I. Literature Review

A. Early research

Early research on information source preferences identified several factors that influence how people choose where to go for information. The identified factors fall into four main categories: effort, quality, habit, and individual circumstances.¹

In the effort category, studies generally supported the principle of least effort. When searching for information, people prefer sources that are more accessible,² more convenient,³ more familiar,⁴ and easier to use.⁵ Research on the factor of information quality is more mixed: studies suggest that usefulness, trust, and relevance can influence people’s choices, but they disagree on how much.⁶ Researchers agree, however, that habit leads to inertia that makes people reluctant to switch to new sources.⁷ Finally, studies have also shown that people’s

⁶ Compare, for example, Fred D. Davis, *Perceived Usefulness, Perceived Ease of Use, and User Acceptance of Information Technology*, 13 MGMT. INFO. SYSS. Q. 319 (1989) (arguing that usefulness is the most important factor), with Chechen Liao, Pui-Lai To, Chuang-Chun Liu, Pu-tan Kuo, & Shu-Hui Chuang, *Factors Influencing the Intended Use of Web Portals*, 35 ONLINE INFO. REV. 237 (2011) (arguing that habit is more important than usefulness).
information source choices are influenced by factors such as the type of information needed and the specific context.

B. Comparing Google and Bing

In the past several years, as Microsoft’s Bing has gained prominence, studies have begun to compare Bing to Google.

In June 2009, Catalyst Group, a user centered research and design firm, conducted a focus group study comparing Google and Bing. Catalyst monitored twelve individuals with eye-tracking cameras as they conducted two separate searches on both Google and Bing. Afterwards, Catalyst surveyed and interviewed each subject.

The study found that users preferred Bing’s visual design over Google’s, but most thought that the two search engines produced equally relevant results. Most of the twelve users thought that Bing beat Google in visual design, organization, and filter options. Seven of the twelve users reported that the two search engines produced equally relevant results. Of the remaining five, three thought Google results were more relevant to varying degrees, and two thought Bing results were slightly more relevant. However, overall, users preferred using Google to Bing by a ratio of 2 to 1: Eight of the twelve users stated they would continue using Google over Bing, while the other four chose to switch to Bing. Users who preferred Google overall cited familiarity, Google’s other apps, and inertia. Users who preferred Bing overall cited Bing’s more welcoming design, better results organization, and better filter options.

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Catalyst Group focus group also spent more time and scrolled further down on the Google search results pages for both searches conducted.

Around the same time, Microsoft employee Michael Kordahi created a search engine comparison website that allowed users to compare unbranded results from Google, Bing, and Yahoo for any search query. Early on, after about 350 votes, a plurality of users preferred Google. Bing took over the lead after another 300 votes. Google reclaimed the lead as the tally exceeded 2500 votes. After about 40,000 votes, Yahoo surged into the lead. At that point, Kordahi took down the website because “the poll ha[d] been compromised.”

In 2010, two researchers at the University of Waterloo examined twenty-five individuals’ preferences for search results over a large, diverse set of search queries. When the users were presented with unbranded results, they consistently rated Google’s results as better. However, when the researchers branded the results, the users’ brand preference for Google overrode perceived quality differences in the results, even when the researchers intentionally branded the results incorrectly.

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12 Id. (“Google is in the lead with the tally standing at ‘Google: 40%, Bing: 31%, Yahoo: 29%’ out of 355 votes.”).
13 Id. (“Google: 36%, Bing: 38%, Yahoo: 26% | 641 votes”).
14 Id. (“Google: 40%, Bing: 37%, Yahoo: 23% | 2554 votes”).
17 Ahmed A. Ataullah & Edward Lank, Googling Bing: Reassessing the Impact of Brand on the Perceived Quality of Two Contemporary Search Engines, in PROCEEDINGS OF THE 24TH BCS INTERACTION SPECIALIST GROUP CONFERENCE 337 (Tom McEwan & Lachlan McKinnon eds., 2010).
Many people have also conducted more informal comparisons of Google and Bing. One blogger on Search Engine Land searched for terms on both Google and Bing in early 2011, and again a year later. The blogger created a scoring system for the relevance and quality of the two search engines’ results for his terms. Both years, the informal tests found overwhelming parity in quality between Google and Bing.

In August 2012, a blogger on another website surveyed 150 people on Google and Bing’s search results pages for the same keyword. The majority preferred Bing’s social search layout over Google’s, but preferred Google’s overall search layout over Bing’s.

After Microsoft released the Bing It On website, many bloggers conducted their own informal comparison tests. Some found that Bing beat Google, while others found that Google beat Bing.

C. Comparing Other Search Engines

Various studies have also compared Google with other search engines.

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22 See, e.g., Zara, *supra* note Error! Bookmark not defined. (reporting that Google won two out of two times when the author ran the Bing It On challenge twice).
23 Because of Google’s early and overwhelming dominance in the search engine market, we did not find any search engine comparisons that did not include Google.
In 2008, CrowdFlower, a leading microtask crowdsourcing platform, conducted a Mechanical Turk study comparing what were then the four top English language search engines: Ask, Google, Live, and Yahoo. Study participants rated the relevance of the top five results for each search engine for 500 search queries. Each person was shown one unbranded search result at a time, and each search result was rated by three people. CrowdFlower recorded each engine’s percentage of queries with at least one result that was rated highly relevant. Ask received the lowest percentage, but the other three engines came out in a statistical tie.

In 2012, database company Implied Intelligence tested the accuracy and completeness of the business listings data on nine leading local search sites, including Google Maps, Bing Maps, Superpages, and Yellowpages (YP.com). Implied Intelligence evaluated each engine on four criteria: coverage, number of duplicates, accuracy of information, and richness of information. Although Bing had a lower percentage of duplicates, Google Maps performed better than Bing in all of the other criteria. Overall, however, Google Maps came in third, behind Superpages and Yellowpages. Bing placed fourth overall.

Recently, YP, the provider of the online yellow pages directory YP.com, commissioned CrowdFlower to perform a single blind study comparing YP.com to Google Maps, Bing local, and Yahoo! Local. In a white paper released in March 2013, CrowdFlower announced that its study found that users reported the highest satisfaction with YP.com search results.

For over a year, CrowdFlower tested approximately 13,000 local search query results per month and tracked user satisfaction as a proxy for search relevance. Each search query consisted of a search keyword and a location. For each search query, crowd contributors, who were required to pass an accuracy threshold test, were asked to rate search results from all four engines that were stripped of all branding and other identifying information. Contributors reported satisfied ratings for YP.com search results more frequently than for the other three engines’ results. In addition, YP.com results received the highest ratings, and YP.com results received an “invalid search” rating with the lowest frequency of all four engines.

II. Survey Methodology Screenshot Examples

As discussed in Section II of this paper, the Bing It On website asks users to perform five searches. This section contains examples of the search screens, individual search results screen, and the screen showing the identity of the searches that produced the preferred result.

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27 Id. at 1.
28 Id. at 3.
29 Id. at 3.
30 Id. at 2, 3.
31 Id. at 4 (“Users were satisfied with YP.com search results 86% of the time, compared with 83% for Google Maps, 82% for Yahoo! Local, and 74% for Bing local.”).
32 Id.
Figure A.1: Initial Search Screen

![Initial Search Screen]

Figure A.2: Individual Search Results Screen

![Individual Search Results Screen]
Figure A.3: Second Search Screen

Figure A.4: Identity of the Searches that Produced the Preferred Results
III. Additional Lanham Act Claim

Though not included in the main body of the article, we identified a possible but weak Lanham Act claim against Microsoft’s express language. The plain meaning of the phrase “web’s top searches” is that participants used terms with the greatest volume of searches. However, the study actually employed “Google Zeitgeist 2012” terms, which include search terms listed as “trending,” indicating only an increase in the volume of searches between 2012 and 2011 and not aggregate volume. While Google Zeitgeist 2012 does include categories of “most searched” terms, these are limited to narrow categories such as “movies,” “news sources,” and “celebrity break-ups.” While the “Justin Bieber & Selena Gomez” split may have been the most searched term under the celebrity break-ups category, it is unlikely that its volume rivaled search terms such as “facebook,” “gmail,” or even “Bing.” As Microsoft cites tests to support Bing It On, its advertised claims are treated as establishment claims. This means that rather than having to demonstrate that Bing is not preferred over Google for most searched terms, the plaintiff can prove legal falsity by showing that the cited test does not actually support the proposition. Because few (if any) terms are actually most searched terms, a test using Zeitgeist would not be able to support a claim for most frequently searched terms.

As only an “unambiguous message can be literally false,” the statement concerning “the web’s top searches” is literally false only if it unambiguously refers to the most searched term. However, the top results from a search for “web’s top searches” on both Google and Bing refer to trending terms identified by Google Zeitgeist. This suggests that trending terms are a plausible

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33 Wallaert, supra note Error! Bookmark not defined..
35 Id.
36 “Facebook” and “gmail” are among the most commonly searched words on Google. See sources cited supra note Error! Bookmark not defined..
37 Establishment claims are claims that rely on tests or surveys for support.
meaning of “web’s top searches,” and the implication that Bing was preferred by test participants for most searched terms is not false, but merely has a potential to mislead consumers due to ambiguity. Thus, in order to obtain a legal remedy based on this claim, a challenger must show materiality by demonstrating that a significant number of consumers are actually (or likely to be) mislead into believe that Bing It On claims an advantage for the most searched terms based on overall volume.

IV. Microsoft’s Liability Under the FTC and Baby FTC Acts

A. Federal Trade Commission Act

1. Deception and False Advertising under the FTC Act

The Federal Trade Commission Act (“FTC Act”) confers authority on the Federal Trade Commission (“FTC,” or “the Commission”) with the authority to regulate advertising and promotional practices in interstate commerce. Section 5 of the FTC Act prohibits “unfair” or deceptive acts or practices in or affecting commerce, and Section 12 finds it unlawful to “disseminate, or cause to be disseminated, any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.” There is no private right of

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38 An advertisement or practice is “unfair” if it is likely to cause substantial consumer injury “which is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers or competition.” Leslie Fair, Federal Trade Commission Advertising Enforcement, FED. TRADE COMM’N (March 1, 2008), http://www.ftc.gov/oia/assistance/consumerprotection/advertising/enforcement.pdf.
action or recovery under the FTC Act, though the Commission does accept complaints from private parties.

A finding of a “deceptive” or false advertisement requires the Commission to establish that (1) there is an express or implied representation, omission or practice which (2) is likely to mislead reasonable consumers and (3) is material. Advertisers must also have a “reasonable basis” for their representations and substantiate all express and implied claims before they are disseminated. The literal truth of a claim does not immunize the advertiser, if its implicature is untrue. An action or omission may be deceptive only if it is likely to mislead “a consumer acting reasonably in the circumstances.” As such, claims involving exaggerated representations or puffery generally will not trigger liability. When the action or sales practice is intended for a specific audience, the FTC makes a finding of reasonableness based on the effect of the practice on a reasonable member of the target group.

In evaluating the effect of advertising on the reasonable consumer, the FTC may rely on its own interpretation of the advertisement, as well as extrinsic evidence such as expert opinion,

41 Following the D.C. Circuit holding in Thompson Medical Co., Inc. v. FTC, 104 F.T.C. 648 (1986), and the subsequent FTC Policy Statement Regarding Advertising Substantiation, advertisers had to satisfy all claim substantiation prior to the advertisement and could not do so through post-advertisement. The failure of an advertiser to rely upon a reasonable basis for all claims constitutes a violation of Section 5 of the FTC Act. See William H. Brewster et al., Advertising Basics, KILPATRICK STOCKTON LLP (Jan. 1, 2009), http://www.kilpatricktownsend.com/~media/Files/articles/LPearsonAdvertisingBasics.ashx; FTC Policy Statement Regarding Advertising Substantiation, FED. TRADE COMM’N (1986), http://www.ftc.gov/bcp/guides/ad3subst.htm (appended to Thompson Medical Co., 104 F.T.C. 648).


43 See Pizza Hut, Inc. v. Papa John’s Int’l, Inc., 227 F.3d 489 (5th Cir. 2000); Brewster et al., supra note 41.

44 For example, in the Listerine case, the Commission reviewed the case based on the effect of the advertisement on the “average listener.” Warner-Lambert, 86 F.T.C. 1398, 1415 n.4 (1975), aff’d, 562 F.2d 749 (D.C. Cir. 1977), cert denied, 435 U.S. 950 (1978).
consumer testimony, copy tests, surveys, or other reliable evidence of consumer interpretation.\textsuperscript{45} In general, extrinsic evidence regarding an advertisement’s effect or materiality on reasonable consumers is not required. Advertisements are assessed based on a range of added factors such as the clarity of their representations, the conspicuousness of qualifying statements, the importance of omitted information, and the familiarity of the public with the product or service. In cases where more than one reasonable interpretation might exist, the advertiser remains liable for a misleading interpretation.\textsuperscript{46}

A “material” representation, omission, or practice is one that is likely to impact a consumer’s decision or conduct related to the product or service to their detriment.\textsuperscript{47} Certain types of information receive a presumption of materiality: express claims; implied claims intended by an advertiser; and cases where an advertiser knows or should have known that consumers would be misled or need additional information to evaluate a product or service.\textsuperscript{48} Moreover, in some cases, information may be found material where it concerns the purpose, safety, efficacy, durability, performance, or quality of the product or service.\textsuperscript{49} According to the FTC, “a finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique.”\textsuperscript{50}

Finally, when an advertisement claims to be supported by scientific evidence—a so-called “establishment claim”—the FTC expects the advertiser to have performed scientific

\textsuperscript{45} FTC Policy Statement on Deception, supra note 42.
\textsuperscript{46} Jay Norris Corp., 91 F.T.C. 751, 836 (1978), aff’d, 598 F.2d 1244 (2d Cir. 1979); National Comm’n on Egg Nutrition, 88 F.T.C. 89, 185 (1976), enforced in part, 570 F.2d 157 (7th Cir. 1977).
\textsuperscript{47} Under the Restatement (Second) of Torts, a “material misrepresentation or omission” is one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. RESTATEMENT (SECOND) OF TORTS § 538(2) (1977).
\textsuperscript{48} FTC Policy Statement on Deception, supra note 42.
\textsuperscript{49} Id. (citations omitted)
\textsuperscript{50} Id.
studies that correspond to the claimed level of substantiation. Advertisers are responsible for all claims, express and implied, that are expressed by an advertisement. A finding of liability does not require proof that an advertiser intended to mislead or deceive consumers. The FTC recognizes that advertisements “may imply more substantiation than it expressly claims or may imply to consumers that the firm has a certain type of support; in such cases, the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers.”

Consumer surveys and expert testimony can also be helpful in determining the adequacy of evidence possessed by the advertiser.

2. Remedies

Under the FTC Act, the Commission has the authority to seek or order a wide range of remedies, including cease and desist orders, consent agreements, and court-ordered civil and criminal sanctions. Depending on the circumstances, the FTC’s consent orders may enjoin the unlawful action, require advertisers to pay redress or disgorge profits, or include additional constraints on the advertiser. The FTC claims broad discretion to introduce these “fencing-in” provisions, which may extend beyond the particular illegal practices challenged.

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51 See Sears, Roebuck & Co. v. FTC, 95 F.T.C. 406, 511 (1980), aff’d, 676 F.2d 385 (9th Cir. 1982).
52 See Chrysler Corp. v. FTC, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977); Regina Corp., 322 F.2d 765, 768 (3d Cir. 1963). See also Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988) (holding that company’s purported good faith reliance on the advice of counsel is not a defense under Section 5).
53 FTC Policy Statement Regarding Advertising Substantiation, supra note 41.
54 Id.
56 See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965) (“The Commission is not limited to prohibiting the illegal practices in the precise form in which it is found to have existed in the past. Having been caught violating the [FTC] Act, respondents must expect some reasonable fencing in.”).
57 Factors considered in determining the appropriate remedy include the severity of the violation, the violator’s past record, and the potential for transferability. Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 391 (9th Cir. 1982). For example, courts have upheld FTC orders that apply to all products the company
officers may be held liable for violations of the FTC Act if a corporate officer “owned, dominated and managed” the company and if awarding individual liability is needed to fully prevent future violations of the Act.  

Similarly, advertising agencies can be held liable for active participation in the creation of deceptive advertisements, if it knew or should have known the advertisement was misleading.

Other remedies include the redress or disgorgement of profits which may be granted by district courts under Section 13(b). Various forms of corrective advertising are also available, as are orders to make accurate information available through disclosures, direct notification, or consumer education.

3. Disclosures and Disclaimers

Advertisers often attempt to correct unclear, misleading, or deceptive advertisements with qualifying disclosures. Yet fine print and inconspicuous disclaimers have regularly been found insufficient to remedy a misleading representation. For example, a false headline may be

markets based on violations involving only a single product or group of products. ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976).


Standard Oil Co., 84 F.T.C. 1401, 1475 (1974), aff’d and modified, 577 F.2d 653 (9th Cir. 1978).

See, e.g., FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982).

See Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000) (upholding Commission order requiring marketer of Doan’s pills to run corrective advertising to remedy deceptive claim that product is superior to other analgesics for treating back pain); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978) (upholding order enjoining company from representing that Listerine helps prevent colds and sore throats and requiring it for a specific period to state in future advertising “Listerine will not help prevent colds or sore throats or lessen their severity”).

See Giant Food, 61 F.T.C. 326 (1962) (finding a fine-print disclaimer inadequate to correct a deceptive impression). The Commissioner agreed with the examiner that “very few if any of the persons who would read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer.” Id. at 348. In Litton Industries, the Commission held that fine print disclosures that the surveys included only “Litton authorized” agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. Litton Indus., 97 F.T.C. 1, 71 n.6 (1981), aff’d as modified, 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure “Litton and one other
misleading to consumers even with accurate information in the text. The FTC acknowledges that “reasonable consumers often do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.” Furthermore, the recent FTC guidance on online advertising, “Dot Com Disclosures,” notes that consumer protection laws apply regardless of device or medium. The FTC notes that mobile devises “present additional issues because a disclosure that would appear on the same screen of a standard desktop computer might, instead, require significant vertical and horizontal scrolling on a mobile screen.”

Where disclaimers for potentially misleading advertisements have been approved, the disclosures and disclaimers must be “clear and conspicuous.” The FTC and the courts

brand” was reasonable to quote the claim that independent service technicians had been surveyed, “[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance.” Id. at 70 n.5. In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. D.L. Blair, 82 F.T.C. 234, 255, 256 (1973). See also FTC Policy Statement on Deception, supra note 42. Furthermore, in American Home Products, the court held that “[i]f the advertisement contains a definition or disclaimer which purports to change the apparent meaning of the claims and render them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, it will not remedy the misleading nature of the claims.” Am. Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568, 590 (S.D.N.Y. 1987).

In one case respondent’s expert witness testified that the headline (and accompanying picture) of an ad would be the focal point of the first glance. He also told the administrative law judge that a consumer would spend “[t]ypically a few seconds at most” on the ads at issue. Crown Central, 84 F.T.C. 1493, 1543 nn. 14-15 (1974).

FTC Policy Statement on Deception, supra note 42.

See, e.g., Potato Chip Inst. v. Gen. Mills, Inc., 333 F. Supp. 173 (D. Neb. 1971) (finding a disclaimer of “fashioned from dried potato granules” to be sufficient to convey that certain “potato chips” were not made from raw potatoes).

determine whether a disclaimer is sufficient by looking to how the target consumers understand the claims within the context of the full advertisement.\textsuperscript{67}

\textbf{B. Remedies for False Advertising Under the Lanham Act}

A successful plaintiff against Microsoft may have access to injunctive relief, market damages, and corrective advertising.\textsuperscript{68} A competitor can obtain injunctive relief against Microsoft merely by proving a “likelihood of damage,”\textsuperscript{69} which is presumed where the plaintiff shows literal falsity. While none of Microsoft’s express claims run the risk of being found literally false, several of its implied claims are vulnerable to findings of falsity through necessary implication.\textsuperscript{70} Such findings are presumed to deceive consumers and would permit courts to grant an injunction, while misleading claims would require surveys demonstrating the likelihood of consumer deception before a court enjoins further Bing It On advertisements.\textsuperscript{71}

Market damages, defined as lost profits, reputation damages, or disgorgement of defendant profits, is awarded only after a showing of actual damages.\textsuperscript{72} Because it difficult to show that a false advertisement caused actual damages without evidence of consumer deception, most circuits require proof of actual consumer deception for market damages. In these jurisdictions, even if a plaintiff against Microsoft meets the burden for an injunction by showing literally falsity by necessary implication, it would be unable to win market damages without

\textsuperscript{67} According to the FTC guidance, the adequacy of disclosures is evaluated by assessing the “overall net impression” created by the online advertisement, based on the following elements: proximity and placement; prominence; distracting factors; repetition; and using language understandable to the intended audience. \textit{.com Disclosures: How to Make Effective Disclosures in Digital Advertising}, FED. TRADE COMM’N (March 2013), http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf


\textsuperscript{69} Johnson & Johnson v. Carter Wallace Inc., 631 F. 2d 186, 189-90 (2d Cir. 1980).

\textsuperscript{70} These include implied claims of (1) unbiased suggested terms (2) generalized consumers preference for Bing based on studies, and (3) that the untrue implication that the “blind tests” used to establish express claims are the same as or consistent with the more than 5 million Bing It On challenge results.

\textsuperscript{71} Zoller Labs. LLC v. NBTY, Inc., 111 Fed. App’x 978, 982 (10th Cir. 2004).

\textsuperscript{72} Balance Dynamics Corp. v. Schmitt Indus., 204 F.3d 683, 690 (6th Cir. 2000).
demonstrating actual consumer deception. Google’s market damage is potentially extensive. Since the Bing It On campaign began, Bing’s market share has risen at Google’s expense. While merely insufficient to prove causation, if it can link lost market share to Bing with evidence of actual consumer deception (most likely via surveys and/or expert testimony), Google may be able to recover significant lost ad revenue. The circuits are split as to whether intentional conduct on the part of the defendant is necessary for plaintiffs to recover defendant profits from false advertising.

Corrective advertisement can come in the form of an injunction forcing the ordering the defendant to correct the false impression it had created, or as an award to plaintiff to fund retrospective or prospective advertising efforts that specifically target the false impressions.

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73 The Ninth and Eleventh Circuits, however, have insisted that actual deception is not necessary because courts have the discretion to allocate damages based on “the totality of circumstances.” See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997); Burger King v. Mason, 855 F. 2d 779, 781 (11th Cir. 1988).


76 The Second, Third, Sixth, Eight, Ninth and D.C. Circuits have held or suggested that only intentionally or willfully false advertising can lead to the award of defendant profits. See, e.g., Grace v. Grace, 217 F. 3d 1060, 1068 (9th Cir. 2000); Securacom Consulting v. Securacom, 116 F. 3d 182, 190 (3d Cir. 1999); Minn. Breeders v. Schell & Kampeter, 41 F. 3d 1242, 1247 (8th Cir. 1994); George Basch v. Blue Coral, 978 F. 2d 1242, 1247 (8th Cir. 1994); Minn. Breeders v. Schell & Kampeter, 41 F. 3d 1242, 1247 (8th Cir. 1994); George Basch v. Blue Coral, 978 F. 2d 1242, 1247 (8th Cir. 1994); ALPO Petfoods, Inc. v. Ralston Purin Co., 613 F. 2d 958, 968 (D.C. Cir. 1990); Frish v. Elby’s Big Boy, 849 F. 2d 1012, 1015 (6th Cir. 1988). The Fifth, Seventh, Tenth and Eleventh Circuits do not generally require willful misconduct. See Estate of Bishop v. Equinox Int’l, 256 F. 3d 1050 (10th Cir. 2001); Rolex USA v. Meece, 158 F. 3d 816 (5th Cir. 1998); Web Printing Controls v. Oxy-Dry Corps., 906 F. 2d 1202, 1205-6 (7th Cir. 1990); Burger King v. Mason, 855 F. 2d 779, 781 (11th Cir. 1988).

77 Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511 (8th Cir. 1996) (ordering the defendant to explain away false impressions to sales representatives, doctors, pharmacists and patients).
created by defendant’s ads. As Google has yet to run advertisements challenging Microsoft’s Bing It On claims, it would only qualify for prospective corrective advertisement damages.

C. Connecticut Unfair Trade Practices Act

Every U.S. state has adopted some form of the FTC provision prohibiting unfair and deceptive practices. State consumer fraud statutes, often referred to as “little or baby FTC Acts,” have largely adopted and applied the rules and standards established by the FTC Act. The Connecticut Unfair Trade Practices Act (CUTPA) prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade of commerce” within the state, defining trade or commerce to include "advertising . . . of any service.” CUTPA directs Connecticut courts to use the FTC and federal court’s interpretation of the FTC Act to guide their determination of whether an activity is proscribed by the Act.

CUTPA permits “any person who suffers ascertainable loss of money or property” as a result of prohibited deceptive practices to bring a claim under the statute. “Ascertainable loss” may be shown “whenever a consumer has received something other than what he bargained for” and can demonstrate at least a nominal loss. Under CUTPA, the Connecticut Commissioner of Consumer also has the authority to seek out potentially deceptive practices.

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78 See, e.g., ALPO Petfoods, Inc., 913 F. 2d at 969.
79 CONN GEN. STAT. § 42-110a(4).
80 CONN GEN. STAT. § 42-110b(a).
81 CONN GEN. STAT. § 42-110b(c).
82 The term “ascertainable loss” has been described by courts as a “threshold barrier which limits the class of persons who may bring a CUTPA action” by the courts in Connecticut. Hinchliffe v. Am. Motors, 184 Conn. 607, 615 (1981); see also Service Rd. Corp. v. Quinn, 241 Conn. 630, 638 (1997).
83 CONN GEN. STAT. § 42-110g(a).
84 Hinchliffe, 184 Conn. at 614.
85 Id. at 625.
without showing ascertainable loss.\(^{86}\) According to the “ascertainable loss” requirement, an internet user who had viewed the Bing It On ad and became a Bing user in some part because of the advertisement would likely have standing to bring a CUTPA claim against Bing.

\(^{86}\) **CONN GEN. STAT.** § 42-110b(c).