



# Dare to Compare:

## Perception in Ad Land is the Only Reality

### PART 2

Comparative advertising – promotion of an advertiser's product or service as being superior to that of a competitor – is perfectly legal, frequently desirable, and often effective. But there are rules of the game and landmines to be avoided.

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“Let the wiener wars begin,” announced Judge Morton Denlow as the manufacturers of Oscar Mayer hot dogs, and Ball Park franks dragged each other’s buns into court this summer over each other’s advertising.<sup>1</sup> Ball Park calls itself “America’s Best,” Oscar Mayer says its 100% beef franks are the winners of national taste tests. The 2011 trial is just the latest instalment of comparative advertising wars, so passionately fought by makers of competing products.

This article is the second in a series about comparative advertising, offering guidelines to advertisers who choose the strategy of promoting the merits of their products over those of their competitors. Guidelines arise from regulations agreed to by industry players through Advertising Standards Canada, from laws covering fair and honest business practice (covered in last month’s *Vue*), and from test cases and interpretations borne out in court decisions. This article in the series deals with the “General Impression” test. Whatever the actual facts or disclaimers appearing in an ad, judges, regulators and tribunals called upon to resolve a dispute will defer to the general impression – what people understand and take away from the ad. Ads can carry implications, nuance or innuendo, all of which have the potential to create a negative halo over a competitor’s product.

In examining the General Impression test, it is suitable to begin with the assumption that a comparative

advertisement contains nothing which is factually false. Indeed, false advertising is a clear offense on its own, and can be separated from this discussion. But the opposite of false is not enough. Even if literally true, an advertisement has the potential to deceive consumers by way of unstated implication, unnoticed disclaimers, vagueness, puffery or humour, all matters of human perception. In that respect – the determination of what consumers perceive – some form of consumer research will always be a partner to advertising law. Even if no actual instance of deception is put before a court or regulator, evidence of the *likelihood* of deception established through market research may be sufficient to succeed in shutting down an offending campaign.

“Unstated implication,” the first of five potential sources of deception named above, can refer to the very identity of the competitor being targeted by a comparative ad. Canada’s most well-known example of “identification by implication” concerned a dispute between makers of Arm and Hammer Baking Soda (Church & Dwight), and Sifto Baking Soda (Sifto Canada Inc.).<sup>2</sup> Church & Dwight Ltd. sought an injunction against Sifto Canada regarding Sifto’s baking soda advertisements. Sifto’s box described its new baking soda product as “100% pure and natural,” and claimed that its production plant in the Colorado mountains produced “the purest possible baking soda ... [with] no chemical additives, making it the only naturally

occurring baking soda on the market.”<sup>3</sup> Sifto’s box never mentioned the brand “Arm and Hammer.” However, noting that Arm and Hammer had 80% share of the market, the judge observed: “Where a party virtually controls the marketplace, it cannot be said that the absence of the name of the target competitor is [a sufficient defense].” When there is so dominant a market leader, the identity of an unnamed competitor, in an ad that uses comparative or superlative words, may be inferred as a matter of general impression.

Vagueness or ambiguity can leave consumers vulnerable to a false impression. The advertiser may be held responsible for failing to avoid such “implication by ambiguity.” An advertisement for a new Gillette razor, Fusion ProGlide, made the following statement in print: “New Gillette Fusion ProGlide turns shaving into gliding with thinner blades for less tug and pull” and an effortless glide.” (Footnote: “leading blades vs. Fusion”).<sup>4</sup> Energizer Personal Care challenged the advertisement before the American industry regulator, National Advertising Division (“NAD”), claiming that consumers might think “leading blades” referred to its own product, as it had held the leading market share for some part of the time during which the ad was running. But Gillette protested that the phrase “leading blades” meant not the competitor’s blades, but the four “first” blades in a series of six blades in a ProGlide cartridge. It was the same meaning of the phrase “leading blades” that appeared in its registered patent, said Gillette. The NAD sided with Gillette’s competitor in concluding that consumers could not be counted on to interpret the phrase in the technical sense of a patent description. Other parts of the ad campaign referred to Gillette’s basic Fusion product as the “leading product.” This only served to add to the confusion, said the NAD, because “product” could refer to just the razor cartridges or the entire razor systems, and Gillette was not consistently first in both market share categories. These and other ambiguities in the language of the ad campaign left open the possibility of misinterpretation, and the regulator recommended an end to it.

Disclaimers in an ad pose another topic for general impression. Disclaimers are explanatory statements in advertisements which clarify or contextualize some central claim. Disclaimers must be of a size or positioning that makes them likely to be noticed. Where an ad may mislead without the clarifying information in the disclaimer, the disclaimer must be perceptible. “The greater the likelihood [of a misled consumer],” said one court, “the more prominent must be the disclaimer.”<sup>5</sup>

Disclaimers featured into a high-profile American case concerning baby formula advertising,<sup>6</sup> in which the NAD professed to be “incredulous” at the persistence of the

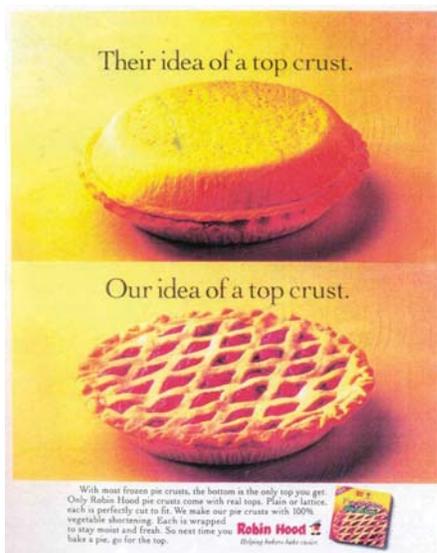
advertiser’s disclaimer offenses. Health benefit claims for Mead Johnson’s Enfalac infant formula drew the ire of competitor Abbott Nutrition, who brought a challenge to the NAD. The advertisement claimed that “Enfamil LIPIL is the only infant formula shown in independent clinical studies to improve baby’s brain and eye development.” A footnote stated: “vs. same routine formula without DHA and ARA. Studied to 18 months.” The footnote was found to be insufficient, because the benefits themselves were actually only temporary, lasting till about 4 years of age. The footnoted disclosure that the babies had been *studied* to 18 months was deemed to be misleading. Abbott also complained about side-by-side graphs in the advertisement – one showing IQ data from a study of infants who had consumed Enfamil and the other for infants who had consumed Abbott’s competing Similac formula. The graphs incorporated a disclosure in small print: “These studies are not directly comparable. There have been no head-to-head comparisons of IQ scores of infants fed any of the Enfamil formulas with infants fed any of the Similac formulas.” NAD found it inappropriate to display side-by-side graphs arising from differently conducted studies. The NAD was of the further view that the footnote was unlikely to prevent a misimpression by consumers that use of Enfamil, compared to Similac, would help to grow smarter babies.<sup>7</sup>

Puffery is another tactical appeal to consumers. Puffery means an exaggerated statement, which would be perceived to be based on opinion rather than fact. Puffery has proven tolerable, as long as it does not create an unexpected and misleading general impression. Once an ad claim is presented as fact, it needs to be proven. A campaign aired by Papa John’s Pizza featured images of “fresh, vine-ripened tomatoes” and pizza dough made with filtered water and yeast, which were accompanied by statements that its competitors made tomato sauce from tomato paste, and pizza dough from unfiltered water or even frozen dough. The ad ended with the slogan, “Better Ingredients. Better Pizza.” Taken alone, the American court acknowledged that the slogan would be mere non-actionable puffery. However, because of the contextual elements in the ad, a general impression was created that Papa John’s sold better pizzas than its competitors – better in a meaningful way – as a matter of objective fact. In the end, however, the court was unable to find that the misleading impression left by the ad would negatively affect competitors’ sales. A consumer tracking study put into evidence was not persuasive, because it did not account for whether people’s opinions of Papa John’s pizza arose from the advertisements or from pre-existing beliefs.<sup>8</sup>

Finally, the use of humour can entertain, but is always risky in the context of a comparative ad. An advertisement created by Duracell showed a unicorn representing Duracell

outlasting the Energizer Bunny; at the end of the ad, the bunny appeared to keel over and die. Sound amusing? Duracell was criticized for subjecting the Energizer trademark to “visual humiliation.”<sup>9</sup>

Another notorious misleading advertising decision centered on an advertisement which featured an image of Robin Hood’s new frozen top crust for pies. Sitting on top of a pie, it was latticed and perfect and presented as “our idea of a top crust.” Next to it was Maple Leaf’s sloppier-looking pie crust, which was actually a bottom crust thrown on top of a pie, and was labeled “their idea of a top crust.”<sup>10</sup>



Maple Leaf complained to the court that if you followed directions properly about rolling out a bottom crust to make a top crust, you would not end up with a disfigured pie as the ad depicted. The defendant claimed it was all meant in good humour. The court found that the ad would do Maple Leaf irreparable harm, and ordered it removed from the media. Inevitably, there will be some people who do not get the humour in an ad – you just have to hope the judge is not one of them.

In summary to the General Impression test, advertisers should keep in mind that facts and images are filtered through the complex and sometimes mysterious machinery of human perception. Humans frequently use what they see and hear to make inferences, which in turn facilitate judgment and contribute to evolutionary survival. Negative halo effects are part of the inferences that humans frequently make, rational or not. A negative halo effect occurs when the awareness of a single negative quality creates a more general negative impression. Recall Scandinavian Airline President Jan Carlzon’s famous example when, describing his airline’s commitment to better customer service, he explained “Coffee stains on the flip

tray suggest to the customer that we do not service our engines properly.” Impressions created through a negative halo cast upon a product by a competitor’s ad provide a reason for regulators and courts to disallow comparative ads to continue. Social science tools exist in abundance to help reduce the risk of a devastating wasted expense.

Here is an advertisers’ checklist before launching what seems to be the perfect, brilliant, comparative ad:

- Are the claims in the ad true, according to facts, surveys, or scientific support on hand?
- Based on the ad’s language, images, nuances, and implications, what are all the take-away messages that material percentages of people might infer? Are any of them misinterpretations that can’t be supported?
- Would the information in the ad be false or misleading without the disclaimers? If so, can the disclaimers be worked into the main content of the ad, rather than left as smaller-print footnotes?
- Is there an explicit or implied reference to another product, another market player? Is the reference vague enough to risk misinterpretation?
- Is there any puffery or bragging that is likely to be taken as factual information? If so, would evidence support it?
- Does humour in the ad poke fun at a competitor? Will the competitor also be chuckling – or fuming?

General impressions are part of the magic that excellent advertising can create. But in the context of comparative advertising, general impressions are a double-edged sword. Advertisers can exploit them to advantage or suffer their consequences.

#### Endnotes

- 1 Commencement of trial announced in *The Toronto Star*, p. 1, August 15, 2011
- 2 *Church & Dwight Ltd/Ltée. v. Sifto Canada Inc.*, (1994), 20 O.R. (3d) 483, 58 C.P.R. (3d) 316 (Ont. Gen. Div.), additional reasons at (1994), 17 B.L.R. (2d) 92 (Ont. Gen. Div.).
- 3 *ibid.*, at p. 319 [C.P.R.].
- 4 The Gillette Company (Fusion ProGlide Razors), Report #5299, *NAD/CARU Reports* (March 2011).
- 5 *National Hockey League v. Pepsi-Cola Canada Ltd.*, 1992 CarswellBC 15, D.L.R. (4th) 349 (B.C. S.C.).
- 6 Case #4288 (April 2008) Mead Johnson Nutritionals/Enfamil LIPIL, and *Case #4822CIII (Feb. 2009)*, *Mead Johnson Nutritionals/ Enfamil LIPIL Compliance Proceeding from NAD Case Report #4822*, found at <http://jimedwardsnrxc.files.wordpress.com/2009/02/nad-enfamil-decision.pdf> Advertising
- 7 Highlights of the case are reviewed in Bulletin #646 of the Advertising Compliance Service, “Noteworthy Developments in NAD and CARU False Advertising Cases,” Jeffrey Edelstein, at <http://www.lawpublish.com/s4.html>
- 8 *Pizza Hut, Inc. v. Papa John’s International, Inc.*, 227 F.3d 489 (2000, 5th Cir.).
- 9 *Eveready Canada v. Duracell Canada Inc.*, (1995), 44 C.P.C. (3d) 104, 64 C.P.R. (3d) 348, CanLII 7328 at para. 24 (Ont. Ct. J.).
- 10 *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.*, [1994] O.J. No. 2165, 58 C.P.R. (3d) 54 (Ont. Gen. Div.).

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