

## **QUESTION 140**

### **Unfair competition - comparative advertising**

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Q140

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#### **Unfair competition - comparative advertising**

#### **Resolution**

##### **AIPPI has taken into consideration:**

In the context of Question Q 115 AIPPI dealt with unfair competition in general and adopted two Resolutions, one in June 1994 at its Executive Committee in Copenhagen, and one in June 1995 at its Congress in Montreal. In February 1996 WIPO published Model Provisions on protection against unfair competition.

The AIPPI study expressly excluded comparative advertising, which is the topic of the present Resolution, and which is not dealt with in the WIPO Model Provisions.

##### **1. Scope of comparative advertising**

For the purpose of the Resolution comparative advertising is understood as any advertising in which the advertiser explicitly or by implication compares himself with his competitor(s) or his goods or services with those of his competitor(s) or compares goods or services of third parties. Comparative tests or reports undertaken by third persons, such as consumer associations which do not trade in the products or services concerned, are not covered by this definition. Comparative advertising that refers to such comparative tests or reports is, however, subject to the same rules as set forth below.

##### **2. Basic legal situation**

###### **AIPPI observes that**

The rules on comparative advertising are in many countries based on specific statutes, while in many others case law applies general industrial property and/or unfair competition law. Sometimes both approaches are combined and in some countries the rules have been developed solely by case law.

In an important minority of countries comparative advertising is in principle prohibited, even if generally exceptions are granted. In the majority of countries comparative advertising is generally permitted or permitted under certain circumstances. Also the

Directive of the European Union (97/55/EC Directive of the European Parliament and of the Council) dated 6 October 1997 provides that comparative advertising shall, as far as the comparison is concerned, be permitted when certain conditions are met.

### **AIPPI believes that**

Truthful comparative advertising provides useful information to consumers in making their purchase decision and is also a useful tool for fostering competition. It should therefore in principle be permitted. However, certain conditions must be met in the interest of fair competition.

## **3. General principles of unfair competition law**

### **AIPPI observes that**

In all countries comparative advertising, like any act of competition, must comply with the general principles of Article 10bis of the Paris Convention. As concerns discrediting, it is sometimes provided that such act is only prohibited if it refers to a registered trademark or if the comparison goes beyond a certain degree of discrediting which is necessary for the comparison. However, discrediting is generally prohibited if the advertiser compares attributes of the competitor which bear no relation to his commercial activities (such as references to nationality or race).

The majority of the countries also prohibit comparative advertising if it damages a competitor's goodwill or reputation or the goodwill or reputation attached to his business, his trademark or his trade name. Some countries generally prohibit any act leading to dilution of the competitors trademark or trade name or presentation of his products or services, in others the term dilution is deemed to be too vague (since dilution is deemed to be to a certain extent inherent to comparative advertising).

### **AIPPI confirms the Resolution taken in Copenhagen and believes that**

Comparative advertising is an act of unfair competition if it is misleading, unjustifiably discredits the competitor or his trademark or trade name or causes a likelihood of confusion between the advertiser and the competitor, or between the respective goods or services or trademarks or trade names. A comparison that refers to attributes of a competitor bearing no relation to his commercial activities should always be prohibited as unfair business practice.

Comparative advertising resulting in unjustified dilution of the goodwill or reputation should be regarded as unfair competition (see Resolution Copenhagen 9.3). Dilution of the goodwill or reputation can for that purpose be described as the lessening of the distinctive character or commercial value of a trademark or a trade name, the appearance of a product or the presentation of a product or service (see WIPO Model Provisions on protection against unfair competition, Article 3(2)(b)).

## **4. Specific conditions**

### **AIPPI observes that**

In most countries specific conditions are provided by statute or case law for comparative advertising to be acceptable.

Some countries provide that the advertiser must have sufficient cause for comparing his goods and/or services with those of his competitor(s).

In many countries the goods or services compared must be of the same kind and/or quality and/or intended for the same purpose.

Generally, the comparison must be objective and must compare relevant and verifiable features. In the majority of the countries the comparison need not relate to all essential features of the goods or services and partial comparisons are permitted. Whilst there is agreement that there should be no restriction of comparative advertising to price comparisons, the majority of the countries accepts the possibility of comparisons which only relate to prices.

One country does not allow the comparison with a product or service which has a limited market share.

### **AIPPI believes that**

Certain conditions should be met for comparative advertising to ensure that it provides truthful information to consumers:

The goods and/or services compared should be of the same kind, of the same standard, meet the same needs or serve the same purpose.

The comparison should be objective and compare relevant and verifiable features, which may include the price of the compared goods or services. Subject to section 3, the comparison may exclusively consist of the price of the compared goods and/or services.

## **5. Reference to the trademark or trade name of a competitor**

### **AIPPI observes that:**

In a minority of the countries a reference to the competitor's trademark or trade name is prohibited or only permitted with his consent.

However, in the majority of countries the reference is generally allowed or is allowed if it is necessary in order to compare the goods or services. Sometimes it is not allowed to use the specific graphic representation, in particular the logo or device mark, of a competitor's trademark or trade name in order to refer to his goods or services.

The reference to the competitor's trademark or trade name is generally prohibited if it unfairly capitalizes on its reputation or takes undue advantage of or causes detriment to its distinguishing function.

### **AIPPI believes that**

References to a competitor's word mark or trade name in order to identify the goods or services which are compared, should be permitted.

However, it should be prohibited to refer to the competitor's trademark or trade name in a manner that takes unfair advantage of its reputation.

When a competitor's logo or device mark is used in comparative advertising, there is no apparent need for such use, and there is a greater risk of taking unfair advantage than when reference is made only to a competitor's word mark. Therefore, while using a competitor's device mark or logo need not be prohibited per se, stricter scrutiny should be applied to ensure that such use is necessary for the purpose and does not take unfair advantage of the competitor's goodwill.

## **6. Other conditions**

### **AIPPI observes that**

In a certain number of countries other conditions are to be met for comparative advertising to be permissible. However, no general tendency can be derived from these conditions and most countries do not provide for any other specific conditions.

### **AIPPI believes that**

Truthful comparative advertising is an advertising technique that should be permitted as useful information for the consumer and as a useful tool for fostering competition (above 2). Therefore it should only be subject to a minimum of specific conditions which take into account the fact that it compares businesses or their goods or services and in that context it refers to trademarks or trade names of competitors. No other conditions than those enumerated in sections 4 and 5 should therefore be imposed.

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