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False Advertising Liability, FTC Scrutiny, and Competitive Litigation in the Age of AI Marketing

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KEY POINTS

- The FTC has brought 13 AI washing enforcement actions, treating deceptive AI capability claims — including both express and implied misrepresentations — as violations of Section 5 of the FTC Act.
- Section 43(a)(1)(B) of the Lanham Act gives competitors a private cause of action against AI washing, with preliminary injunctive relief available that can halt an offending marketing campaign before final judgment.
- A literally false AI claim — such as describing a product as "AI-powered" when it contains no AI component — allows a Lanham Act plaintiff to presume consumer deception without consumer survey evidence.
- Apple's $250 million class action settlement in *Landsheft v. Apple Inc.* demonstrates that marketing AI features before they are available to consumers creates actionable false advertising exposure.
- Marks incorporating AI-suggestive terms filed with the U.S. Patent and Trademark Office are vulnerable to deceptive misdescriptiveness challenges under Section 2(a) of the Lanham Act if the underlying product does not actually use AI.

The artificial intelligence (AI) gold rush has created a new and increasingly dangerous temptation for marketers and brand managers: claiming that a product or service is "powered by AI" when, in reality, it is not. The phenomenon — increasingly referred to as "AI washing" — sits at the intersection of trademark law, false advertising doctrine, and federal regulatory enforcement, and it is drawing serious and growing scrutiny from both the Federal Trade Commission (FTC) and private litigants. Companies that yield to the marketing allure of AI branding without substantive technological backing do so at considerable legal peril.

THE MARKETING TEMPTATION AND THE LEGAL TRAP

The commercial logic is straightforward. AI has become perhaps the most potent buzzword in the history of technology marketing. Consumer and business surveys consistently show that products described as "AI-powered" or "AI-driven" command higher perceived value, greater consumer trust, and stronger purchase intent than functionally identical products described without the AI label. For brand managers under constant pressure to differentiate in crowded markets, the temptation to append "AI" to a product name, incorporate it into a trademark, or weave AI-capability claims into advertising copy is understandable — and, in many cases, actively encouraged up the management chain.

The legal trap, however, is significant. Federal law prohibits false and misleading commercial speech across several overlapping doctrines. Section 43(a) of the Lanham Act creates a private cause of action for false advertising when a company makes a false or misleading statement of fact in commercial advertising that is likely to deceive consumers and that causes or is likely to cause competitive injury. The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. State consumer protection statutes in virtually every jurisdiction add additional layers of exposure. And the common law of unfair competition provides yet another avenue for aggrieved competitors. When a company claims its product uses AI and it does not, it potentially implicates all of these simultaneously.

The problem is compounded by the nature of AI claims themselves. Unlike many product attribute claims — a precise drug dosage, a measured fuel efficiency rating, or a tested tensile strength — AI claims tend to be vague enough that a company may believe it has legal cover, even when the underlying reality falls well short of what a reasonable consumer would understand. Calling a product "AI-enhanced" when it uses a simple rules-based algorithm, or describing a platform as "machine learning-powered" when it relies on basic statistical filtering, may seem like harmless marketing latitude. Courts and regulators are increasingly concluding otherwise.

THE FTC'S EXPANDING ENFORCEMENT FRAMEWORK

The FTC has made clear that AI washing is on its enforcement radar. In guidance issued over the past several years, the FTC has emphasized that its existing authority under Section 5 of the FTC Act — prohibiting deceptive acts or practices — applies fully to AI-related claims. The FTC has articulated the principle that a claim is deceptive when it is likely to mislead consumers acting reasonably under the circumstances, and when the misleading impression is material to their purchasing decisions. AI capability claims almost invariably satisfy both prongs.

The FTC has been particularly focused on two categories of AI washing conduct. The first involves express claims — advertisements, product descriptions, press releases, and investor communications that affirmatively state a product uses AI when it does not. The second, and more nuanced, category involves implied claims — product names, logos, interface design, and marketing language that create the net impression of AI functionality without technically stating it. A financial services company that names its customer-facing software platform "NeuralAdvisor" or a health care company that brands its diagnostic tool with a name incorporating "AI" or "Intelligence" may be making an implied AI claim with the same legal exposure as an express one, even if the fine print contains a disclaimer that careful legal review would consider adequate.

The FTC has also signaled that AI washing in connection with investment and capital markets activity warrants particularly heightened scrutiny — an area where the Securities and Exchange Commission (SEC) has taken parallel enforcement action against companies that overstated AI capabilities to investors. While the securities law dimensions of that problem are beyond the scope of this article, corporate counsel advising technology companies should be aware that the same AI washing conduct can trigger simultaneous enforcement interest from multiple federal regulators.

Importantly for practitioners, the FTC's remedial authority includes not only civil penalties and injunctive relief but also disgorgement of profits obtained through deceptive practices in appropriate cases. The 2021 Supreme Court decision in *AMG Capital Management v. FTC* limited the FTC's authority to seek equitable monetary relief under Section 13(b), but the FTC has adapted by pursuing enforcement through administrative proceedings under Section 19 and by collaborating with state attorneys general who retain broad restitutionary authority under their own consumer protection statutes. Companies that have been commercially successful precisely because of AI washing claims face meaningful monetary exposure from this multijurisdictional enforcement architecture.

Any expectation that AI washing enforcement would soften with the change in presidential administration has not been borne out. Throughout 2025 and 2026, the FTC not only continued this enforcement focus but brought new cases following the same blueprint. Recent enforcement actions against Click Profit and Workado showed that the FTC's scrutiny continued — and perhaps intensified. Click Profit was targeted because it presented its service as an online business opportunity that promised "an automated, AI-powered system" to generate thousands of dollars a month in passive income — promises that went unfulfilled. FTC Bureau of Consumer Protection Director Christopher Mufarrige confirmed at a recent NAD conference in September 2025 that the FTC is "targeting fraudsters and other unscrupulous actors who make false and misleading claims related to their use of AI." Echoing the continuing focus of the FTC on this issue, FTC Chairman Andrew Ferguson described the agency's efforts in April 2026 congressional testimony as encouraging "growth in the AI market by targeting bad actors who undermine innovation through deception."

THE LANHAM ACT FRONT: COMPETITORS ARE ALREADY LITIGATING

While regulatory enforcement operates on its own timeline, private Lanham Act litigation moves on the plaintiff's schedule — and competitors have been increasingly willing to use it as a tool to challenge AI washing in the marketplace. Section 43(a)(1)(B) of the Lanham Act provides that any person who believes they are or are likely to be damaged by a false or misleading description or representation of fact made in commercial advertising has a cause of action in federal court. Unlike FTC enforcement, private Lanham Act litigation does not require prior regulatory action, does not depend on agency resources or priorities, and can be filed the day after a competitor launches an offending campaign.

The elements of a Lanham Act false advertising claim require the plaintiff to establish that the defendant made a false or misleading statement of fact in commercial advertising, that the statement actually deceived or had the tendency to deceive a substantial segment of the audience, that the deception was material, that the defendant caused the statement to enter interstate commerce, and that the plaintiff has been or is likely to be injured as a result. In the AI washing context, each of these elements is increasingly supportable.

On falsity, the threshold question is whether the statement is literally false or only misleading. A product that contains no AI component whatsoever described as "AI-powered" in advertising copy is literally false — the most favorable posture for a Lanham Act plaintiff, because literal falsity allows the court to presume consumer deception without requiring consumer survey evidence. Where the claim is more ambiguous — "intelligent," "smart," "adaptive," or an AI-suggestive product name — the plaintiff must prove that the net impression conveyed to a relevant consumer audience is false or misleading, typically through consumer survey evidence, expert testimony on reasonable consumer perception, and evidence of actual marketplace confusion or deception. Both categories of claim are viable; literal falsity cases are simply faster and less expensive to prove.

On competitive injury, AI washing plaintiffs have a straightforward argument. In markets where AI capability is a recognized driver of consumer preference, competitive selection, and pricing power, a competitor that truthfully describes its technology while a rival falsely claims AI equivalence or superiority suffers quantifiable harm. Lost sales, price erosion, and reputational damage from being perceived as technologically inferior to a company that has achieved its AI reputation through deception are all cognizable injuries under the Lanham Act. Courts have not hesitated to recognize that false superiority claims by one competitor injure the truthful competitors who were passed over as a result.

The remedies available in a successful Lanham Act false advertising claim are substantial. A prevailing plaintiff may recover the defendant's profits attributable to the false advertising, actual damages, costs of corrective advertising, attorneys' fees in exceptional cases, and — critically — preliminary and permanent injunctive relief. The preliminary injunction remedy is often the most commercially significant. A court order requiring a defendant to pull AI-based marketing claims mid-campaign, repackage products, or suspend use of an AI-incorporating trademark pending trial can be commercially devastating and may effectively resolve the dispute on terms favorable to the plaintiff well before a final judgment.

The most commercially significant recent development for practitioners advising large consumer-facing technology companies may be the Apple Intelligence litigation. In *Landsheft v. Apple Inc.*, No. 5:25-cv-02668 (N.D. Cal.), plaintiffs argued that Apple's marketing ran ahead of delivery when it advertised AI features that were not yet available to customers. The Apple settlement covers all iPhone 16 models and certain iPhone 15 models purchased between June 10, 2024, and March 29, 2025, roughly 37 million devices. The Apple matter did not involve a claim that the AI technology did not exist at all — it involved a claim that the marketing preceded the product's availability. The legal theory that consumers paid a premium for AI features that were advertised as ready but were not, is one that extends beyond Apple's facts to any company that front-loads AI capability claims in its product launch before the underlying technology is ready to deliver.

Before trial, Apple agreed to an eye-popping $250 million proposed class action settlement filed on May 5, 2026, covering iPhone 16 and iPhone 15 Pro buyers who purchased between June 10, 2024, and March 29, 2025, with eligible buyers potentially receiving between $25 and $95 per device. The complaint alleged that Apple's advertisements created a "clear and reasonable consumer expectation" that the iPhone 16 would ship with the promoted AI capabilities, while the product allegedly delivered "a significantly limited or entirely absent version of Apple Intelligence."

TRADEMARK SELECTION: A DISTINCT BUT RELATED RISK

One dimension of AI washing that receives insufficient attention in most corporate legal counseling is the trademark dimension. Companies eager to capitalize on AI's marketing power have flooded the U.S. Patent and Trademark Office (USPTO) with applications for marks that incorporate "AI," "Intelligence," "Neural," "Machine," "Learning," and similar terms. Many of these applications are filed for products and services that have no genuine AI component.

The trademark risks here operate on multiple levels. At the prosecution level, the USPTO has been scrutinizing AI-incorporating marks for descriptiveness and deceptive misdescriptiveness. Under Section 2(a) of the Lanham Act, a mark that misdescribes the goods or services in a way that is likely to be believed by consumers can be refused registration — or, if registered, cancelled. A company that obtains a registration for an AI-incorporating mark for a product that does not actually use AI has obtained a potentially vulnerable registration that a competitor can attack in a TTAB cancellation proceeding.

Beyond the USPTO, a registered AI-incorporating mark that is used in the market creates ongoing false advertising exposure, because the mark itself functions as a commercial claim about the product. Every use of the mark in commerce is a repetition of the implied AI capability claim. If that claim is false, the trademark registration provides no shield against Lanham Act liability — it merely means the false claim has been used more extensively and with more commercial weight than it otherwise might have been.

PRACTICAL GUIDANCE FOR COUNSEL

The practical guidance for counsel advising clients on AI-related marketing and brand strategy flows directly from this analysis.

Substantiate before you market. Before any AI claim — express or implied — goes to market, counsel should require that the marketing or product team provide technical documentation confirming the AI functionality claimed. The FTC's substantiation doctrine requires that objective product claims be supported by a reasonable basis at the time the claim is made. "We thought it used AI" is not a defense.

Scrutinize the mark. Any trademark application that incorporates AI-suggestive terminology should be accompanied by a clear-eyed assessment of whether the applied-for goods or services actually use AI. If they do not, the mark should be reconsidered before filing. If the product is expected to incorporate AI in the future, counsel should advise on the use requirements and the risk of a deceptive misdescriptiveness challenge.

Monitor the competitive landscape. Companies that have invested in genuine AI development should be monitoring competitors' advertising and trademark filings for AI washing claims that disadvantage them competitively. The Lanham Act's private right of action is a meaningful tool, and the preliminary injunction remedy can deliver fast and commercially significant relief.

Disclose accurately and consistently. Where a product uses AI in some features but not others, or uses AI in a limited or preliminary form, marketing materials should describe the AI functionality with specificity rather than sweeping generalization. A claim that a product "uses AI to personalize recommendations" is more defensible than a claim that the product is "fully AI-powered," if only the recommendation engine incorporates machine learning.

CONCLUSION

The AI marketing boom has created a legal landscape in which the distance between an aspirational product claim and a legally actionable false advertisement has narrowed considerably. The FTC has made clear that it regards AI washing as deceptive conduct squarely within its enforcement jurisdiction. Competitors with Lanham Act standing are actively monitoring the marketplace and pursuing litigation to level the competitive playing field. And the trademark system itself provides no safe harbor for a mark that misdescribes a product's AI capabilities. The legal system has caught up with AI marketing hyperbole, with a $250 million consumer class action settlement, 13 FTC enforcement actions, the first criminal AI washing prosecution, and a bipartisan FTC chairman explicitly framing enforcement as pro-innovation policy.

Companies and their counsel who approach AI marketing claims with the same rigor applied to drug efficacy claims, financial performance claims, and environmental claims will be well positioned to exploit AI's marketing power legitimately. Those who treat AI branding as cost-free marketing hyperbole — a digital-age version of "new and improved" — are likely to learn, at considerable expense, that the legal system has caught up with the technology.

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