‘Dare to Compare’ Part III
Knowing Who Should be Surveyed in Comparative Ad Testing

The third instalment of *Vue*’s ‘Dare to Compare’ series examines some of the nuances of choosing the right survey population in comparative ad testing. The choice can determine the survival of an advertisement.

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The 2011 election campaigns across Canada have given advertisers plenty of object lessons. Elections are the ultimate high season for comparative advertising, political ads comparing one party to another on any number of factors – policies, values, track record, even integrity.

The name *attack ad*, applicable to some, leaves little doubt as to their “comparative” content. In Ontario’s fall election, for example, the Liberal Party was accused of advocating cross-dressing and kissing booths for public school children. Liberals called the opposition’s claims false and misleading. Barely is there time to say the words “cease and desist” before an election is over.

Now imagine that one political team sued another for misleading statements and chose to take survey evidence into court. Who would constitute the relevant universe for such a survey? The answer is straightforward: It would be voters. Voters are the people to whom comparative election ads are directed, the people who care most about the advertised issues, the people materially affected by false or misleading information. Lost votes are the “damages” that an injured party might claim.

With regard to other types of comparative advertising, the choice of whom to survey in order to substantiate a claim or a complaint is more complex. This third instalment of *Vue*’s “Dare to Compare” series examines some of the nuances of choosing the right population. Perhaps surprisingly, the decision can prove pivotal to winning or losing the right to keep an advertisement on air.

The Importance of Choosing the Right Population

From the earliest time that surveys were accepted as expert evidence, identification of the right and pertinent population has been at the top of the list of must-haves. In the Supreme Court of Canada case *R. v. Prairie Schooner News Ltd.*, Justice Dickson wrote, “Essential to admissibility … is selection of the proper universe, i.e., that segment of the population whose characteristics are relevant to the question being studied” (quoted on p. 17 of *Trial by Survey: Survey Evidence and the Law*, by R. Corbin, A.K. Gill, and R.S. Jolliffe; Carswell Publishing, 2000). He was explaining the exclusion of survey evidence on the topic of community standards with respect to obscenity. The survey had polled an ad hoc population of students and railway employees in one Manitoba city. The court considered the sample too narrow to represent the community standards of all of Canada.

The Prairie Schooner case has resurfaced in many Canadian legal and regulatory decisions since its original publication, in the context of explaining the significance that judges and regulators are prepared to give to the choice of “universe” in survey evidence (see “Reasons for the Decision,” available at http://publications.gc.ca/collections/collection_2011/ccri-cirb/LR12-2-2010-525-eng.pdf).

Pertinent population is the term frequently used in case law to identify the universe of customers or consumers whose views matter in a dispute. Surveys submitted as evidence in litigation have been discounted and even discarded when the wrong universe has been surveyed. The high cost of surveys can make such an outcome a financial tragedy.

An Example from Frozen Diet Foods

A case between Weight Watchers and Stouffer's, producers of "Lean Cuisine," provides a cogent example (see *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259, 1272-73 [S.D.N.Y. 1990]). Weight Watchers sued Stouffer's over advertisements which claimed that certain of Stouffer's foods were equivalent to the so-called "exchange" value of comparable Weight Watchers menu options. In other words, Stouffer's seemed to imply, Weight Watchers diet followers could readily substitute Stouffer's products, and continue on their determined road to healthy weight loss.

Both sides submitted survey evidence in respect of claims of confusion and misleading advertising. The court wryly observed, "As might be expected, each side's expert on market research came to a conclusion that disfavoured the other." Stouffer's survey was given entirely no weight, due to methodological flaws.

About Weight Watchers' survey, the judge said, "I accord [it] slight weight, with strong misgivings about its improper universe." The universe of the Weight Watchers surveys was defined as women between the ages of 18 and 55 who had purchased frozen food entrees in the past six months and who had tried to lose weight through diet and/or exercise in the past year. The court's analysis is instructive:

"The [Weight Watchers] studies did not limit the universe to consumers who had purchased a diet frozen entree, or who had tried to lose weight through diet as opposed to exercise; therefore, some of the respondents may not have been in the market for diet food of any kind, and the study universe therefore was too broad. Sloppy execution of the survey broadened the universe further when interviewers mistakenly included participants who did not qualify even under [the intended criteria]. For example, on some of the qualifying surveys, not all of the questions qualifying participants for the universe were answered; therefore, it is impossible to discern whether the respondent fit within the defined universe. Flaws in a study's universe quite seriously undermine the probative value of the study, because to … be probative and meaningful … surveys … must rely upon responses by potential consumers of the products in question. … Respondents who are not potential consumers may well be less likely to be aware of and to make relevant distinctions when reading ads than those who are potential consumers."

An Audience of Purchasers/Influencers or Consumers?

Additional refinement needs to be given to the concept of "potential consumers," as used by the court in the Weight Watchers case, above. The purchaser and product consumer may not always be the same person. An advertising claim needs to be tested against the language of the claim.

Testing an ad about prices of a 24-case of beer would likely require an audience of beer *purchasers*, whereas testing an ad claim about the preferred beer for taste would likely require an audience of beer *drinkers* (whether or not they are the ones who go out to buy the beer). The overlap between the two is not a problem: the screener qualifications just need to ensure that a respondent is in the required category.

Cat litter provides a colourful case in point. Church & Dwight Co., the maker of Arm & Hammer Super Scoop cat litter sued Clorox over its ad campaign for Fresh Step cat litter (*Church & Dwight Co., Inc., v. The Clorox Company*, 2011 WL 18879 United States District Court, S.D. N.Y.). The ad showed cats refusing to use litter boxes containing Super Scoop but readily using ("preferring") boxes containing Fresh Step. The ad announced that cats like Fresh Step "because Fresh Step's scoopable litter with carbon is better at eliminating odors than Arm & Hammer Super Scoop." Reference was made in a footnote to a scientifically controlled test of cat behaviour in everyday consumer households.

The problem was that the reference to offensive odours was anthropomorphic. Who knows what odours cats want eliminated? "Cats do not talk," complained Church & Dwight in their submissions. After legal proceedings had been launched, Clorox announced it was pulling the ads, undertook not to rerun them, and the case was dismissed (see Jonathan Stempel's February 2, 2011, Reuters article, "Lawsuit over Clorox Cat Litter Ads Dismissed," available at www.reuters.com/article/2011/02/02/clorox-churchand-dwight-catlitter-idUKN0225993320110202).

Sufficient Geographic Coverage

In-person advertising testing poses the inevitable question of how broad the audience has to be to satisfy the standards of a court or regulator. For claims directed at a national audience, Advertising Standards Canada recommends sampling from at least four of Canada's major geographic regions (see Advertising Standards Canada's "Guidelines for the Use of Comparative Advertising," April 2010, available at www.adstandards.com/en/ASCLibrary/guidelinesCompAdvertising-en.pdf).

In the writers' experience, this level of coverage for national claims has also proven satisfactory to the Federal Court of Canada. For disputes focused on selective parts of the country, the choice may be different.

The case of *NHL [National Hockey League] v. Pepsi-Cola Canada Ltd.* ([1992] 6 W.W.R. 216) confirms that single-city pilot tests may prove insufficient. It concerned Pepsi's "Diet Pepsi $4,000,000 Pro-Hockey Playoffs Pool," an under-the-cap instant win game in which prizes were tied to the outcome of the Stanley Cup playoffs. Pepsi was not one of NHL's licensed sponsors of the playoffs and was accused of passing itself off as one, through "ambush marketing."

A test of consumer impressions was conducted on a single day at three shopping centres in the Greater Vancouver region. Justice Harding found the survey scope insufficient, expressing bewilderment that the expert would "insist that the results of her survey could be extrapolated to represent the perceptions of consumers across Canada." The survey evidence was dismissed in its entirety.

Other Relevant Qualifiers

Published comparative cases provide not a clear list of do's and don'ts, but a clear list at least of the issues that have been open to debate. Additional to those issues discussed above are the following:

• Whether the audience is broad enough or too broad to capture the population whose views are most material to the potential damage caused by a misleading comparative ad.
• Whether the survey audience qualifies respondents according to their media habits, to ensure that those tested will have a reasonable likelihood of being exposed to the allegedly offensive advertising.

• Whether participants have the qualifications for purchase. Tests of rental car advertising, for example, might reasonably be restricted not just to those in possession of a driver's licence, but to those of sufficient age to qualify for renting a car (25 years or older).

• Whether past purchasers, future purchasers, or both should be part of the pertinent population.

• Where two product categories are being compared for possible substitution (such as dental floss and plaque-fighting mouthwash), whether the pertinent population should be consumers of "our" product, "their" product, or both.

• Whether sufficient quality controls accompany an Internet survey to make an Internet panel an acceptable universe.

Conclusions

Choice of research audience comes into play at two stages of decision-making in comparative advertising. The first is the substantiation stage. An advertiser should substantiate a claim in advance, testing the ad on the very audience named or implied in the claim. If there are caveats to be made (given the parameters of the supporting research), then it may be appropriate to disclose one or more of the caveats in the body of the ad or in a perceptible footnote.

The second stage of decision-making occurs at the time of a competitive complaint. The complaint itself may require supporting research, particularly if the complaint is about a misleading impression rather than a statement which is factually false. If so, the offended competitor may need to show that purchasers of its own product are likely to be misled in a manner that can affect the competitor's reputation or business.

For big-picture thinkers in the world of advertising and market analysis, the topic of survey universe for claim substantiation may seem mundane, or technically obscure. Yet issues about the pertinent population in survey evidence can affect the outcome significantly when warring advertisers go to court.

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