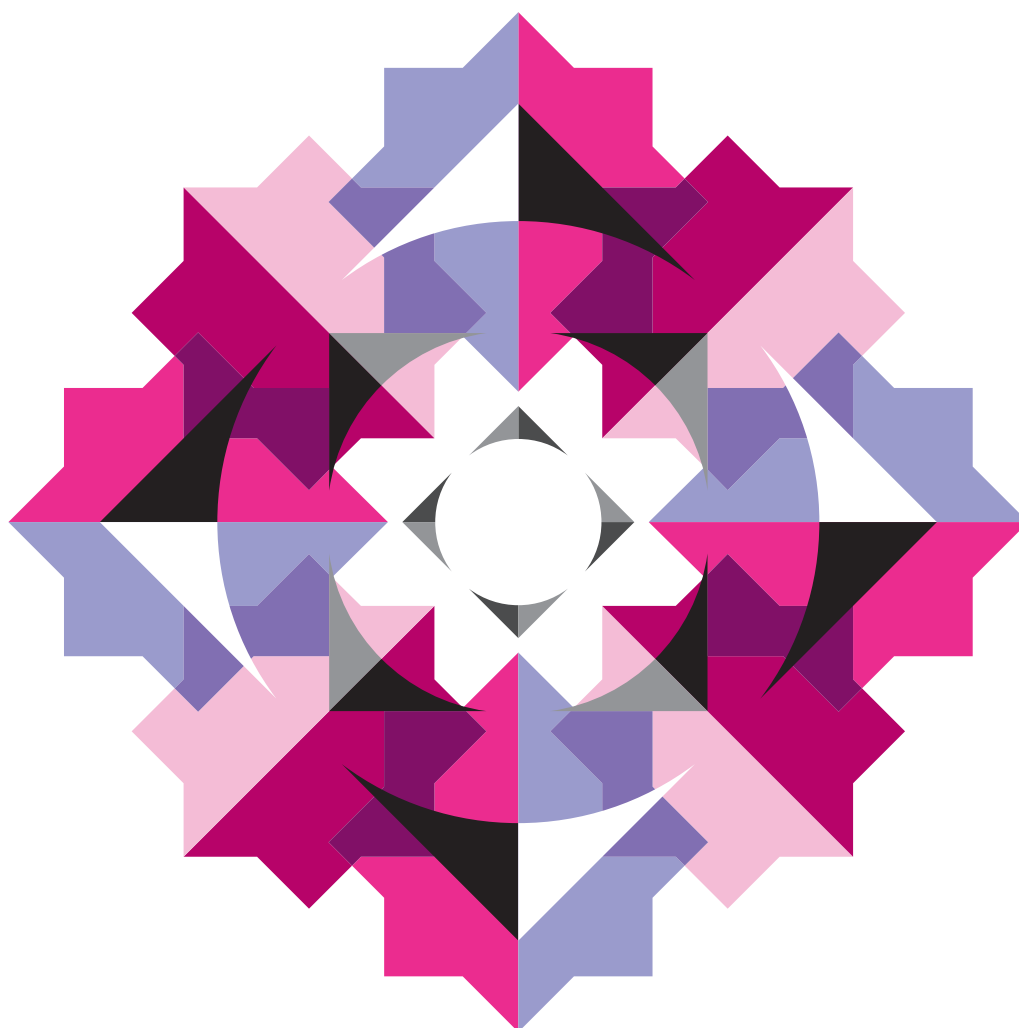


Comparative advertising



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Comparative advertising, also called 'knocking copy', is any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. It is not necessary to name a competitor in order for an advertisement to qualify as a comparative advertisement.

EXPENSIVE
BA _ _ _ _ DS!

	Ryanair from*	BA from*
FRANKFURT	£ 69	£ 374
GENOA	£ 129	£ 560
TURIN	£ 119	£ 462 (I)
ANCONA	£ 129	£ 562 (II)
BIARRITZ	£ 99	£ 534 (III)
DINARD	£ 99	£ 315

*Minimum return fares. BA fares in £100s. (I) Bologna, (II) Bari/Basle, (III) Bordeaux



RYANAIR

THE LOW FARES AIRLINE

0870 333 1236 www.ryanair.ie or contact your local travel agent

RYANAIR is a member of the Ryanair Group. Ryanair Group plc is a public company listed on the Irish Stock Exchange. Ryanair Group plc is a member of the Ryanair Group. Ryanair Group plc is a member of the Ryanair Group. Ryanair Group plc is a member of the Ryanair Group.

Competitors' trade marks are often used in comparative advertising to identify the competitor (e.g. "Dell is cheaper than Apple"). The use of a competitor's trade mark in this way could infringe



the trade mark owner's rights and result in a legal claim. However, provided the use complies with the conditions set out in the Comparative Advertising Directive, the advertiser will have a good defence to any trade mark infringement action.

The courts have acknowledged that comparative advertising is in the public interest as it promotes competition by allowing companies to bring consumers' attention to the relative advantages of goods and services. The conditions of the Comparative Advertising Directive should therefore be interpreted in the way most advantageous to comparative advertising. Advertisers should therefore be given reasonable leeway, within those conditions, in the way in which they present comparative advertising in order to make the advertisement effective.

Copyright and comparative advertising

Compliance with the comparative advertising directive provides a good defence to a trade mark infringement action, but not for copyright infringement. A competitor's name will only be a trade mark, not a copyright work (e.g. 'apple'), but its logo (e.g. the apple motif) is likely to be both a trade mark and a copyright work. It is therefore advisable to exclude all branding, insignia or other materials of the competitor which could be copyright works from comparative advertising.

Example

The Sunday Mirror broadcast a television commercial for its Sunday supplement called "personal", distributed free with the newspaper. The TV commercial depicted a copy of the rival "woman" magazine, with the price displayed in a black band superimposed on the magazine, and then showed a copy of the personal supplement, stating it was free. The publishers of woman successfully claimed that their copyright had been infringed in three areas: the woman logo itself, the overall layout of the front cover and the photographs and artwork on the front cover.

Passing off

If a comparative advertisement falsely suggests that the advertised product has some commercial link with the competitor's product, that could result in a claim for "passing off".

Example

The manufacturers "Nouvelle" toilet tissue launched an on-pack promotion, stating that if people were not satisfied with the packet of Nouvelle, they could exchange it for "Andrex". The packaging carried a flash in large letters "Softness guaranteed (or will exchange it for Andrex®)", and a small footnote which stated "Andrex® is a registered trade mark of Kimberly Clark Ltd". A further statement in the terms and conditions stated "Andrex is a competitor's brand which does not belong to the manufacturers of Nouvelle". The court upheld Kimberly Clark's passing off claim, taking the view that the normal but busy shopper was likely to be misled by the large flash on the packaging into believing that the Nouvelle product came from the same source as the Andrex product, and that this confusion would not be rectified by the small print.

Malicious falsehood

If a comparative advertisement makes a factual statement about a competitor or its goods/services which is false, that may be a malicious falsehood, if the advertiser made the statement knowing it to be untrue or not really caring whether it was true or false.

Example

Comet displayed two promotional posters outside its stores claiming that Comet's prices were lower than competitor's "10% off" and "£10 off" promotions, together with references to arch rival Currys. In fact, Comet's prices were not lower than Currys', so they applied for an injunction to stop the advertising on the grounds of malicious falsehood. Comet argued that the statements were 'mere advertising puff' and not intended to be taken seriously. This was rejected. The statements made specific and verifiable claims against a competitor and so went beyond mere puff. As Comet's knew or should have known that the claim was false and the claim created a real

risk of financial harm to Currys, an injunction was granted to stop the advertising.

Defamation

If a comparative advertisement attacks a competitor in such a way as to suggest that the competitor is incompetent, dishonest or in financial difficulties then that can give rise to a claim for defamation. See the Lewis Silkin InBrief on Defamation and Malicious Falsehood for more details.

The Regulatory Regime

In addition to the legal issues already considered, there are further limitations on comparative advertising in the self regulatory advertising codes. For example, the Codes include provisions relating to:

- **Substantiation:** Before submitting an advertisement for publication, advertisers must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation
- **Truthfulness:** No advertisement should mislead or be likely to mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise
- **Denigration:** Advertisers should not take unfair advantage of the reputation of trade marks, trade names or other distinguishing marks of organisations or of the designation of origin of competing products
- **Imitation:** No advertisement should so closely resemble any other that it misleads, is likely to mislead or causes confusion

Example

The advertisement overleaf zzvwwas held by the Advertising Standards Authority to be in breach of the Code because the comparison was unfair, as both the layout and the headline of the advertisement misleadingly implied the Corsa had no other specifications to offer for the stated price.

Buy the one on the right and you definitely need specs.



Daihatsu 1.0 Sirion + Free Automatic Option	Vauxhall Corsa GLS 1.0 Manual Only
<ul style="list-style-type: none"> Power steering Central locking Electric front windows Electrically adjustable door mirrors Driver's airbag Passenger airbag Side airbags Air conditioning ABS brakes Electric rear window Removable fuel flap release Remote tailgate release Electrically retractable door mirrors Road spoiler with brake light Free 4 speed automatic gearbox option 3 year unlimited mileage warranty 	<ul style="list-style-type: none"> Power steering Central locking Electric front windows Electrically adjustable door mirrors Driver's airbag
£9,595	£10,770

If you would like more information or details of your nearest Daihatsu dealer call 0800 638 618.
If you would like more information on the Corsa visit an option.

Price and performance comparison based on the latest available information. Prices are in pounds sterling and include VAT. All prices are subject to change without notice. © 2012 Lewis Silkin LLP

Conclusions

Comparative advertising can be very effective, but must be carried out carefully in order to avoid legal and regulatory problems. Getting the facts of the comparison wrong is the most common pitfall.

There are specific rules and restrictions on certain types of comparative advertising, including for financial services and medicines, which are beyond the scope of this InBrief.

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