cause prong was satisfied because the plaintiffs “plausibly alleged that Uber’s deceptive advertising ha[d] caused customers to refrain from using their dispatch services” and “that this diversion of business harms the economic value of their business and their reputation.”²⁴⁵ One court took a more relaxed approach, finding that the plaintiff had satisfied the proximate cause prong because the complaint “allege[d] a direct injury to [the plaintiff’s] commercial interest.”²⁴⁶ Another court’s analysis seemed closer to but-for cause²⁴⁷ than proximate cause; it found standing under the proximate cause prong because plaintiff alleged “that it suffered an injury to its commercial interest in its reputation and a decrease in sales as a result of defendants’ misrepresentation” and “that, but for the misdesignation [sic] and deceptive advertising” by the defendant, plaintiff would not have suffered the injury.²⁴⁸ The common theme between cases that have considered the proximate cause prong thus far is a fairly permissive application of proximate cause to federal false advertising standing. It is difficult to extrapolate from the small pool of available cases, but based on the false advertising standing cases that have been decided since *Lexmark*, courts seem unlikely to use the proximate cause requirement to deny a commercially injured plaintiff standing under the Lanham Act.

IV. CONCLUSION

Overall, the *Lexmark* standing test better serves the purpose of the Lanham Act than did the previous three tests for § 43(a) false advertising standing. The zone-of-interests prong actively seeks to grant standing to plaintiffs that the Lanham Act intends to protect. The proximate cause prong, as phrased by the Court in *Lexmark*, may temper the zone-of-interests prong’s reach by barring consumer standing, arguably in service of the Lanham Act’s purpose. But the proximate cause requirement may unduly burden some plaintiffs at the pleading stage. First, plaintiffs injured by defendants who have a low market share may be unable to plead proximate cause. Second, companies whose products benefit from network

245. See *Yellow Grp. LLC v. Uber Techs. Inc.*, 2014 WL 3396055 at *3 (N.D. Ill. July 10, 2014).

246. *Toddy Gear, Inc. v. Navarre Corp.*, 2014 WL 4271631 at *3 (N.D. Ill. August 28, 2013).

247. But-for cause, or causation in fact, is a type of causation in torts and is satisfied when the injury would not have occurred absent the defendant’s conduct. See, e.g., *Zuchowicz v. U.S.*, 140 F.3d 381, 388–390 (2d Cir. 1998).

248. *Advanced Fluid Sys., Inc. v. Huber*, 2014 WL 2770231 at *19 (M.D. Pa. June 14, 2014).

effects may be especially burdened by the proximate cause requirement because their injuries flow from long, complex causal chains. For industries characterized by network effects, such as the software industry, the proximate cause requirement may bar commercially injured plaintiffs that the Lanham Act intended to protect. Regardless, reality thus far has seen a relaxed application of the proximate cause requirement by courts in different circuits, potentially mitigating the denial of standing to those plaintiffs who would otherwise come within the Lanham Act's purpose.

APPENDIX

A. THE 1946 VERSION OF THE LANHAM ACT

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 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.

15 U.S.C. § 1125(c), Lanham Act § 43(a).

B. THE 1988 AMENDED VERSION OF THE LANHAM ACT

(a) Civil action

(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--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another 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.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

15 U.S.C. § 1125(c), Lanham Act § 43(a).

