

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

BY TELECOPIER: (310) 860-0830

April 13, 2009

Elizabeth Swanson
Swanson & Associates
Suite 500
9454 Wilshire Blvd.
Beverly Hills, California 90212

Re: *InfomercialScams.com v. Instyler*

Dear Ms. Swanson:

I represent the operator of *Infomercialscams.com* in connection with the trademark complaint that you sent to Abacus America, the operator of the web hosting service *Aplus.net*, concerning the alleged “misuse” of your client’s trademark on the *infomercialscams* web site. I called you Friday afternoon to try to discuss this matter with you, but you were not available and you have not returned my call. Because lawyer-to-lawyer discussion has not been possible, I am writing to explain why we intend to file an action against your client, Tre Milano LLC, seeking a declaratory judgment of non-infringement as well as damages and attorney fees, unless you promptly retract your demand letter to Abacus America or, at least, specify that you are not making any claims under the Lanham Act based on the web site.

As you know, *infomercialscams.com* is a web site that hosts a series of message boards about products that are sold through television infomercials. Consumers who have had experiences either with the goods and services themselves, or with the sellers of those goods and services with whom they have interacted on telephone or Internet when responding to infomercials, are able recount their experiences which they may express either as complaints or as defenses of the products or sellers. Your clients’ product, the “Instyler,” has drawn a number of complaints, and a smaller number of defenses, on *infomercialscams.com*, as it has done on several other consumer commentary web sites. Like many commentary web sites, *InfomercialScams.com* is supported by advertising. Our client does not select the ads that appear on the site.

Instead of objecting directly to the owners of the web site, you chose to write instead to the company that hosts the web site, with a copy to the web site operator. In your four-page complaint to Abacus America, you refer repeatedly to the fact that, in identifying the name of the product that is the subject of your client’s infomercials, the web site is using — or, in your terms, supposedly

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“misusing” — your client’s “trademark.” In this respect, I assume that you are aware that, although web hosts like Abacus America are immune from suit under 47 U.S.C. § 230 for content placed online by their customers, there is an exemption from liability for claims under the “intellectual property” laws. In writing directly to Abacus and stressing claims based on your client’s trademark, you are deliberately trying to injure infomercialscams.com by asserting baseless trademark claims.

The trademark claims are baseless, first, because although you repeatedly refer to the allegedly false or misleading use of the mark, you never claim that the mark has been used in a manner that creates any likelihood of confusion about whether Tre Milano is the source or sponsor of the infomercialscams.com web pages. The Ninth Circuit, however, does not recognize abstract claims of unfairness with respect to trademark as stating a claim under the Lanham Act – to be actionable, there must be confusion about the source of the product: *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979) (“It is the source denoting function which trademark laws protect, and nothing more”); *Smith v. Chanel, Inc.*, 402 F.2d 562, 566-569 (9th Cir. 1968). Nor could you make such a claim. Any consumer visiting the web page, or seeing references to the web page in connection with a Google search, would recognize that these are web pages that provide consumer commentary about the Instyler product. No consumer could possibly imagine that the web pages were affiliated in any way with the maker of the Instyler. Nor do you make any dilution claims, and no such claim could be made, in part because consumer commentary is not dilution, and in part because your client’s mark is not “famous” in the way required by the Lanham Act under the 2006 amendments – “widely recognized by the general consuming public of the United States.”

You also complain about supposedly unfair means that our client has used to boost the “page rank” of its web pages about Instyler that will be displayed in response to a Google search using your client’s product name as a search term. Because you do not and cannot complain that this unfairness results in any confusion about affiliation or source, you cannot state any claim based on the Lanham Act. But beyond that, there is nothing unfair about calling the attention of search engine users who are looking for information about “instyler” to the web pages on our client’s web site that are **about** Instyler. The Ninth Circuit has recognized that the use of a trademark to denote web pages about a trademarked product is fair use. *Brookfield Communications v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1065 (9th Cir. 1999).¹

Your complaint does assert that infomercialscams.com is engaged in false advertising, but your client cannot possibly state a claim under the Lanham Act, either against Abacus or against

¹ One of your claims of unfairness relates to a technical flaw in the web site’s software that has since been fixed. Your letter complains that each of the page titles produced by a search of the infomercialscams.com web page using the search term “Instyler” includes the word “complaints” even though two of the pages actually contained “defenses” by satisfied consumers. This was due to a flaw that my client promptly fixed. The pages that contain “defenses” are now properly labeled as such.

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infomercialscams.com. It would not provide a claim against Abacus because false advertising claims are not “intellectual property” claims, even though they are cognizable under the Lanham Act, and hence they would not provide any exception from section 230 immunity. Moreover, although infomercialscams.com carries advertising on its consumer commentary web pages, its statements about Instyler do not constitute “commercial advertising or promotion,” as required for liability under the false advertising provisions of the Lanham Act. Nor does infomercialscams.com compete with Tre Milano, yet the Ninth Circuit has squarely held, in agreement with other circuits, that standing to bring a false advertising claim is accorded only to companies whose products compete with the product of the allegedly false advertiser. *Jack Russell Terrier Network v. American Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005); *Stanfield v. Osborne Indus.*, 52 F.3d 867, 872 (10th Cir. 1995); *L.S. Heath & Son v. AT&T Info. Sys.*, 9 F.3d 561, 575 (7th Cir. 1993). Finally, nothing that our client has said about Instyler is false or misleading. The name “Instyler” appears in the banner and URL’s for pages about the Instyler to designate the fact that the pages are about Instyler. This expression is entirely truthful.

Despite the fact that your trademark claims are utterly baseless, you deliberately sent a letter to the web host, implicitly threatening to impose liability on that host outside its section 230 immunity. And Abacus America **understood** your letter to be threatening the prospect of liability under the trademark laws for pages related to Instyler on the infomercialscams web site. Accordingly, unless you promptly retract, in writing, your contention that infomercialscams.com has misused your client’s trademark, we will bring an action for a declaratory judgment of non-liability under the Lanham Act. In that regard, we will contend that your trademark claims are “groundless,” and hence that this is an exceptional case under the Lanham Act. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002). And, if you succeed in your effort to intimidate Abacus America into taking my client’s web site down, we will seek an award of the damages that you have caused by doing so.

I hope that this litigation will be unnecessary. If, on the other hand, your client intends to stand by your letter as written, please let me know whether you will be authorized to accept service of our complaint for a declaratory judgment, or whether I may send you a request for waiver of service under Ruler 4(d) of the Federal Rules of Civil Procedure.

I look forward to hearing from you by the end of the day on Wednesday, April 15.

Sincerely yours,


Paul Alan Levy