



Grace Lindo

Advertising Beyond Compare

How far can you go?

Advertisers are always looking to promote their products in a favourable manner. As a result, they have become innovative in choosing their medium, such as electronic tickers and mobile billboards. In addition, advertisers have coined creative messages to increase the awareness of their brands. One of the most effective ways to advertise is to compare your goods and services to those of your competitors. This form of comparative advertising eliminates the guesswork which must be done by the potential consumer by providing evidence of the superiority or utility of a good or service. While this may seem harmless, there are legal constraints to comparative advertising and more specifically the use of a competitor's trademark.

Comparative advertising is the advertising of ones goods or services by comparing them to a competitor's. Comparative advertising often involves the use of a competitor's trade mark and possibly infringement of that mark. The rights in a mark can also be infringed when unfair advantage is taken of the reputation in that mark.

However, the Trade Marks Act does not prevent the use of a registered trade mark by a person as a means of identifying the goods of the proprietor of a mark where such use is "...in accordance with honest practices in industrial or commercial matters" and does not "...take unfair advantage of, or is detrimental to the distinctive character of the reputation of the trade mark". This seemingly allows comparative advertising but within very strict guidelines as not only must the assertion about the product be honest (and therefore true) but it must not be detrimental to the mark. Overall, there is a duty to act fairly in the interest of the proprietor.

Curiously, whether an advertisement is “honest” will be construed through the eyes of the reasonable consumer. The question to be asked is whether a reasonable consumer knowing all the facts, considers the advertisement to be honest. The average consumer expects the use of hyperbole or exaggeration, but such excessiveness must be done with the interest of the competitor’s reputation in mind.

There are also restrictions on advertising under both the Fair Competition Act and the Consumer Protection Act. For instance, under the Fair Competition Act, it is an offence “to make a representation to the public that is false or misleading or is likely to be misleading in a material respect.” It is also an offence to falsely represent the “particular kind, standard, quality or quantity” of a service being provided by a particular person. This offence is committed whether the communication is made directly or indirectly. The Consumer Protection Act provides a more detailed protection by prohibiting misleading representations (inclusive of advertisements) which are deceptive or tend to mislead the public as to the nature of the good or service.

The law on comparative advertising and the restrictions on the use of a competitor’s trademark seek to balance the proprietor’s rights in the marks and the need for vigorous competition in a free market. Ultimately, the consumer will benefit from this balancing act.

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