

Kangxin Partners PC

Playing with fire: the risks and rewards of comparative advertising in China

Often the best way to make a product stand out is to compare it to competing products on the market. However, while powerful, comparative advertising treads a fine legal line between good business and unfair competition

To compare is to see the difference between two things; in the commercial world, the unique qualities and features of one product are often best demonstrated by comparing it to another.

It is therefore not unusual for advertisers to use comparative advertisements to highlight their products' unique aspects. However, while such ads can enhance consumer awareness as well as the reputation of goods/services when properly used, they can also be misleading, deceptive and even disparaging towards the product being compared.

For example, an advertiser may try to disadvantage a competitor's product by exaggerating the superior qualities of its own and minimizing its shortcomings. For this reason, comparative advertising must be carefully regulated to prevent unfair trade practices.

The right side of the law

In China, there are no explicit legal provisions governing comparative advertising. However, various related laws reflect the standards used by the legislature and the judiciary to determine when comparative ads constitute unfair competition.

The following provisions of the Unfair Competition Law apply to comparative ads:

- Market operators must follow, among others, the principles of equality, fairness, honesty and credibility, and observe generally recognized business ethics (Article 2);
- Operators must not use an ad to give false or misleading information on the quality, composition, performance, use, manufacturer, useful life or origin of the goods (Article 9.1);
- Operators shall not design, produce or release false advertising where they

clearly know, or should know, that such ads are false (Article 9.2); and

- Operators shall not utter or spread falsehoods to damage the goodwill of a competitor or the reputation of its goods (Article 14).

The Supreme People's Court suggests that in civil unfair competition cases, the following shall be regarded as 'false advertising', according to Article 9.1 of the Unfair Competition Law:

- Making one-sided advertising or comparison of the products;
- Presenting information as true to promote a product when in fact that information is uncertain; or
- Using idiomatic expressions with ambiguous or multiple meanings in order to mislead.

However, advertising that is obviously exaggerated will not be considered as misleading or false. The court has stated that it will base its decisions on the everyday experience of the general public, while assessing the allegedly misleading aspects against the actual status of the advertised goods or services.

It appears that the Supreme Court does not unconditionally prohibit advertisers from comparing products. The law protects comparative ads that comply with the rules of fair competition. However, false, one-sided or misleading advertising, and the use

of comparative ads to injure the legal rights of other entities and disrupt the market order of fair competition, shall constitute unfair competition.

Enforcement in Chinese courts

Chinese courts have heard several cases of unfair competition arising from the improper use of comparative advertising, one example being *Beijing Milan Spring Co Ltd v Beijing Paris Spring Wedding Co Ltd* (First Intermediate Court IP First Instance 76, 2000). In this case, Beijing Milan Spring Co accused Beijing Paris Spring Wedding Co of unfair competition for using the slogan "No 1 in China, Area No 1, Luxury No 1, Service No 1". The Beijing First Intermediate Court agreed.

Another noteworthy case is *Fujian FuQing Damin Biological Engineering Co Ltd (Company A) v Fuzhou Nanhai Biological Engineering Co Ltd (Company B)* (IP Final Instance 7, 2000), an unfair competition case arising from comparative advertising. At trial, the Supreme Court stated that:

"1. Company A claims that 'of all the eel calcium currently on sale in the market, only the eel calcium produced by Company A is authentic', which is sufficient to mislead ordinary consumers to believe that only the eel calcium produced by Company A is authentic, while all the other eel calcium produced by other companies, including Company B, is not authentic. Company A also claims in the advertisement that 'the

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absorptivity of A eel calcium is higher than other calcium supplementing products, and its effect of supplementing calcium is much better than ordinary calcium supplementing products', which is sufficient to mislead the ordinary consumers into thinking that the effect of 'A eel calcium' is better than the effect of 'B eel calcium', and shall constitute unfair competition by making misleading false advertising.

2. Company A's advertisement states that eel calcium products from other brands are 'rough' in quality, though it does not expressly indicate that the eel calcium produced by Company B is rough in quality, but as one of the 'eel calcium products of other brands', the reputation of eel calcium produced by Company B is also damaged by Company A, so the advertisement damaged the goodwill of Company B and the reputation of its product, and constitutes unfair competition which damages the goodwill of competitors and reputation of their products by fabricating and spreading false information."

Therefore, the Supreme Court ruled that Company A must:

- cease immediately its acts of unfair competition – that is, false advertising and fabrication and dissemination of false information to damage the reputation and goodwill of Company B;
- issue an apology to Company B and publish the apology in the press; and
- pay compensation of Rmb250,000 for Company B's economic loss.

Treading a fine line

Pursuant to legislation and judicial case law, it appears that the key criterion to determine whether comparative advertising is legal is whether the ad damages the lawful rights of other market operators and harms the competition in the market.

Specifically, an advertisement's content must be substantiated and must not contain any false statements. Ads must be based on fact and make comprehensive, objective comparisons between one or more features of the goods/services, without exaggeration or fabrication. Articles 9 and 14 of the Unfair Competition Law explicitly prohibit false comparative advertising.

The principles of fair competition and good faith must be met in all advertising. Operators must compare the strengths and weaknesses of the products fairly and not take advantage of others' famous brands. Operators must compete in good faith and not denigrate their competitors' reputation. Using comparative advertising to attack a



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competitor's reputation is business libel; denigrating behaviour not only violates the competitor's lawful rights, but also damages market competition.

While it is clear that comparative advertising must not be misleading, there is no specific provision governing the extent to which an ad can be considered misleading under current Chinese law. Judges usually apply the principle of ordinary consumers' attention and try to determine whether an ad would likely mislead the majority of such consumers.

Paying the price

According to Article 20 of the Unfair Competition Law: "Where an operator, in contravention of the provisions of this law, causes damage to another operator (ie, the injured party), it shall bear the responsibility of compensating for the damages. Where the losses suffered by the injured party are difficult to calculate, the amount of damages shall be the profit

gained by the infringer during the period of infringement through the infringing act. The infringer shall also bear all reasonable costs paid by the injured operator in investigating the acts of unfair competition committed by the operator suspected of infringing its lawful rights and interests."

The infringer shall be liable for compensation even if the injured party's losses are difficult to calculate, the infringer did not profit from its act or the profit is difficult to determine. In such cases, the court may decide the amount of compensation based on the injured party's actual condition.

Generally, the amount of damages awarded by Chinese courts for unfair competition is much less than the amount claimed by plaintiffs. In *Shanghai Huili Flooring Co Ltd v Shenzhen Senlinwang Wood Co Ltd* (Hu Second Intermediate Court IP First Instance 54, 1998) the Shanghai Second Intermediate Court rejected a claim for substantial damages, after comparing the case with similar rulings.

On the basis of the facts and taking into consideration the infringement's social effect, its duration and extent, and the nature of the defendant's acts, the court ruled that the defendant should pay compensation of Rmb2 million for the plaintiff's economic losses and Rmb500,000 for damage to its goodwill.

In determining damages, Chinese courts generally consider the following factors:

- The losses that the injured party has sustained from the unfair competition – although in practice, it is difficult to put an exact price on the damage caused by false advertising;
- Reasonable legal costs, including notary fees, litigation fees and attorneys' fees; and
- Reasonable costs for the injured party to rebuild its reputation.

Conclusion

Comparative advertising can be a powerful but dangerous tool. However, operators must be very careful when using comparative advertising, especially when they are comparing specific products or producers. Advertisers must strictly examine the authenticity of the comparison to avoid being sued by competitors for trademark infringement or for unfair competition.

On the other hand, companies that have been affected by unfair comparative advertisements have the right to file suit in China and, if successful, receive compensation. [WTR](#)