Misleading and Comparative Advertising: The Price of Comparing Prices

Advertisers find it irresistible to say that they are cheaper than their competitors. But how far can advertisers legitimately go in comparing prices before they risk the high price of litigation and the chance that they will be forced to scrap a costly comparative advertising campaign? Two recent decisions provide some useful guidance.

Introduction

The ability of brand owners to use the trade marks of competitors in advertising is an issue that has challenged the courts many times. The courts are charged with the difficult task of balancing the interests of fair competition against the rights of trade mark owners to prevent others from using their marks.

Since the introduction of the original Comparative Advertising Directive and the well known decision in O2 v Hutchinson 3G (regarding Hutchinson’s use of O2’s “bubble” trade marks in its advertising campaign) it is clear that advertisers are free to use the trade marks of their competitors in their advertising campaigns provided that they comply with the requirements of the comparative advertising regime (currently embodied in the Misleading and Comparative Advertising Directive). Essentially, this means that advertisers must ensure that their comparative adverts are not misleading, compare objective and verifiable characteristics of goods which meet the same needs, do not create confusion between the advertiser and competitor and do not discredit or take unfair advantage of the competitor’s trade marks.

The Case of the French Supermarkets

The Court of Justice of the European Union (“CJEU”) has recently issued its decision in a reference from the French Courts regarding a comparative advert used by French supermarket chain Leclerc. Leclerc placed an advertisement in a local newspaper showing a Lidl and a Leclerc till receipt side by side, listing goods by way of general description and by weight or volume, with individual and total costs for both supermarkets. The total price shown for the Leclerc products was cheaper than that for the Lidl products.

Lidl brought a claim under French unfair competition laws claiming that the advert was misleading as Leclerc had only selected goods that showed it in a favourable light, and, due to qualitative and quantitative differences between Lidl’s goods and Leclerc’s goods, the advertisement did not compare goods which met the same needs.

On a reference regarding the interpretation of the Misleading and Comparative Advertising Directive, the CJEU found that food products could “meet the same needs” even where factors such as ingredients and place and conditions of production mean that there are differences in terms of how much consumers want to consume such products. The test is whether there is a sufficient degree of interchangeability between the products being compared—where the line will be drawn has been left to the National Courts to decide—and if there is, advertisers can legitimately compare.

As to the question of “misleading”, the CJEU found that such advertisements could be misleading if a significant number of shoppers to whom the advert was addressed might make the
decision to buy products in the mistaken belief that the selection of goods chosen for the comparison was representative of the advertisers general prices compared with those of the competitor. The court also found that for comparison criteria to satisfy the requirement that they be verifiable, the actual products compared must be capable of being identified from the information contained in the advertisement.

**The Case of the English Supermarkets**

The Advertising Standards Agency ("ASA") recently published its decision on a complaint made by Morrisons and Tesco in relation to an ad campaign being run by competitor Asda. The ASA reviews compliance with advertising codes such as those issued by the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice. These codes are designed to prevent misleading adverts, and so deal with similar issues to those raised by comparative advertising.

The Asda advertising campaign in question concerned a price guarantee which promised to give back to consumers the difference in the price of their shopping if it cost less elsewhere. The adverts contained slogans such as "If your grocery shopping could have cost less elsewhere we’ll give you the difference—Guaranteed", "Don’t waste money this Bank Holiday. The Asda Price Guarantee means your shopping will cost less than Tesco, Morrisons or Sainsbury’s" and “Buy all of this for less at Asda or we’ll give you the difference”.

The ASA decided that, in certain adverts, Asda had prominently shown items that were not included in the price guarantee, along with a logo stating “Guaranteed!”, and had given the general impression of a store which included items that were excluded from the guarantee, such as non-grocery items. The small print in these adverts stating “exclusions apply” was not enough to warn consumers about the exclusions from the price guarantee and these adverts were therefore held to be misleading. The ASA also found that, in some cases, Asda’s price guarantee claims had referred to shopping generally rather than to specific items, and had suggested that Asda was generally cheaper than its competitors. This was also found to be misleading.

The ASA rejected the complaint that the price guarantee was misleading because of the methods used to check prices. The ASA were not concerned, on the facts, that the prices of different supermarkets were checked with differing regularity or that some were checked manually and others online. Small errors on the part of the price check website used in connection with the comparison, such as failing to pick up similar products offered by competitors, were also not problematic, as the number of products compared overall was sufficiently large.

**Tips for Advertisers**

Before launching a comparative advertising campaign, care should be taken to ensure that you have retained copies of all documents and price lists that you have used as a basis for your comparisons. The following do’s and don’ts may also provide a helpful reference point:

<table>
<thead>
<tr>
<th>Do</th>
<th>Don’t</th>
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<tbody>
<tr>
<td>Compare like with like—although some differences between products will still mean they are considered interchangeable, don’t compare your basic range with the premium range of a competitor.</td>
<td>Make claims that suggest you are generally cheaper than a competitor based on a sample of products if you can’t in fact support such a claim.</td>
</tr>
<tr>
<td>Ensure that it is possible to identify from the advertisement the goods or services actually compared.</td>
<td>Omit relevant information from the comparison which may affect the consumer’s decision to purchase e.g. a brand name.</td>
</tr>
<tr>
<td>Only show products in the ad that are actually included in the price claim.</td>
<td>Rely on the small print in the advert to overcome a general impression given which could be misleading.</td>
</tr>
<tr>
<td>If your claim only applies to certain items only make claims that refer to specific items.</td>
<td>Prominently display in the ad items that are not part of the comparison you can legitimately make.</td>
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2 ASA Adjudication on ASDA Stores Ltd dated 2 February 2011 (Ref 129579)
Practice group contacts

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