

Garrigues

Mapping the labyrinth: advertising regulation in Spain

The sprawling legislative regime governing advertising, along with a fragmented administrative system, means that practitioners must stay on their toes when trying to determine whether an advertisement is permitted in Spain

In the 1960s Spain was at the forefront of modern European law as far as advertising was concerned. The Advertising Statute of 1964 established a centralized administrative system to control unlawful advertising. However, the Spanish Constitution of 1978 removed control of various sectors, including advertising, from the state and passed it to Spanish regional authorities.

The enactment of the EU Misleading and Comparative Advertising Directive (84/450) led to the statute being replaced by the General Advertising Law (34/1988). Since 1991, advertising has also been regulated by the Unfair Competition Law, which classifies as unfair competition a number of acts that the General Advertising Law defines as 'unlawful advertising' (eg, acts likely to cause confusion, mislead the public, discredit a competitor or take advantage of a third party's reputation). The overlap between these two laws has led to confusion over which should apply. Most Spanish courts allow claimants to choose between the actions envisaged in both laws. Claimants may even join actions together (although this does not entail doubling the damages) provided that the ad in question can be deemed to be both an act of unfair competition and an act of unlawful advertising. However, a bill has been proposed which will amend the legal regime relating to unfair competition and advertising, and which should put an end to this conflict.

In addition to the General Advertising Law and the Unfair Competition Law, a raft of special provisions establish specific requirements for certain products (eg, food, alcoholic beverages, tobacco and drugs), advertising in particular media (eg, television) and ads directed at certain target audiences (eg, children or adolescents).

Therefore, the first problem is determining which provisions apply. Second

is that Spain's political setup – 17 regional authorities, with regulatory powers over advertising – means there is no unity in the marketplace. The rules relating to, for instance, advertising tobacco and alcoholic beverages, differ from one region to another so that the same advertising campaign can be considered legal in one part of Spain and unlawful in another.

Third, although judicial control is established by the General Advertising Law, a number of special provisions have awarded jurisdiction over the unlawful advertising of particular products or services to the various administrative authorities. This has created a state of legal uncertainty and opened the door to potentially conflicting decisions.

The courts and the Autocontrol Jury

The legal system governing advertising is based, for the most part, on case law. This requires practitioners to analyze continually the practice of courts, administrative authorities and self-regulated bodies. Practitioners are also advised to study the decisions of the Autocontrol Jury, Autocontrol is a private body which oversees self-regulation in advertising. It maintains ethical standards recognized by the European Commission and offers an out-of-court settlement system for advertising-related matters. The Autocontrol Jury is a member of the European Advertising Standards Alliance, the single authoritative

body on advertising self-regulation issues in Europe. Autocontrol Jury members include all the main advertisers, agencies and media (eg, television, press, radio and online) in Spain, as well as all the main advertising industry associations.

The importance of Autocontrol Jury's role in Spanish advertising is evidenced by the following statistics: since January 1 2008 approximately 21 decisions in this area have been handed down by the Spanish courts (most relating to misleading advertising and none regarding comparative advertising), whereas the Autocontrol Jury has handed down approximately 294 decisions (available at www.autocontrol.es). The fact that the estimated time to resolve a claim brought before Autocontrol at first instance is 14 days and 28 days at second instance explains these figures, especially bearing in mind that in advertising, time is of the essence.

Comparative advertising

What exactly is understood by the term 'unfair advertisement'? In the United States this is interpreted in the broad sense of the word 'unfair' – that is, including all categories of unlawful advertising. However, in Spain, the term denotes a specific type of unlawful advertising, one of the broad categories of acts envisaged as unlawful in the General Advertising Law.

According to the law, the following are considered unlawful:

“ The Spanish legal framework regarding advertising is characterized by an overabundance of legal provisions ”

- advertising that harms personal dignity or infringes the values and rights recognized in the Constitution, particularly for infants, adolescents and women;
- misleading advertising;
- unfair advertising;
- subliminal advertising; and
- advertising that infringes special provisions.

Comparative advertising is included as a specific kind of unfair advertising but only where it fails to meet certain criteria.

According to Spanish law, 'comparative advertising' is advertising that expressly or implicitly identifies a competitor or a competitor's product or service. Regardless of whether such references are explicit or implicit, they should be unmistakable.

An explicit reference is where a competitor's name or trademark is expressly mentioned (which rarely happens in Spain). In this regard, it is important to reconcile the protection of registered trademarks and the use of comparative advertising. Spanish case law coincides with EU case law in considering that the owner of a registered mark may not prevent the use of an identical or similar mark by a third party in comparative advertising unless there is a likelihood of confusion on the part of the public (*O2 Holdings Limited v Hutchison 3G UK Limited* (Case C-533/06, June 12 2008, European Court of Justice) and *Royal Canin Iberica v Hill's Pet Nutrition España* (Case AC 2008\1075 Madrid Provincial Appellate Court, April 29 2008)).

An example of an implicit reference can be found in a decision rendered by the Autocontrol Jury in July 2006. The case was part of an ongoing battle between Grupo Leche Pascual and J García Carrion. The ad in question showed a blind tasting between two brands of bottled fruit juice: one was Pascual's and the other was contained in a bottle with a green cap – García Carrion is the only other market leader to bottle its juice this way. The Autocontrol Jury held that this constituted implicit comparative advertising.

In the same way, a Supreme Court judgment of February 22 2006 (Case RJ 2006\828) found that an ad for Engel SA was "unmistakably" referring to its rival El Corte Inglés in the following message: "in fragrances and perfumes the new Corte falls short of the mark... given the big reductions that have always been a part of Cañellas perfume store" The original Spanish version included the words 'Corte' ('cut') with a capital 'C', 'corto' ('short') and 'recorte' ('reduction', 'cut down'), all references to El



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Corte Inglés (literally, "The English Cut").

Advertising is not viewed as comparative where it makes general claims but it is not possible to identify a competitor. An example might include a reference by the advertiser to its products as "the number one brand" (see the Autocontrol Jury's decision in *Reckitt Benckiser España SL v Procter & Gamble España SA*, February 5 2009..

Comparative advertising is permitted where the comparison is based on features that can be objectively assessed and not on personal opinions. This was clearly illustrated in the Autocontrol Jury decision of January 11 2001 concerning a television commercial for Pepsi.. The commercial showed a Pepsi and a Coca-Cola delivery man each drinking a bottle of Pepsi and Coca-Cola, respectively. They exchange their drinks as a friendly gesture during the Christmas season. While the Pepsi delivery man takes a sip of his colleague's Coca-Cola and gives it back, the Coca-Cola delivery man refuses to give the Pepsi bottle back after trying it. The Autocontrol Jury considered the commercial unlawful because the characteristics of the products (eg, the better taste of a cola drink) could not be objectively assessed.

As far as this last requirement is concerned, all comparative advertising, to some extent, has the effect of disparaging a competitor. Therefore advertisers should be careful not to engage in gratuitous or unnecessary acts likely to discredit their competitors. In its decision of December 11 2008, the Autocontrol Jury set out some useful guidance on where the limit lies.. Telefónica and Ono were in dispute over an ad that the latter had placed on its website: "Save €330 a year versus Telefónica's prices. Telephone charges all included +Essential Television+ 3Mg broadband: don't be a melon" (the term 'melon' in Spanish not only designates a fruit, but is also used colloquially as a synonym for a sap or a fool). The Autocontrol Jury considered the expression "don't be a melon", depicting a human figure with a melon on his head, to be unnecessarily denigrating.

Careful evaluation

The Spanish legal framework regarding advertising is characterized by an overabundance of legal provisions. This, together with the different judicial and administrative authorities responsible for overseeing unfair advertising practices, forces experts and legal practitioners to evaluate rigorously the legal and institutional framework in each individual case. [WTR](#)