

General Report Questionnaire for Working Session

“Claims about claims and disclaimers - welcome to the glamorous world of advertising!”

Distribution Commission

Technology, Media and IP Commission

AIJA Munich 2016 Congress

General Reporter:

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Dear AIJA friend, thank you for agreeing to be a National Reporter for the Working Session entitled “*claims about claims and disclaimers - welcome to the glamorous world of advertising!*”, to be held at the AIJA Annual Congress in Munich in August 2016. I appreciate your efforts to provide information and ideas to contribute to this Working Session.

Please find below the questions which I would like you to answer. The purpose of the questionnaire is to cover the range of issues which will be addressed in the Working Session. As follows from the questionnaire, the reports and the Working Session will cover various aspects of advertisement law, with a focus on the claims used in advertising.

Please answer each question fully, yet concisely. Also, please provide the legal support for your analysis and conclusions as much as possible, using footnotes like this one.¹ When drafting your report, please use the attached template and follow the styles and formats stated therein.

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Please send your report to the General Reporter by e-mail **by 1 February 2016**. If you have any questions, please do not hesitate to contact me at kr@kiveld.nl.

Finally, I would like to draw your attention to the Transfer of Copyright statement included at the end of this Questionnaire.

1.1

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- Your body text needs to be Garamond, Size 12.
- If you need to display a list, you may use bullet points or letters in lowercase.
- For the use of footnote, you can use the style available here².

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² This is a footnote.

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Read here your body text in Garamond, Size 12.

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BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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Thank you again for your efforts. It's going to be great!

Best regards,

Kasper

Questionnaire

Please note that the questions are rather monotonous in their formulation. The purpose thereof is to only set up a systemic framework for your answers, avoiding any implied direction or suggestion.

1. Questions regarding the content of advertisement law on a national level

All of the questions in this section regard the regulations in your country.

1.1 Can you describe in 100 words or less the legal framework regulating the advertising practice?

The main pieces of legislation regulating advertising are:

- Consumer Protection Law 2251/1994
- Unfair Competition Law 146/1914
- Presidential Decree 109/2010 on Greek television and radio legislation and the
- The Greek Code of Advertising and Communication which is based on the consolidated ICC Code of Advertising & Marketing Communication Practice (introduced by virtue of Law 2863/2000) and is a self-regulated code.

Finally, the relevant provisions of the Greek Civil Code pertaining to the protection of one's personality rights (articles 57 and 59) along with tort provisions (articles 914 onwards) are also applicable.

1.2 What is the general content of the regulations regarding health claims in advertisement?

There is no particular provision regarding health claims but rather a larger number of more specific ones, depending on the nature of the advertised products. In general, one of the basic pillars on which advertising is based is the principle of truthfulness in advertising which means that any health claim that may mislead consumers shall not be permissible as misleading.

1.3 What is the general content of the regulations regarding comparative claims in advertisement?

Although it is generally accepted that comparative advertising is to the benefit of consumers, as it allows for direct comparison of competing products, making the market more transparent, and fostering competition which, as a result, leads to lower prices and higher quality, not any form of comparative advertising is permissible. Certain rules are in place, to protect both consumers and competitors alike, the first,

from being misled and the latter, from unfair behaviors and tarnishment of their names and brands. The general rule is, however, that comparative advertising is permitted and, only under certain circumstances, is it forbidden³.

Any advertising, that defines directly or indirectly or suggests the identity of a specific competitor or his products/services, is by definition comparative⁴. Such advertising is, as far as the comparison is concerned, permitted when the following conditions⁵ are met:

- i it is not misleading⁶ (i.e. it does not meet the criteria to be labeled as an unfair business-to-consumer commercial practice);
- ii it compares goods or services meeting the same needs or intended for the same purpose;
- iii it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- iv it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- v for products with designation of origin, it relates in each case to products with the same designation;
- vi it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- vii it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
- viii it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names or other distinguishing marks,

1.4 What is the general content of the regulations regarding wrongful claims in advertisement?

Wrongful claims clearly fall under the scope of the provisions against misleading advertising and as a consequence the advertisement shall not be permissible. The Consumer Protection Law⁷ identifies an act as misleading if it contains false

³ Supreme Court decisions nr. 371/2012 and 613/2009

⁴ Law 2251/1994 on Consumer Protection article 9 par. 2

⁵ Idem

⁶ Athens Court of Appeal decision nr. 2928/2004, according to which comparative advertising may be misleading if the misleading elements concern the competing product and not the advertised ones

⁷ Law 2251/1994, article 9d par. 2

information and is therefore untruthful or in anyway - including overall presentation- deceives or is likely to deceive the average consumer, even if the information is factually correct, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. An extensive black list⁸, with practices that are *de facto* misleading is also provided by the Law.

Misleading advertising may not only arise through acts but also through omissions by concealing facts or elements which could be critical parts of the consumer's decision making process. Failure to provide all the critical facts impairs consumers' ability to make informed decisions. This will be the case if material information is hidden or provided in an unclear, unintelligible, ambiguous or untimely manner⁹.

- 1.5 Is there a general regulation on the content, without a target audience being specified (for example, no "offensive" or "pornographic" or "political" advertisements)?

Besides the general obligation that requires advertisements to be decent and upright to be found in article 1 of the Greek Code of Advertising and Communication no general regulation blocking content regardless of its target audience exists.

- 1.6 Is there any regulation regarding types of audiences, regulating content (for example, no fast food advertisements targeted at children)? If yes, what is the general content of this regulation?

Special categories or groups of consumers who are more prone to be influenced are protected from advertising and therefore special provisions are in place. Any advertisement that is contrary to the requirements of professional diligence and materially distorts the economic behavior of consumers, who are particularly vulnerable to the practice or the underlying product because of their age, is by Law¹⁰ unfair and as such prohibited. Children are inexperienced consumers and are therefore easy prey for advertisers and clearly fall under this definition. The inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them is prohibited¹¹.

However, not any kind of advertisement targeting children is prohibited. Only the kind that distorts their buying behavior by leading them to enter into transactions which do not seem logical and into which they would not have entered had they had

⁸ Law 2251/1994 on Consumer Protection, article 9f which includes the practices identified as misleading in Annex I point, 1-23 of European Directive 2005/29

⁹ Law 2251/1994 on Consumer Protection, article 9e par. 1 and 2

¹⁰ Article 9c of Consumer Protection Law (2251/1994)

¹¹ *Idem* article 9H par. 5

the necessary and required experience. Furthermore for the advertisements to be deemed as illegal, these will have to specifically target children, a fact that will be deducted from their content and messages they convey. If they are appealing to the general consumer public it will be more difficult to establish abuse.

In any event the broadcasting of advertisements of alcoholic beverages during children's programs or during the children zone is forbidden¹².

1.7 What are the developments in your jurisdiction regarding *ad blockers*?

So far the issue of deploying *ad blockers* has not been dealt with by the legislator or the Courts.

1.8 What are the sanctions in the field of advertisement law in your jurisdiction? Please cover both public (fines etc) and private (damages claims etc) sanctions related to wrongful advertisement.

Any consumer or consumer organization is entitled to take legal action¹³ against misleading advertising and request from the Court to order the cessation of the advertising and its omission in the future but also to seek compensation for any damages caused. Furthermore the plaintiffs have the right to request publication of that decision in full or in part and in such form as they deem adequate but also to request in addition the publication of a corrective statement. Especially the last remedy is of significant importance as it is rather unlikely that all the consumers that were exposed to the misleading advertising will be informed about the outcome of the trial and this way the widest possible audience will be reached.

The Minister of Development has also the right to order the cessation of the misleading advertising if this is dictated by reasons concerning public interest.

In the case of comparative advertising or any other kind of advertising that harms competitors' interests these have the right to take action on the basis of unfair competition law provisions. In such cases the court may instruct the defendant to cease and desist from the illegal advertising, it may order the publication of the courts decision and/or the publication of a corrective advertisement or corrective declaration and it may also award damages.

¹² Article 10 par. 4 of Presidential Decree109/2010

¹³ Law 2251/1994 on Consumer Protection, article 9i par. 1 and 2

2. Questions regarding Intellectual Property Rights and advertisement

2.1 What is the general content of regulation in your jurisdiction regarding the use of Intellectual Property (such as trademarks) of competitors in advertisement?

The current legal framework regulating advertising does not contain specific provisions regarding the use of IP rights in advertisements. In general, third parties are not entitled to use registered trademarks in commercial advertising for their own products/services unless a license has been obtained. Nevertheless it is an often observed phenomenon that new-entrants into a specific market or market segment use established trademarks in order to free ride on their goodwill by creating an association between the two competing products (e.g. “better taste than Coca Cola”) or even creating an association between two products that are irrelevant (e.g. “the Rolls Royce of boats”). Of course using such a trademark where it is necessary in order to indicate the intended purpose of a product or service, in particular as accessories or spare parts, in accordance with honest practices in trade or commerce¹⁴ does not qualify as an infringement.

Besides trademarks, advertisements very often use or include works of literature (written texts), art (musical compositions) or science (architectural plans) all of which enjoy copyright protection¹⁵. However, the main idea of an advertisement is not protected by copyright in itself, only the form through which this is expressed. This is because in most cases the idea will fall short from the originality threshold necessary in order to qualify for such protection¹⁶. Nevertheless, given that most advertisements are the result of creative processes they might be entitled to copyright protection, even if they are based on existing ideas, depending of course on the level of originality they show.

2.2 Under what conditions would based on the case law in your jurisdiction, the use of trademarks of others as 'Ad Words' in a Google ad word campaign be allowed?

So far the limited case-law in Greece regarding “adwords” is aligned to that of the CJEU, meaning that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, goods or services identical with those for which that mark is registered, in the case where that ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

¹⁴ Idem article 126

¹⁵ Article 2 par.1 of Law 2121/1993 on Copyright

¹⁶ Idem

3. Questions regarding a remarkable case regarding advertising claims

Can you please describe a case from your (national) jurisdiction that concerns a claim used in advertisement, which claim (or statement) was allegedly wrongful, misleading or in any other way unlawful?

In 2013 a dispute arose between two major razor blade manufacturers, namely Gillette and BIC. Gillette had sought to obtain a preliminary injunction against BIC, requesting that the latter refrain in future from depicting the Greek flag in its advertisements and from airing specific radio messages inferring that BIC shaving utensils are Greek, i.e. produced in Greece. The message that BIC tried to get across in the contested campaign was that BIC razor blades are Greek. This was expressed through slogans such as “*BIC are ours*” and “*BIC are the only shaving utensils produced in Greece*”. Gillette, which controls approximately 65% of the relevant market in Greece, took legal action against BIC in an attempt to challenge the latter’s aggressive advertising campaign in Greece on the radio and with poster advertisements.

Gillette based its action on unfair competition clauses claiming that BIC’s advertising campaign was misleading since it made extensive use of the Greek flag in order to stir consumer’s emotions and canvass customers from competitors. Further, it claimed that the campaign was questionable since it inferred that BIC is a Greek company and that its profits remain in Greece; the truth being that it’s a foreign company which only operates production sites in Greece.

3.1 What was the claim or statement under dispute?

Gillette contested two points of BIC’s advertising campaign.

- The widespread use and depiction of the Greek flag in its advertisements;
- The broadcasting of specific radio advertisements inferring that BIC shaving utensils were produced in Greece.

3.2 What was the outcome?

The Athens Court of First Instance handed down decision nr. 1202/2012 by virtue of which it found that:

- the mere depiction of the Greek flag in BIC's advertising campaign was insufficient to constitute appropriation of the Greek flag for advertising and commercial purposes;
- the defendant was not trying to coerce consumers psychologically into buying its products; and
- consumers are accustomed to receiving messages related to the origin of products and that statements such as 'BIC are ours' are incapable of persuading consumers that all BIC razor blades – even those that are manufactured abroad – are in fact produced in the country.

The court concluded that the advertising campaign was legitimate since:

- its intention was to inform consumers of the quality of the products produced in Greece;
- it contained true statements;
- it did not mislead consumers regarding the nature of the products; and
- it did not influence consumers' financial behaviour.

3.3 What are in your opinion the interesting points in this case?

The interesting point of this case was the Court's attempt to measure the impact of the contested advertisement to the consumer's behavior. Key in determining whether or not an advertisement is unfair is the concept of materially distorting a consumer's economic behavior which means, using a commercial practice to impair appreciably the consumer's ability to make an informed decision, thereby causing the consumer to make a purchase that he or she would not otherwise have made. A significant point which this decision raises is the attempt by many companies to benefit from their Greek identity by highlighting facts such as Greek ownership and the operation of production sites in Greece. This practice had become extremely popular and gained momentum under the dire financial circumstances in Greece. In the case at hand, BIC tried to do exactly that, by conveying to consumers the message that:

- BIC shaving utensils are produced in Greece;
- the company is a source of income for Greek families; and
- by buying BIC products, consumers support the Greek economy.

Gillette claimed that this practice caused consumers to make a decision that they would not have made otherwise. However, given that BIC does indeed produce some of its products in Greece, and since BIC was not trying to persuade Greek consumers that it is a Greek company and that all of its products are produced in the country, the court rejected the motion.

Further, the decision stressed that consumers are accustomed to being exposed to advertisements that refer to product nationality, and that any advertisement conveying such a message is not necessarily an attempt by the advertiser to disparage competitors' products.

4. Points of interest in the field of advertisement law and B to C communication

This final part of the questionnaire is an unusual one. As discussed with many of you in 2015 in Antwerp and in London, everyone of us has particular expertise and interests that cannot be captured in a traditional questionnaire. As you know, you will have the chance to speak during the Working Session in Munich. The answers provided to this part of the questionnaire will be used to shape and prepare the speakers panel of that Working Session.

4.1 What would you like to be discussed during the Working Session?

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4.2 What specific advertisement law related point of interest would you like to speak about yourself?

I think that the issue of trying to determine whether or not an advertisement is unfair and the concept of material distortion of a consumer's economic behavior touched upon in the above mentioned case, between BIC and Gillette is a very interesting one.

4.3 Do you have any suggestions of points of interest omitted in this questionnaire?

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