Scientific Realism & The Lanham Act

Courtney Cox and *Peter Brody*

This piece will address a problem that arises in applying laws governing misrepresentation to scientific advertising. It will take as its central case study the Lanham Act, a federal statute that governs both trademarks and false advertising. Technology companies (and courts) are increasingly facing difficulty knowing how to comply with the limits imposed by the Lanham Act when sharing scientific studies about their products—including on social media or in educational programs directed towards their clients. The Second Circuit took a step towards providing some guidance in its 2013 decision, ONY, Inc. v. Cornerstone Therapeutics, Inc., 720 F.3d 490 (2d Cir. 2013). ONY had sued Cornerstone and its affiliates for false advertising based on publication of and promotional materials surrounding a Cornerstone-sponsored study that found ONY's product "was associated with a 49.6% greater likelihood of death" than Cornerstone's product. Id. at 495. The Second Circuit affirmed dismissal of ONY's complaint, holding that sharing scientific conclusions about unsettled matters of scientific debate cannot give rise to liability. Id. at 492. But the district courts have since reached confusing decisions about how to apply this test. Part of the problem stems from conceptual difficulties about the nature of scientific conclusions, including epistemic disagreements about how to evaluate reliable methodology and how methodology affects what results mean. This work will analyze the limits that these conceptual difficulties create for laws governing science-based representations. It will then propose practical solutions within those limits to minimize consumer confusion, one of the purposes of false advertising law.