

No False Advertising Where There Is No Injury or Statements Are Opinions

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Addressing the standard for violating the Lanham Act's false advertising provisions, the US Court of Appeals for the Fourth Circuit affirmed a district court's grant of summary judgment for the defendant, finding that the plaintiff failed to establish the necessary elements of a false advertising claim for any of the challenged statements. *Verisign, Inc. v. XYZ.com LLC*, Case No. 15-2526 (4th Cir., Feb. 8, 2017) (Harris, J).

Verisign operates the .com and .net generic top-level domains (gTLDs). XYZ.com LLC, a competitor, operates the .xyz gTLD. Verisign sued XYZ and its CEO, Daniel Negari, over a series of advertising statements that the court classified into two categories: (1) those touting the popularity of the .xyz gTLD, and (2) those warning about the shortage of available .com domain names. In the first category, Verisign challenged a statement that appeared in an XYZ blog post stating that .xyz is "the most used new gTLD" and that it had "received the most registrations of all new gTLDs." Following an NPR interview with Negari in which the reporter stated, "you could try to become the next .com," XYZ published a blog post titled ".xyz – the Next .com." In the second category of challenged claims, Verisign challenged Negari's statement during the NPR interview that "all of the good [.com] real estate is taken. The only thing that's left is something with a dash or maybe three dashes and a couple numbers in it." Verisign also took issue with another XYZ blog post, which stated, "Did you know that 99% of all registrar searches today result in a 'domain taken' page?" as well as an XYZ advertisement on YouTube that stated, "With over 120 million .coms registered today, it's impossible to find the domain name that you want."

Verisign sued, claiming the statements violated the Lanham Act's false advertising provisions. To prevail on its claims, Verisign would have to establish that (1) XYZ made a false or misleading statement of fact about its or Verisign's product(s), (2) the misrepresentation is material, (3) the misrepresentation deceives (or has a tendency to deceive) consumers, (4) the statement was made in commerce, and (5) Verisign has been (or is likely to be) injured as a result. The district court granted XYZ's motion for summary judgment, finding that (1) Verisign could not show that any of the challenged statements were false or misleading, (2) there was no evidence to show that the claims were material or had deceived consumers, and (3) Verisign failed to demonstrate that it suffered any damages. Verisign appealed.

The Fourth Circuit affirmed the summary judgment with respect to the first group of challenged

statements on the ground that Verisign had not established that it suffered any injury. Specifically, the Court upheld the district court's decision to exclude Verisign's expert report on damages for failing to show a causal link between XYZ's statements and diverted domain name registrations. For the second group of challenged statements, the Court also agreed with the district court that the challenged statements were merely nonactionable opinions or puffery. The Court specifically cited the word "you," stating, "Whether an anonymous 'you' can find the domain name of his or her choosing is not something that can be proven true or false." Furthermore, "what counts as a 'good' domain name is a matter of opinion, not fact," and "when it comes to spoken statements like Negari's, which may be offered more casually than their written counterparts, we must take care not to label as 'literally false' what really is no more than a colloquial exaggeration, readily understood as much." For those statements that were factual in nature, namely that "99% of all registrar searches today result in a 'domain name taken' page," Verisign admitted that the statistic was verifiably true and had not presented any evidence of consumer confusion, which would be necessary for Verisign to successfully argue that the statement was verifiably true but misleading.

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