

ADVERTISING & MARKETING BULLETIN

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COMPARATIVE ADVERTISING: THE BASICS

INTRODUCTION

Simply the best. Better than the rest.

Does this sound like your new ad campaign? Does your newest ad proudly boast that your product is better than the others? Do you use the other products' names? If so, be aware – in Canada the message seems to be “compare with care.” Companies advertising their wares and services need to understand the boundaries and restrictions Canadian law imposes on comparative advertising. The following takes a glimpse at some key restrictions.

MISLEADING

In Canada, the *Competition Act* makes publishing a false or misleading advertisement illegal. So, any advertisement that makes claims, statements, illustrations, or representations about a competitor's products or services had better be accurate. Deceptive, false or misleading claims about competitors' products or services can spell big trouble.

CREATING FALSE IMPRESSIONS

Try not to create a false impression. Advertisements that talk about competitors and their products or services must not only be true, but also give the whole story. Saying something that is technically true is not good enough if you have left out essential information. Even if your claims are true and complete, they should not be used in ways that create a general impression that is false or misleading. For example, the advertised test results of a product, though accurate, may have nothing to do with how well it actually works. Also, make sure that the visuals accompanying your ad do not mislead or distort the message. For instance, do not show the entry model of your competitor's product if you are comparing features on luxury models.

MAKING PERFORMANCE CLAIMS

Always fully and properly test your product before making performance claims in your ads. If the claim should ever be challenged you will need to be able to prove that you had evidence to substantiate the claims prior to the ad being run. Also, to be on the safe side, clearly explain why your product or service claims to be better and qualify any superiority claim that is limited to a certain range of conditions. Note that users' testimonials alone do not constitute adequate and proper testing.

BEING UNFAIR

Because it is illegal to compete unfairly, your ads should never unfairly discredit, disparage or attack a competitor or its products, services or advertisements. Never exaggerate the nature or importance of differences between your competitor's product or service and yours.

INFRINGING INTELLECTUAL PROPERTY

For the most part, Canada's copyright and trade-mark laws protect intellectual property rights. So, a competitor's trade-mark, packaging, slogan, or logo might be protected by copyright and/or trade-mark rights, which could make reproducing them, or a substantial part of them, intellectual property infringement.

Using a competitor's trade-mark in an advertisement could amount to trade-mark infringement depending on whether the trade-mark is registered, what it is registered for and how it is used in the advertisement. Take, for instance, the trade-mark for SPEEDY AUTO GLASS that is registered for use in association with auto repair services. If another auto repair company were to use the SPEEDY AUTO GLASS trade-mark in a comparative ad, then that company could be seen to be using the SPEEDY AUTO GLASS trade-mark in association with its own services, and thus be found guilty of trade-mark infringement.

There is less risk in using a competitor's trade-mark that has been registered just for products as opposed to services, or that is not registered at all, but even though this may not amount to trade-mark infringement, it could constitute illegal "passing-off" (see below).

Also, if you mention a competitor's registered trade-mark in a negative context in your ad, you could be found to have depreciated the value of the goodwill associated with your competitor's trade-mark. Goodwill could be depreciated by reducing the allure of your competitor's mark or by enticing away customers who would otherwise buy or keep buying the trade-marked goods or services of your competitor. However the courts have found that ads that focus on the differences between two products or services, rather than the similarities, may be acceptable as in that case you are not seen to be trading on the goodwill of your competitor's mark. Therefore, price comparisons pointing out that your product or service is cheaper will usually be allowed.

PASSING-OFF

"Fido users, come on over to Telus." Have you seen these ads from Telus using Fido's trade-marks and pictures of dogs? In the spring of 2004, Microcell Solutions Inc. ("Fido") brought an action against Telus, Bell Mobility and Rogers to stop them from continuing to use Fido trade-marks. In doing so, Fido accused Telus and company of "passing-off." Does your ad make such prominent use of your competitor's trade-marks that at first glance it may look like an advertisement for your competitor's services, or that your competitor is somehow associated with the ad? If so, you too may be found to be "passing-off" your wares and services as those of your competitor.

To avoid lawsuits for passing-off, your own trade-marks should always be more prominent than your competitor's in your ads. Using a disclaimer also helps. For example, stating that "Brand X is a trade-mark of XYZ Company, who is not associated with this promotion [or advertisement]" has been found to help dispel doubt. Finally, if using a competitor's trade-mark in your ad, make sure you spell it correctly, include all words that form part of the mark, and use the special font or other characters that distinguish it as a trade-mark.

KEEPING OUT OF TROUBLE

Crossing the boundaries around comparative advertising can lead to not only costly litigation and potential liability, but also jail in some cases. So, before comparing products, think carefully. Getting into trouble can be as easy as comparing yourself with the restaurant "with the golden arches"; even though you have not named your competitor or used its trade-mark, the average consumer knows who you mean.

Keep to the guidelines and remember that bad comparisons can cost you money, damage your reputation, and land you in court or even jail. Be creative in your advertisements. But, if you compare, do it with care.

By Sharon Groom and Brett Stewart

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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