ADDLESHAW GODDARD

FAIR GAME OR FOUL PLAY?

Our specialist reputation and information protection, IP and advertising lawyers came together at this event to consider what commercial rivals can get away with saying about each other and how businesses can best protect and defend themselves from (and avoid liability for) advertising and sales tactics.

Market considerations

Whether it is your business considering its strategy for promoting its goods/services, or perhaps responding to a competitor's tactics, you will have in mind not only the organisation's culture and attitude to risk, but that of the competition, as well as the attitude of the relevant market and target audience. Certain brands thrive on particularly edgy campaigns that might come close to or even cross the legal line, which may simply not be appropriate – or work - for your organisation.

We considered some examples of competitors responding in a "tit for tat" fashion (like the Mercedes Benz and Jaguar "*chicken v jaguar*" campaign which ran in the US). It was noted by the audience that some of the more successful competitor v competitor campaigns have involved an element of humour and the ability of brands to take criticism as well as dish it out, and respond in a like manner.

The legal framework

We considered the legal framework in the context of comparative advertising campaigns specifically, as well as in more general terms. Depending on the scenario, a whole range of legal rights could be infringed, but the main causes of action to consider are: defamation, malicious falsehood, unlawful interference with business, IP infringement (trade mark, copyright, design right, etc.) and unlawful advertising (see below). The legal framework is of course just as relevant when considering what you might say about a competitor, as when you are considering whether your competitor has fallen foul of your legal rights. The speakers looked at it from both angles, including providing a "dos and don'ts" (see below) for your sales force, as well as considering what practical steps you might take if your competitor has crossed the line.

Comparative advertising

Whether it is running a comparative advertising campaign or considering complaining about a competitor's, you will need to have regard to the relevant legislation: the Business Protection from Misleading Marketing Regulation 2008 (BPRs), the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Trade Marks Act 1994, and relevant codes: the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) and the UK Code of Broadcast Advertising (BCAP Code). There may also be product or sector specific codes and guidance.

Some practical considerations for running a campaign include:

- Consider the purpose of the campaign for the business
- Consider how the claim will be understood by consumers - ensure it is not misleading
- Should the competitor be expressly named or will it be implied?
- Take care of the use of superlatives such as best, cheapest, number one, leading, etc.
- Confirm data and statistics are accurate and documentary evidence is held on file.

If you take issue with a competitor's campaign, then the business will have to decide what to do about it: do you ignore it and let it run its course (but perhaps it might inform your own strategy in the future, particularly with reference to that competitor), respond to the advertisement via the same or similar channels, or take formal legal action? If the latter, that may include a complaint to the Advertising Standards Authority. Or, if the advertisement has infringed one or more of the other legal rights mentioned above (such as trade mark or copyright infringement), then it may involve commencing legal proceedings, seeking injunctive relief and/or damages (see further below).

Whatever you decide, you will need to consider the potential reputational implications of your actions. We considered the example of the supermarket chain Aldi, which is known for running price comparison campaigns. Yet when another organisation (Bargain Booze) followed suit in a comparison between its prices and Aldi's, Aldi's complaint about it, irrespective of the rights

and wrongs, arguably did not reflect well on the brand. Bargain Booze had done the same as Aldi had historically, yet Aldi did not like it when it was on the receiving end.

Dos and don'ts

Some of the "dos and don'ts" for your sales force (not in an advertising specific context) include the following:

- Do you research: verify the truth of the statement
- Stick to the facts; don't exaggerate or offer an opinion, especially where the facts speak for themselves
- Don't assume you can avoid liability by not referring to a competitor by name; if the audience understands to whom you are referring (e.g. by reference to logos or plays on words) then it could still be actionable
- If you are criticising a competitor's good or services, try to avoid any defamatory imputation about the company itself
- Repeating a statement made by another can still be actionable, so if you are going to repeat it, make sure it is true - simply quoting the source won't get you off the hook.

Remedies

What action might you want to consider taking if you competitor has crossed the legal line? The business will need to assess which legal rights are engaged and have been infringed. In broad terms, however, the legal remedies are likely to involve issuing proceedings, seeking an injunction restraining the competitor from continuing to publish the offending statement(s) and damages. For some of the causes of action, in order to claim damages, it may be necessary to prove that you have suffered or are likely to suffer serious financial loss (e.g. defamation) or special damage (e.g. malicious falsehood).

In terms of injunctive relief, the court is highly unlikely to grant an injunction if your claim is in defamation and/or malicious falsehood. That is because if the competitor is likely to raise a defence that the statement is true (which presumably it would) then the court will not grant an injunction. For other causes of action, such as IP infringement, no such considerations apply, so if it is injunctive relief that you want, then think carefully about your cause of action.

Of course, it is perfectly possible (and more cost effective) to achieve the same results without litigating. Litigation should in all but the most exceptional of cases be seen as a last resort. It may be possible to negotiate with the competitor and get assurances, undertakings, retractions/corrections and/or an apology in correspondence, which could then form part of an effective communications programme to reclaim any ground lost to your competitor.

You will also need to bear in mind that, in bringing proceedings, it is likely to be your products and/or organisation that are in the legal spotlight, just as much as your competitor's, perhaps even more so. You would also do well to consider, before proceedings are started, whether confidential or commercially sensitive information might need to be deployed in evidence, and assuming you do not want your competitor getting their hands on it and using it to their advantage, what your strategy is going to be for ensuring that you protect that information. And, finally, always bear in mind that irrespective of the legal rights and wrongs, it is possible to win a case but still lose out on the battle of reputations.

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