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Should You be Engaging in Comparative Advertising to Promote Your Business?

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In today's competitive market, companies use competitive advertising to promote their products by comparing them to those of their competitors. But there can be a fine line between good old fashioned and outright unlawful forms of competition. If you want to utilize the benefits of this form of advertising, it is important to understand what it is, where the distinction lies between permitted and unlawful forms of comparative advertising, and how to avoid liability for unlawful comparative advertising.

What is Comparative Advertising?

A company engages in comparative advertising when it compares the price or other measurable attributes of its products or services, either directly or indirectly, with products or services offered by another company. This form of advertising highlights and compares particular attributes of competing products or services so that consumers can make informed decisions as to which product or service will best suit their needs. Comparative advertising provides consumers with information that enables them to distinguish brands and make more rational decisions. However, such comparisons must be truthful and fair, and must not expressly or implicitly deceive consumers.

Examples of allowable comparative advertising include:

- ▶ "7 out of 10 prefer the taste of Progresso Soup over Campbell's Select Harvest Soup"
- ▶ "Glade Fabric and Air Odor Eliminator penetrates deeper than Febreze on carpet"
- ▶ In the 1980s, during what has been referred to as the cola wars, Pepsi ran a series of advertisements where people, caught on hidden camera, in a blind taste test, chose Pepsi over rival Coca-Cola
- ▶ Apple Inc. has utilized its "I'm a Mac vs. I'm a PC" advertisements as part of its marketing efforts to increase its market share over the years
- ▶ In 2012, Microsoft's Bing search engine began running a campaign about which search engine consumers prefer as it compared Bing to Google, and that more people preferred Bing over Google.

Unlawful Forms of Comparative Advertising

Not surprisingly, companies can be held liable if their comparative advertising is literally false. However, even truthful comparative advertising can be unlawful if it is likely to deceive or mislead consumers because of some implied message contained in the advertising. Further, a comparative advertiser cannot make untruthful statements about its own products or services or those of its competitors.

Examples of unlawful comparative advertising include:

- ▶ False claim of being the first magazine to be written, edited and produced on a personal computer system
- ▶ False claim that tests proved that cat litter with carbon better eliminated bad odors than competitor's cat litter with baking soda
- ▶ False claim that a construction equipment product was compatible and interchangeable with competitor's product and also stronger and better
- ▶ Truthful claim that company's toy construction system attached to competitor's brand of toy construction system held unlawful because, while literally true, the clear implication was that all pieces of company's toy could be safely intermingled with all pieces from competitor's toy set, when some pieces could not be safely attached
- ▶ False claim in advertisement which encouraged doctors to substitute one drug for another when the Food and Drug Administration did not classify the drugs as fully bioequivalent
- ▶ Advertising that asked customers to compare price and style on sunglasses was unlawful when there was no real similarity between company's cheap sunglasses and expensive sunglasses made by high-end fashion company

Liability Exposure for Certain Types of Comparative Advertising

One of the bigger questions that many businesses face is: What liability risks do I face if I engage in competitive advertising? While most businesses want to engage in comparative advertising, these comparisons implicate certain risks when referencing or making remarks about competitors or their products. Depending on the form of comparative advertising used, a company could be held liable if its advertisement incorporates another company's registered trademarks. So when does liability come into play? Liability arises when a showing is made that the public is likely to be confused as to the source of the product being advertised. A touchstone of liability under trademark law is trademark infringement which is established when there is determined to be a likelihood of confusion as to the source of goods or services. If the

general public could be confused as to the source or sponsorship of the advertisement, the advertiser could potentially be subject to liability.

How to Avoid or Minimize Liability

So, how do you avoid liability for infringement in your comparative advertising? The use of a competitor's mark in truthful comparative advertising is permissible as long as there is no customer confusion, regardless whether the use involves a competitor company's mark, slogan or logo. Further, you should always be mindful of the following points in order to avoid advertising and marketing problems when utilizing comparative advertising:

- ▶ Always be truthful in your comparative ads. Being truthful will mitigate any claims as to misrepresentation and infringement.
- ▶ Be mindful that your ads should be intended for and communicated to your target audience in a fashion to inform them about the products/services and never to discredit or unfairly attack competitors. The connotation of your advertisement should also be to educate and not disgrace and place a competitor in a false light. By attempting to discredit your competitor, you open up the potential for liability exposure.
- ▶ When utilizing comparative advertising, your comparison of a competitor's goods and services should be made fairly and truthfully, but never in a manner or tone that may degrade their goods or services. By doing so, your potential consumers might actually feel sympathetic to your competitor's products if they believe you are treating the competitor unfairly which would thereby create a disadvantage to your company in the process.
- ▶ You should only compare products and services. It is never a good practice to attack a competitor's general business practice or business methodology.
- ▶ Many businesses like to conduct surveys or tests to provide statistics on product or service preferences. If your company is considering conducting such testing, it should be performed by an independent source so that any doubt as to the authenticity of the testing can be minimized. Consumers are naturally suspicious that these tests are biased toward the product of the company that sponsored the test. By illustrating that the test was performed by an independent source, your company can remove some of the perceived bias. Additionally, it is always a good idea to keep all test results on file and update the testing periodically if your company wishes to utilize these comparative tests for an extended period of time.
- ▶ When comparing products and/or services, it is important to point out the aspects and qualities that are being compared and the significance of the differences between the products and/or services with respect to value or usefulness of the products to the consumers.

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