

COMPARATIVE ADVERTISING



CASE LETTER 6
2007

Gouden Gids W

COMPARATIVE ADVERTISING

We regularly see advertising that compares the brand of the advertiser with the brand of a competitor. Needless to say, the advertiser's brand always comes out the winner in the comparison. In most cases these advertising campaigns disappear from the picture after just a short period of time, sometimes after a lot of furor. This is often because the competitor takes legal action against the advertiser, as a result of which the court decides that the chosen comparison is not permitted because not all the conditions for comparative advertising have been complied with.

According to Dutch law, comparative advertising is "any form of advertising in which a competitor or the goods or services of that competitor are expressly or implicitly referred to". With regard to the comparison, such advertising is permitted if a number of conditions are met. Previously, these conditions were determined by legal precedence, but more recently they have been incorporated in the law. From these cumulative conditions, it follows that comparative advertising is permitted if it complies to the following conditions.

1 Comparative advertising should not be misleading.

The comparison cannot be factually incorrect or incomplete.

2 Comparative advertising should only compare things that can be compared.

Only goods or services that cater for the same needs or are intended for the same purpose can be compared. It is therefore not permitted to compare 'apples and oranges'.

3 Comparative advertising should objectively compare demonstrable results.

The comparison must objectively compare one or more substantially relevant, verifiable and representative characteristics of the goods and services, such as price, reliability, quantity and safety.

4 Comparative advertising should not confuse the consumer.

The consumer must not be made to think that the comparative advertising originates with the competitor.

5 Comparative advertising should not negatively reflect on the competitor.

The comparative advertising must not harm the competitor's good name or be disparaging with regard to his brands, activities or products.



6 Comparative advertising should compare products with original regional names with products that have the same origin.

Products with so-called original regional names, such as Parma ham and Feta cheese, can only be compared with each other and not with comparable products that have a different origin.

7 Comparative advertising should not make improper use of the reputation and name of the competitor

The comparison must be the focal point, not the product or service that is being compared. The advertiser cannot use the competitor's brand in such a way that the consumer could think the advertiser is advertising his own products or services, for instance by raising quality suggestions.

8 Comparative advertising should not make the comparison with the aid of copies or imitation goods.

Drawing comparisons with a non-existing or no-brand product is, in itself, permitted. However, if the comparison is made with brand products, only original brand products can be used in the comparison, and not copies or imitation goods.

THE ROADSIDE ASSISTANCE PROVIDERS

Immediately after its establishment in 2004, Route Mobiel took a risk by launching an attack on the Goliath among roadside assistance services, the ANWB, using aggressive comparative advertising campaigns.

With slogans like "As well as 40% cheaper, we are also faster than the ANWB" and "The only service the ANWB still provides as standard in your town is delivering its 'Kampioen' magazine", Route Mobiel acquired enormous name recognition in a short period of time and recruited several hundreds of thousands of members, many of whom were previously members of the ANWB.

Comparing is permitted, provided the comparison is fair. The court recently decided that Route Mobiel was not able to prove that it was actually faster and/or cheaper. In calculating the average speed of arriving at the place of the incident, the time between the customer reporting the incident and Route Mobiel finding the most suitable roadside assistance provider was not taken into account. In the price comparison they managed to 'forget' that the ANWB provides a considerable number of additional free services. These comparisons were therefore deemed misleading. The slogan about delivering the magazine, however, was not considered misleading or disparaging, because the ANWB does not include roadside assistance in the town of residence as standard, so objectively seen the slogan was true.

The ANWB was entitled to compensation because the loss of large numbers of members was partly caused by the unlawful advertising campaigns. As a result, the ANWB is now suing Route Mobiel for 5 million euro.



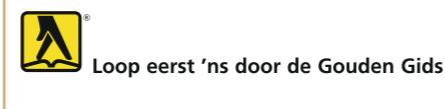
Comparing is permitted, provided the comparison is fair.



KATJA VERSUS THE REST

Under the name iLocal.nl, Yellow Bear offers a service that is identical to that provided by the Yellow Pages, with the difference that the iLocal.nl directory can only be accessed on line. In 2005, the Yellow Pages launched an intensive advertising campaign in which Katja Schuurman, a Dutch actress and model, played a prominent role.

In 2005, Yellow Bear also started an advertising campaign for its product iLocal.nl. In their advertising, they showed a back view of a Katja Schuurman look-alike. Among other things the advertisement announced that there was finally an alternative to the Yellow Pages and that iLocal.nl was much easier to use and considerably cheaper than the Yellow Pages. After this summary of the advantages, iLocal.nl concluded in its advertisement: "It therefore pays to turn your back on the Yellow Pages". The Yellow Pages and Katja Schuurman subsequently sued Yellow Bear.



The court decided that the comparison in the advertising campaign was not permissible. Some of the reasons that the campaign was prohibited were:

- the fact that the claim 'much easier to use and considerably cheaper' was suggestive and not substantiated;
- the fact that the advertisement implied that iLocal.nl also publishes its listings in directory format, when in fact the service is provided only via the internet;
- the fact that Yellow Bear was riding on the reputation and goodwill of the Yellow Pages;
- the fact that the call for consumers to turn their back on the Yellow Pages resulted in harm to the good name and reputation of the Yellow Pages;
- the fact that the campaign caused confusion with the services of the Yellow Pages.

You win some, you lose some: Yellow Bear lost its case and was ordered to issue a retraction, but they did gain a lot of free publicity.

KPN VERSUS TELE2

Tele2 was also ordered by the court to cease its advertising campaign and issue a retraction. In this campaign, Tele2 compared the prices of its services with regard to Internet and VoIP telephony with the average ADSL tariff of its competitors and with the tariff of a basic landline service provided by KPN. The advertisement concludes: "No more need for KPN!". Next to this text is a picture of a boxer with the name 'little bill', raising his arms in a victory pose. This 'little bill' personifies Tele2. In the TV commercial, the KPN logo is also hit by a boxing glove and shatters into pieces.

First of all the court judged that the quoted ADSL tariff was incorrect and therefore misleading, because to calculate the average tariff, Tele2 had only used prices of the major providers and not those of the smaller players.

The use of the tariff of a basic KPN landline service was also misleading, as it gave the impression that consumers pay this amount for an analogue landline service in all cases, which is not true.

Finally the court judged that the text "No more need for KPN!" has a negative impact. The remaining use of the KPN trade name was also considered disparaging and harmful to KPN's good name. The court also felt that there was no need to use the KPN name at all.

RONALD STRAYS FROM THE FOLD

A Burger King TV commercial showed a clown, filmed from the back, standing in front of a Burger King counter. The clown was wearing red-and-white stockings, red clown's shoes, yellow gloves, a dark grey raincoat, a hat and a red wig. The Burger King assistant says: "A Big King, same as always?" When the clown has received his hamburger and turns to leave the assistant calls out after him: "See you tomorrow Ronald!" This is followed by the text "The Big King: 25% more meat than the Big Mac, 25% lower in price! Now for just 1.85 euro".

The court felt that this last statement was permissible comparative advertising. First of all, Burger King had analysed the Burger King and McDonald's hamburgers for their meat content. The research agency used research techniques approved by TNO, the Netherlands Organisation for Applied Scientific Research, for this analysis. The court decided that this meant the result of the analysis was sufficiently credible and therefore not misleading. Secondly, it was easy to verify the prices of both hamburgers. The price comparison proved correct and the court therefore decided that this comparison was not misleading either.

However, part of the advertisement was deemed unlawful. In the view of the court, the advertisement presents the idea that even McDonald's own ambassador, the clown Ronald McDonald, prefers to eat at the competitor's restaurant. The clown is aware that this will harm McDonald's reputation and therefore attempts to do it incognito (using the raincoat and hat). The court judged that this joke is disparaging to McDonald's and ordered Burger King to issue a number of retractions.



Burger King aims high with McDonald's clown



You win some, you lose some



small bill – big bill

THE CHOICE IS YOURS: ADVERTISING CODE COMMITTEE OR THE COURTS

So what do you do when you see a competitor's advertisement on television that puts your products or services in a bad light, wrongfully of course?

In such a case you can submit a complaint to the Advertising Code Committee (RCC). The RCC is a self-regulating body for advertisers. The objective of this Committee is to ensure responsible advertising. Anyone, either a private individual or a company, who feels that certain advertising contravenes the law, the truth, good taste or common decency, can submit a complaint to the RCC.

The main advantage of the RCC compared to legal proceedings is the fact that the injured party need not be represented by a lawyer, which limits the costs. Furthermore, a complaint needs to be described but does not need to be comprehensively reasoned to be taken up. A cheap and simple solution, therefore.

The disadvantage of the RCC is the fact that any decisions made by this Committee are only in the form of a recommendation or advice. Organisations affiliated with the Stichting Reclame Code (Dutch Advertising Code Foundation), such as the STER (Radio and Television Advertising Foundation), on the other hand, undertake to cease broadcasting or publishing a certain advertisement once it has been reproved.

An advantage of going the legal route is that a court decision results in an entitlement to enforcement. This means that the court order can be legally enforced if necessary. Furthermore, the court can impose a fine and order the other party to issue one or more retractions. The disadvantage of legal proceedings, of course, is the cost.

Incidentally, the RCC procedure and the legal procedure are entirely separate. It is therefore possible, in principle, to submit a complaint to the RCC and start legal proceedings at the same time.

The advantages and disadvantages of both procedures result in the fact that private individuals and organised interest groups usually resort to the RCC and that the vast majority of companies tend to opt for bringing a comparative advertising case before the court.

CONCLUSION

Incorporating the comparative advertising regulations into the law had the objective, among other things, to create a balance between the highest possible level of competitive freedom and the interest of acting against incorrect and incomplete reporting. This balance is expressed in the rules that are now easily found in the law, whereby the explanation of permitted comparative advertising has been changed from 'it is not permitted, unless...' to 'it is permitted, provided that...'. Although since the introduction of these regulations it should have been clearer exactly when comparative advertising is or is not permitted, in practice it has proven not to be that easy. Legal precedents in recent years show that many court cases relating to comparative advertising are still being lost by the advertiser. For instance, of all the court cases in 2005, only one had a positive result for the party doing the comparative advertising.

One of the stumbling blocks is the objective justification of the chosen comparison. It is therefore important to always ask the question whether the desired comparison can be substantiated by actual proof, even when the advertisement exaggerates. For instance, a claim of 'always the cheapest' is only permitted if the advertiser can actually prove that he is in fact always the cheapest.

An interesting observation is the fact that some companies - in many cases new companies - deliberately choose to use a risky comparative advertising campaign, as iLocal and Route Mobiel did. An advantage of such a campaign is the opportunity for a lot of free (negative or positive) publicity, which will increase awareness of the company in question in one fell swoop. Of course, if they choose this route, these companies can expect potentially costly legal procedures. It therefore remains to be seen whether the impact of the advertising campaign is balanced out by the potential costs of these legal procedures.

All in all the cumulative regulations have to be observed carefully and it is advisable to always consult an expert advisor before launching a comparative advertising campaign.



'Spotted wrongful,
negative advertising?
Go to the Advertising
Code Committee or
the courts



Intellectual Property

www.novagraaf.nl

For more information:

Novagraaf Nederland BV

Hogehilweg 3
1101 CA AMSTERDAM
P.O. Box 22722
1100 DE AMSTERDAM
The Netherlands

Phone +31 (0)20 564 14 11
Fax +31 (0)20 696 23 03
info@novagraaf.nl
www.novagraaf.nl
CC 33005457