

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: May 29, 2007)

Decided: August 9, 2007)

Docket No. 07-0468-cv

TIME WARNER CABLE, INC.,

*Plaintiff-Appellee,*

—v.—

DIRECTV, INC.,

*Defendant-Appellant.*

Before:

KEARSE, STRAUB, and POOLER,

*Circuit Judges.*

Interlocutory appeal from an opinion and order of the United States District Court for the Southern District of New York (Laura Taylor Swain, *Judge*) issued February 5, 2007, preliminarily enjoining DIRECTV, Inc. from disseminating, in any market in which Time Warner Cable, Inc. provides cable service, certain television commercials and Internet advertisements found to likely violate the Lanham Act on literal falsity grounds.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Saul B. Shapiro, Patterson Belknap Webb & Tyler LLP (Sarah E. Zgliniec, Catherine

1 A. Williams, *on the brief*), New York, NY, *for Plaintiff-Appellee*.

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3 Daniel H. Bromberg, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Redwood  
4 Shores, CA (Marc L. Greenwald, Sanford I. Weisburst, Quinn Emanuel Urquhart  
5 Oliver & Hedges, LLP, New York, NY; Michael E. Williams, Justin C. Griffin, A.J.  
6 Bedel, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Los Angeles, CA; and  
7 Margret Caruso, Quinn Emanuel Urquhart Oliver & Hedges, LLP, Redwood Shores,  
8 CA, *on the brief*), *for Defendant-Appellant*.

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10 STRAUB, *Circuit Judge*:

11 Defendant-Appellant DIRECTV, Inc. (“DIRECTV”) appeals from the February 5, 2007  
12 opinion and order of the United States District Court for the Southern District of New York  
13 (Laura Taylor Swain, *Judge*) preliminarily enjoining it from disseminating, in any market in  
14 which Plaintiff-Appellee Time Warner Cable, Inc. (“TWC”) provides cable service, certain  
15 television commercials and Internet advertisements found likely to violate the Lanham Act on  
16 literal falsity grounds. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 475 F. Supp. 2d 299  
17 (S.D.N.Y. 2007).

18 This appeal requires us to clarify certain aspects of our false advertising doctrine. We  
19 make three clarifications in particular. First, we hold that an advertisement can be literally false  
20 even though it does not explicitly make a false assertion, if the words or images, considered in  
21 context, necessarily and unambiguously imply a false message. Second, we decide that the  
22 category of non-actionable “puffery” encompasses visual depictions that, while factually  
23 inaccurate, are so grossly exaggerated that no reasonable consumer would rely on them in  
24 navigating the marketplace. Third, we conclude that the likelihood of irreparable harm may be  
25 presumed where the plaintiff demonstrates a likelihood of success in showing that the  
26 defendant’s comparative advertisement is literally false and that given the nature of the market, it

1 would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even  
2 though the plaintiff is not identified by name. Reviewing the District Court’s decision under  
3 these principles, we affirm in part, vacate in part, and remand for further proceedings consistent  
4 with this opinion.

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6 **FACTUAL BACKGROUND<sup>1</sup>**

7 **A. The Parties**

8 TWC and DIRECTV are major players in the multichannel video service industry. TWC  
9 is the second-largest cable company in the United States, serving more than 13.4 million  
10 subscribers. Like all cable providers, TWC must operate through franchises let by local  
11 government entities; it is currently the franchisee in the greater part of New York City.

12 DIRECTV is one of the country’s largest satellite service providers, with more than 15.6 million  
13 customers nationwide. Because DIRECTV broadcasts directly via satellite, it is not subject to  
14 the same franchise limitations as cable companies. As a result, in the markets where TWC is the  
15 franchisee, DIRECTV and other satellite providers pose the greatest threat to its market share.  
16 The competition in these markets for new customers is extremely fierce, a fact to which the  
17 advertisements challenged in this case attest.

18 TWC offers both analog and digital television services to its customers. DIRECTV, on  
19 the other hand, delivers 100% of its programming digitally. Both companies, however, offer  
20 high-definition (“HD”) service on a limited number of their respective channels. Transmitted at

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<sup>1</sup>This factual background is derived from the District Court’s findings of fact, which are not in dispute. *See Time Warner Cable, Inc.*, 475 F. Supp. 2d at 302-04.

