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Comparative advertising and ambush marketing on the rise in Brazil

Brazil's new fondness for comparative ads has highlighted ambiguities in the legal regime in this area. However, there is considerably more certainty over ambush marketing: the country's selection as host of the 2014 World Cup and the 2016 Olympics have already prompted bills on the subject

Brazilian consumers have historically reacted negatively to direct comparisons between competitors and tended to sympathize with the underdog. However, increasing numbers of comparative advertisements in all market segments (with the notable exception of the legal market, where strict rules still apply despite pressure for new regulations), and disseminated through all manner of media suggest that this attitude is changing.

Although comparative advertising is now relatively common, there is still uncertainty as to the legality and limits of such campaigns. In particular, comparative advertising is not regulated specifically by any law in Brazil.

Applicable principles can be found in the Constitution in the clauses regulating freedom of expression, free enterprise and the right to compete. The Consumer Code also sets out specific rules which state that advertisements must be clearly identified as such (eg, they should not be disguised as news or editorial content), and prohibit abusive and false advertising, as well as unfair competition.

Further, the Industrial Property Law has specific rules that prohibit unfair competition and establish the scope and limits of trademark rights in the context of comparative advertising. The Civil Code also has rules against unjust enrichment, which can apply in certain circumstances.

CONAR self-regulation

In addition to these statutes, the CONAR rules carry weight in all decisions, including judicial cases, involving comparative advertising in Brazil. CONAR stands for the Brazilian Advertising Self-Regulation Council (in Portuguese). It is a private entity created in 1980 by local advertisers, advertising agencies and media companies.

CONAR's main role is to update the Advertising Code of Ethics and to examine and decide any disputes that may arise from violations of the code.

The Advertising Code of Ethics regulates virtually every aspect of ad content, including:

- misleading messages;
- claims of efficiency or superiority;
- testimonials;
- ambush marketing;
- comparative advertising;
- trademark misuse; and
- copyright violation.

The code also has specific rules restricting advertising of certain products, such as alcoholic beverages and products/services targeted at children.

Although CONAR cannot award damages, it does offer a fast and cheap procedure for obtaining a restraining order, making it the best choice for litigators in Brazil. CONAR generally issues preliminary injunctions within a few days of application and a first decision on the merits within three months. The costs are attractive, usually ranging from between 2% and 10% of a court action of medium complexity.

Statistics for the last few years show of that CONAR is proving popular among private entities and even government authorities. From 2003 to 2008, CONAR examined and decided more than 300 cases per year. The most popular industries have been alcoholic beverages, food, pharmaceuticals and telecommunications – but a significant number of cases have involved other businesses.

CONAR rules

The CONAR regulations include a specific chapter dealing with comparative advertising which permits it under certain circumstances. First, the comparative ad

must comply with the Industrial Property Law. This is important as the law has specific provisions on unfair competition. In addition, Section 132 of the Industrial Property Law states that the owner of a mark may not prevent that mark from being referenced in speeches, scientific or literary works, or any other type of publication, provided that the use has no commercial connotation and is without prejudice to the mark's distinctive character.

The interpretation of this section, along with the principle that the holder of a registered trademark registration has exclusive rights of use, is crucial in cases where a comparative ad includes a competitor's mark.

When a third party uses a mark in a comparative ad, the first criterion which prevents the exclusion being applied (ie, commercial connotation) is always present. The second criterion (use that is without prejudice to the mark's distinctive character) is therefore of key importance when assessing the legality of comparative advertising.

Different views

Some commentators consider that any use of another party's mark by a competitor is prejudicial, as there is no such thing as an impartial advertisement. However, Brazilian case law suggests that courts do not consider the use of a third-party mark *per se* in a comparative ad enough to render the ad infringing. Instead they look for other factors that might prejudice the 'distinctive character', such as denigration and unfair practices (eg, comparing materially different products and services). In many cases where similar products were compared and price lists were used, reference to a competitor's mark was not considered to be illegal.

Other elements in CONAR's regulations that have helped the courts and CONAR

adjudication panels to establish the legality of comparative ads include the following:

- The ad's primary purpose is clarification or consumer protection.
- The comparison must be objective, since subjective, psychological or emotionally based evidence is not a valid basis for comparison.
- The comparison must be supported by evidence.
- In the case of consumer goods, the comparison must be made between models manufactured in the same year. No comparison shall be made between products manufactured in different years, unless it is a reference to show evolution, in which case the evolution must be clearly demonstrated.
- There must be no confusion between the advertised products and competitors' brands.
- There shall be no denigration of the product's image or another company's product.
- There shall be no unreasonable use of a third party's corporate image or goodwill.
- Whenever a comparison is made between differently priced products, this must be clearly indicated in the advertisement.

Cases involving comparative advertising are always fact specific. Even puff statements can be challenged if no evidence is provided, specifically if the statement relates to an objective characteristic, such as the weight of a mobile phone.

Companies should be prepared to face legal action both before CONAR and the courts when planning an aggressive ad campaign. They are advised to prepare alternatives in case the campaign has to be partially or totally modified.

Further, all objective statements should be backed up by verifiable data, preferably by third-party surveys or studies, as the courts and CONAR will always be sceptical of studies conducted by the advertiser.

Ambush marketing and sports events

Brazil has been selected to host the World Cup in 2014 and the Confederations Cup in 2013, subject to certain conditions agreed with the *Fédération Internationale de Football Association* (FIFA). Accordingly, several proposals are already in place, including a bill designed to curb ambush marketing or marketing by association, which can affect the rights of organizers and official sponsors.

Senate Bill 394 was presented on September 3 2009. It deals with the 2014



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World Cup and the 2013 Confederations Cup, and establishes, among other provisions, that:

- FIFA owns the rights related to WORLD CUP 2014 and CONFEDERATIONS CUP 2013, including all the media, marketing, licensing and tickets;
- FIFA and its licensees have exclusive rights to use a large number of terms, as well as combinations and similar terms, including: 'Copa do Mundo da FIFA Brasil 2014', 'Copa do Mundo da FIFA 2014', 'Copa do Mundo da FIFA', 'Copa do Mundo de Futebol', 'Copa do Mundo', 'Copa do Mundo de 2014', 'Copa do Mundo do Brasil', 'Copa de 2014', 'Copa 2014', 'Copa', 'Brasil 2014', 'BRA 2014', 'BR 2014' and 'Copa das Confederações da FIFA Brasil 2013';
- The names, flags, logos, anthems, trademarks and symbols of the national football organizations and teams, as well as the names and nicknames of athletes, are the exclusive property of those entities and enjoy national protection without the need for registration; and
- The Brazilian Soccer Confederation (*Confederação Brasileira de Futebol*) and

its sponsors have exclusive use rights over the following names until 30 days after the event: 'SELEÇÃO BRASILEIRA', 'SELEÇÃO', 'SELEÇÃO CANARINHO', 'EQUIPE BRASILEIRA DE FUTEBOL', 'EQUIPE BRASILEIRA' and 'EQUIPE CANARINHO'.

Further, the bill prohibits goods, services and marks from being associated with protected names, flags, anthems, marks, logos and symbols. 'Association' is defined as any use of the protected symbols, regardless of whether such use is unintentional or disclaimers such as "non-authorized" or "unofficial" are used.

The only exceptions are not-for-profit use by natural persons and use exclusively for information, critique or opinion by media outlets, including online, without association with an unauthorized natural person or company. In addition, there is a grandfather provision respecting rights registered before the law comes into force.

The bill also establishes 'clean zones', where any form of commerce, advertising, marketing or publicity not authorized by FIFA is prohibited.

A similar bill (Bill 4.667-A) proposed by the Brazilian House of Representatives in relation to the Olympic Games is also under consideration.

Defining 'marketing by association' is a difficult task. There is always a grey area where the rights of official sponsors must be balanced against the legitimate marketing efforts of third parties, as there should not be a monopoly on sports marketing even during events such as the World Cup and the Olympics.

Harsher actions expected

Companies should be aware that courts in Brazil are likely to start taking harsher action against associated marketing immediately, and especially during the upcoming 2010 World Cup in South Africa, as Brazil is committed to complying with FIFA's conditions.

Companies are advised to maintain close contact with both their marketing and legal departments to determine an early strategy and assess the risks involved in both comparative advertising and campaigns that might be considered to be marketing by association. On the other hand, companies that have been affected by comparative advertising should consider taking action before CONAR to obtain a swift relief. A parallel court action is also always possible, especially if monetary relief is an objective. [WTR](#)